



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KANTAI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 87 OF 2017

BETWEEN

JULIUS MUGO MUCHIRI.....APPLICANT

AND

NJIRU K. NJAGI.....1ST RESPONDENT

EDWARD MUGO MUNENE.....2ND RESPONDENT

(An Application for extension of time in filing against the decision/ruling of the High Court of Kenya at Kerugoya (Limo, J.) dated 14th June, 2016

in

H. C. Misc. Appl. No. 65 of 2013)

RULING

I am asked under **rule 4** of this court's rules to exercise my discretion and extend time for filing an appeal against the decision/ruling of Justice R. K. Limo made on 14th June, 2016 in Kerugoya High Court Misc. Application No. 65 of 2013. In the grounds in support of the application it is stated that the intended appeal has high chances of success; that the delay in filing it was not deliberate and it was not inordinate; that the intended appeal has high chances of success and, that, if the applicant is not granted the application he will be denied a chance to ventilate his case to this Court. The motion is also supported by the affidavit of the applicant, Julius Mugo Muchiri where it is deponed amongst other things that the applicant in the High Court Misc. Application No. 65 of 2013 – In the matter of the Estate of Wanjoka Njagi alias Stella Wanjoka - was seeking to revoke or annul a grant issued to Njiru K. Njagi on 18th February, 2010 in Kerugoya SRM Succession Cause No. 186 of 2006. A ruling was delivered on 14th June, 2016 which was not in the applicant's favour and because he was dissatisfied with that ruling, the applicant instructed his lawyer to appeal against the ruling; that a notice of appeal was filed on 28th June 2016; that the applicant's advocate applied for certified proceedings from the High Court through a letter dated 27th June, 2016; that the applicant himself went to the court and paid for proceedings; that thereafter the applicant tried to pursue his lawyer on the issue of filing an appeal but this was without success; that the applicant later appointed another advocate who advised him that the intended appeal had

high chances of success; that the delay in filing appeal was neither deliberate nor inordinate and finally, that he had struggled to raise the necessary funds to pursue the matter at the High Court and also for this application. For all these, he prays that I allow him to file an appeal out of time.

Edward Mugo Munene, the 2nd respondent, in a replying affidavit sworn at Embu on 11th January, 2018 sworn on his own behalf and with the authority of 1st respondent, Njiru K. Njagi, says amongst other things that the ruling sought to be appealed was delivered on 14th June, 2016; that the applicant was issued with proceedings on 8th July, 2017; that the motion before me was filed over one year later; that no reason has been given for what the 2nd respondent thinks was unreasonable long delay; and that according to the deponent the application is totally unmerited. Further, that the intended appeal has no chance of success; that the applicant intends to continue occupying land which was subject of the matter at the High Court and for all these and other reasons set out I should dismiss the motion.

Mr. H. K. Ndirangu, learned counsel, appeared for the applicant when the motion came for hearing before me on 16th January, 2018 while Miss Wairimu Mubari, learned counsel appeared for the respondents. Mr. Ndirangu submitted that after the ruling a notice of appeal was filed on time; that proceedings were paid for on 1st July, 2016 and final payment made for the proceedings on 5th July, 2016; that the advocate then on record did not take further action and, that the intended appeal was arguable as per the draft memorandum of appeal annexed to the motion. He asked me to excuse the applicant who had been frustrated by previous lawyers.

Miss Wairimu Mubari opposed the motion. According to learned counsel, delay in filing the motion was inordinate and unreasonable. According to learned counsel, the applicant obtained the proceedings on 8th July, 2016 and it was not until July 2017 about a year later that the motion was filed.

Miss Mubari submitted before me that there must be reasons for delay and those reasons must be plausible. She cited various authorities in support of that submission and reminded me that sympathy should not be a factor in considering an application like this one. On the success of the intended appeal, it was learned counsel's view that there were no chances of success at all as the matter in the High Court went back to 1988 when a succession cause was heard on merit; that other suits had been dismissed by other courts and by this Court. Finally, it was Miss Mubari's view that the application was intended to perpetuate the applicant's occupation of land where courts had found that he was not entitled to occupation.

Mr. Ndirangu submitted in reply that the applicant had not been involved in any succession cause and he had come to learn about it later.

The factors to consider in an application for extension of time like this one have been discussed by various Judges and I wish to go by the ruling of Waki, JA, as was confirmed by the full court in the case of **Fakir Mohamed v Joseph Mugambi & 2 Others in Civil Application No. 33 of 2004** where the learned Judges analyzed factors to be the following:

“The exercise of this court’s discretion under Rule 4 has followed a well beaten path since the stricture ‘sufficient reason’ was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: see Mutiso vs. Mwangi Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs. Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta vs. Mulika M’Ethare and Attorney General, Civil Application No. Nai 8/2000 (ur) and Murai vs. Wainana (No. 4) [1982] KLR 38”.

It is stated in the application before me that upon delivery of a ruling by the High Court on 14th June,

2016 a Notice of Appeal was lodged in that court on 28th June, 2016. I have seen that Notice of Appeal - it was lodged on time as envisaged by the rules of this Court. The applicant goes on to say that copies of proceedings were applied for on 27th June, 2016. I have seen that letter bespeaking proceedings which, although not copied to the other side as required by the rules of this Court – that point has not been taken by the respondents. I also note that there are 2 Receipts issued by the High Court – dated 1st July, 2016 and the other 5th July, 2016 – which is evidence of payment of court fees deposit for proceedings and the other being payment of the balance of court fees. The receipts are issued to the applicant in person but not to the advocate then on record. It is stated at paragraphs 9 – 11 of the affidavit in support of the motion:

“9. THAT I took myself to court and paid for proceedings annexed herein receipts for the same marked “JMM5 a & b”.

10. THAT thereafter I tried to pursue my advocate for filing appeal without any apparent success.

11. THAT I later approached my current advocate for who after perusing the proceedings and ruling informs me which information I verify where to be true (sic) that the appeal if filed has good chances of success, annexed herein are intended grounds of appeal marked ‘JMM6’.

According to the applicant he tried to pursue his lawyer then on record to pursue an appeal but this was not successful leading him to appoint another lawyer through which he has now brought this motion. At paragraph 13 of the said affidavit:

“THAT I have had to struggle to get funds to handle Misc. Application as well as this application”.

While I agree with Miss Wairimu Mubari, learned counsel for the respondents, that there is no reasonable explanation for the period July, 2016 when proceedings were availed to July, 2017, when the present application was filed, I am prepared to excuse the applicant who had a lawyer on record in the High Court but who appears to have abandoned the applicant after delivery of the ruling. The lawyer filed a notice of appeal and applied for proceedings of the High Court to enable filing of an appeal but did not take any further steps in that regard. It took the applicant to pursue the proceedings as is evidenced by the fact that he paid for proceedings personally which he obtained on or about 5th July, 2016. Thereafter the applicant, after not finding his previous advocate decided to appoint a new one, and this took some time. I find this to be a reasonable explanation and it is not lost on me that the applicant complains that the motions he has gone through have drained his resources which could have led to necessary actions not being undertaken on time as required in law. I have also looked at the “APPEAL” – which I take to be a draft Memorandum of Appeal – and I take the view that the intended appeal does not appear frivolous.

Finally, I am of the respectful view that the respondents will not be prejudiced if I exercise a discretion in favour of the applicant. Any prejudice they may suffer can be compensated in an order for costs.

I allow the motion dated 18th July, 2017. The applicant will file a Record of Appeal within 14 days of today. I award costs of the motion to the respondents which I assess at Kshs. 7,500/- payable by the applicant to the respondents within 14 days of today.

Dated and delivered at Nyeri this 21st day of February, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR