



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: HANNAH OKWENGU, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 76 OF 2016**

**BETWEEN**

**KIRAGU MWANGI .....APPLICANT**

**AND**

**JAMES MWANGI KAGERA .....RESPONDENT**

*(Being an application for extension of time to lodge an appeal against the Ruling and Orders of the High Court of Kenya at Nyeri, (Wakiaga, J.) dated 25<sup>th</sup> November, 2011*

**in**

**SUCCESSION CAUSE NO. 535 OF 2009**

**LATER TRANSFERRED TO MURANG'A HIGH COURT AS**

**SUCCESSION CAUSE NO. 114 OF 2013)**

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**RULING**

**[1]** By a notice of motion dated 18<sup>th</sup> October, 2016 filed in Court on 26<sup>th</sup> October, 2016, **Kiragu Mwangi** hereinafter referred to as the applicant moved the Court under **Rule 4** of the Court of Appeal Rules for order as follows:

**1. The time within which the applicant may file his appeal against the ruling of the High Court sitting at Nyeri in Succession Cause No. 535 of 2009 (which was later transferred to Murang'a High Court as H.C. Succession Cause No. 114 of 2013) be extended; Alternatively, the Notice of Appeal dated 2<sup>nd</sup> June, 2016 and filed on 16<sup>th</sup> June, 2016 be deemed to have been filed in time.**

**2. The time within which the applicant may file his appeal against the ruling of the High Court of Kenya at Nyeri dated 25<sup>th</sup> November, 2011 in Succession Cause No. 535 of 2005 (later transferred to Murang'a as H.C. Succession Cause No. 114 of 2013) (per Wakiaga, J.) be extended.**

[2] The application is supported by an affidavit sworn by the applicant on 17<sup>th</sup> October, 2016 in which he has explained the background to the application. In brief the applicant and the respondent James Mwangi Kagera were appointed joint administrators to the estate of Gathumbu Munyua deceased, pursuant to letters of administration issued on 23<sup>rd</sup> September, 2009 in High Court (Nyeri) Succ Cause No.535 of 2009. The letters of Administration were confirmed and the distribution proposed by the two administrators approved by the Court. Subsequently, the respondent changed his mind and declined to sign the necessary documentation for sub-division and transfer of the property to the beneficiaries, as he was dissatisfied with the distribution that had been agreed upon and approved by the Court. The applicant then moved the High Court under Rules 58, 59 and 73 of the Probate and Administration Rules for the Deputy Registrar of the High Court to sign all the necessary transfer documents in place of the respondent, and for the Murang'a District Surveyor to be ordered to sub-divide land Parcel No. Loc. 14 Kiru 779 in accordance with the certificate of confirmation of the grant.

[3] The respondent filed a replying affidavit in which he objected to the distribution proposed by the applicant, and maintained that the two parcels of land belonging to the deceased should be apportioned equally among his seven beneficiaries. In his ruling delivered on 25<sup>th</sup> November, 2011, the High Court, (*Wakiaga, J.*) ruled that there was no justification for the uneven distribution proposed by the applicant. He therefore directed that the two parcels of land that formed the deceased's estate i.e. **Parcel No. Loc. Kagumo-in 616** and **Loc. 14 Kiru 779** be shared equally among the 7 beneficiaries and that the Murang'a District Surveyor do sub-divide the two parcels in equal shares or equally.

[4] The applicant was dissatisfied with the ruling of 25<sup>th</sup> November, 2011. He filed an application under **Rules 59** and **73** of the **Probate and Administration Rules** for review of the ruling on the ground that the respondent had failed to disclose to the learned judge that he had received **Loc. 141/KIRU/842** as a gift **inter vivos** from the deceased, and that this was taken into account in the distribution that had been agreed upon, and that had the judge been made aware of this fact he would not have ordered equal distribution of the deceased's estate.

[5] Before the application for review was heard, **H.C. (Nyeri) Succession Cause No. 535 of 2009** was transferred to Murang'a and registered as HC (Murang'a) **Succession Cause No. 114 of 2013**. The application for review was heard by Waweru, J. who delivered a ruling on 20<sup>th</sup> May, 2016 in which he declined to review the ruling of 25<sup>th</sup> November, 2011 on the ground that the Court was being requested to correct errors of law made by the judge in the ruling of 25<sup>th</sup> November 2011, which was a matter that could only be subject of an appeal to the Court of Appeal. Nevertheless the learned Judge in exercise of his inherent jurisdiction granted leave to the applicant to appeal against the orders of 25<sup>th</sup> November, 2011 within 30 days from the date of his ruling.

[6] The applicant filed a notice of appeal on 16<sup>th</sup> June, 2016 but was unable to prepare and file the record of appeal in time as his advocate had closed down his office. Subsequently, the applicant instructed a new advocate who applied for certified copies of the proceedings on 30<sup>th</sup> June, 2016, the same were certified on 8<sup>th</sup> September, 2016, but the applicant had to obtain photocopies of documents to enable him prepare the record of appeal. This was delayed as the court file could not be immediately traced and the same were only supplied on 19<sup>th</sup> September, 2016. It is in light of the above that the applicant sought extension of time.

[7] The respondent has opposed the applicant's motion through a replying affidavit sworn on 23<sup>rd</sup> November, 2016. The respondent maintains that the applicant failed to file his notice of appeal within the 30 days extended by Waweru, J., and that the reasons he has given for this failure are not satisfactory. The respondent contended that the applicant was guilty of laches and had not come to the court with clean hands and therefore his application for extension of time ought to be dismissed.

[8] **Mr. Gichuki**, learned counsel for the applicant arguing the application, explained that the letter written to the court bespeaking proceedings was inadvertently not copied to the respondent's counsel. He reiterated that the notice of appeal was filed within time in the correct file and that the blunders

committed should be excused as the applicant was initially in person and was also let down by the advocates that he instructed.

**[9] Mr Kirubi**, learned counsel for the respondent argued that the ruling, subject of the intended appeal was made about 5 years ago, and that leave having been granted on 20/5/2016, if the notice of appeal was filed within time then the applicant's motion is incompetent and ought to be dismissed. To this, the applicant responded that 60 days had lapsed since the filing of the notice of appeal, hence the need to have time extended.

**[10]** I have carefully considered the applicant's motion, the background thereto and the submissions made by both counsel. Although the prayers sought in the motion are poorly drafted, it is evident that in prayer **(1)** the applicant is seeking extension of time to file a notice of appeal and in prayer **(2)** the applicant is seeking extension of time to file the record of appeal. According to **Rule 82 (1)** of the Court Rules the record of appeal should have been filed within 60 days from the date when the notice of appeal was lodged.

**[11]** At page 28 of the applicant's motion is the notice of appeal dated 2<sup>nd</sup> June, 2016 and filed in the High Court at Murang'a on 16<sup>th</sup> June, 2016. This was the notice of appeal in regard to the applicant's intended appeal against the Ruling of 25<sup>th</sup> November, 2011. The notice of appeal having been filed within 30 days from 20<sup>th</sup> May, 2011 when leave to appeal was granted, it was filed within time and therefore no further extension of time is necessary. Therefore, prayer (1) of the motion is superfluous.

**[12]** As regards the record of appeal, the same had by 18<sup>th</sup> October, 2016 not been filed hence prayer (2) of the motion seeking leave to have time extended. In **Mwangi v Kenya Airways Ltd [2003] KLR 487**, this Court asserted that **Rule 4** gives a single judge unfettered discretion so long as the discretion is exercised judicially. The Court further observed that in exercising such discretion the factors stated in the case of **Leo Sila Mutiso V Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997** that is the length of delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent are important, and that in addition any other factors relevant to the exercise of the Court's discretion should be considered.

**[13]** In this case, the applicant having filed his notice of appeal on 16<sup>th</sup> June, 2016, the record of appeal was due on or before 15<sup>th</sup> August, 2016. Therefore, as at the time of filing the motion on 26<sup>th</sup> October, 2016 the applicant was already about 70 days out of time. The applicant has explained that the delay was mainly due to his previous advocate having closed down his office without handing over the applicant's file to him, and the applicant's new advocate having applied for a copy of the judgment and certified copies of the proceedings without forwarding a copy of the letter bespeaking proceedings to the respondent's advocate. In addition the applicant required copies of documents from the court file to enable him prepare the record and this was also delayed as the court file at some stage went missing. The applicant has given a plausible explanation for the delay and the delay of 70 days was in the circumstances not inordinate.

**[14]** While the court does not wish to condone laxity on the part of counsel, there are certain factors that call for the overlooking of this laxity. First is the nature of the intended appeal, which is a dispute in a succession matter. The dispute relates to distribution of the estate of a deceased, a matter that involves the right of other beneficiaries. Secondly, from the ruling of Waweru, J. it is evident that the intended appeal raises an issue of law regarding the jurisdiction of the judge in making the orders of 25<sup>th</sup> November, 2011. It would only be fair and just that this arguable point be considered and determined on merit. Thirdly the delay was not inordinate and the respondent is not likely to suffer any prejudice if time is extended for the filing of the notice of appeal. All these factors lead me to the conclusion that this is an appropriate situation in which the Court should exercise substantive justice rather than be fettered by procedural requirement.

**[15]** For these reasons, I allow the application and extend time for the applicant to file and serve the record of appeal within 14 days from date of this ruling. This being essentially a family dispute each party

shall bear their own costs.

[16] I wish to end this Ruling by profusely apologizing to the parties for the delay in delivering this ruling. The delay was due to the file having been misplaced inside another file and was only recently discovered.

**Dated and delivered at Nyeri this 7th day of February, 2018.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**