



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 11 OF 2017

BETWEEN

NELSON NGIRIGACHA KIMANGA...PROPOSED APPELLANT / APPLICANT

AND

KINYUA KABABI WAMAI.....PROPOSED RESPONDENT / RESPONDENT

(An application for extension of time to file the Notice of Appeal and Record of Appeal in an intended appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga, J.) dated 14th April, 2015

in

Nyeri High Court Succession Cause 138 'B' of 2014

RULING OF THE COURT

NELSON NGIRIGACHA KIMANGA (hereinafter ‘ the applicant’) has come calling to this Court with his **Notice of Motion** dated **8th February, 2017** premised on **Section 3A** of the **Appellate Jurisdiction Act, Rule 4, 41, 42, 43** and **81** of the **Court of Appeal Rules** (hereinafter ‘the Rules’), **Article 139** (sic) of the **Constitution** and all enabling provisions of law. He seeks the following orders:-

“

(a) THAT the proposed Appellant be granted leave to appeal out of time and the judgment of the Hon. J. WAKIAGA J., delivered on 8TH MAY 2015.

(sic)

(b) THAT the Notice of Appeal annexed hereto be deemed as duly filed and served.

(c) THAT costs of this application be provided for”.

Appearing on the face of the motion are grounds in support thereof to the effect that:- the applicant has an arguable appeal with a high probability of success, failure to file the appeal in time was occasioned by lack of communication by his erstwhile advocate on record who closed his offices and could not be reached by the applicant, the applicant only learnt after about **one year** and **ten months** that judgment was entered in the superior court against him on **8.5.2015** after perusing the court file; if the orders sought are not granted the applicant will suffer irreparable damage due to the negligence on the part of his previous advocate.

Supporting the motion is the applicant’s supporting affidavit sworn on **8th February, 2017** whose tenor was that:-

- **On 14th April, 2014 judgment was entered in NYERI HIGH COURT SUCC CAUSE NO 138 B / 1996 against the applicant.**

- *Upon reading the said judgment, the applicant learnt that his affidavit of protest was dismissed because it was drawn by an unqualified person, a mistake which ordinarily should not be visited upon him.*
- *Thereafter he lacked funds to instruct a lawyer for purposes of an appeal.*
- *He has now instructed his present Advocates on record who have advised him that the intended appeal has merit.*
- *He has a good appeal which will not occasion prejudice to the Respondent, if the orders sought are granted.*
- *It is only fair and just that the orders sought in the application are granted.*

KINYUA KABABI WAMAI (hereinafter ‘the Respondent’) has opposed the motion by way of a **Replying Affidavit** sworn on **8th March, 2017**, whose tenor was that:-

- *The applicant’s application is premised on lies touching on: - lack of communication, closure of his then Advocate’s offices; and negligence.*
- *The truth as to the applicant’s representation can be verified from the record, and was that he was acting in person before the trial court, and could not be heard to blame a previous advocate on record.*
- *There was inordinate delay of almost 2 years in lodging the present application which has not been explained.*
- *The applicant lacks an arguable appeal with a probability of success.*
- *The applicant has totally failed to satisfy the Court to exercise its discretion under Rule 4 of the Court of Appeal Rules (hereinafter ‘the Rules’).*
- *Litigation ought to come to an end.*
- *The application lacks merit.*

The chronology of events on record indicates that the Respondent petitioned for **Grant of Letters of Administration** in respect to the Estate of **NDOIGU MWAI** (now deceased) vide **NYERI RMCC NO 16 of 1985**. One **JENESIO NJOGU GATHAE** objected to the issuance of the said Grant claiming a purchaser’s interest over the Estate’s property. Next in line to oppose the issuance of the said Grant was the applicant herein, who lodged the requisite application out of time, leading to the grant of letters of administration in his name on **20th September, 1994**. Consequently, the title to all that parcel of land known as **MUTIRA / KAGUYU / 2000** was registered in the applicant’s name.

Come **17th December, 1996** the Respondent lodged an application at the **High Court** for the revocation or the annulment of the Grant of Letters of Administration in question, contending that the same were obtained fraudulently by making of false statements and concealment of material facts. In response, the applicant lodged an affidavit of protest in which he contended that he was the sole beneficial owner of **L.R. NO MUTIRA / KAGUYU / 2000**, which was allegedly an offshoot of the sub-division of the original land parcel namely: - **MUTIRA / KAGUYU / 507**. For completeness of the record, **MUTIRA / KAGUYU / 2001** was the second offshoot of the alleged sub-division. At the tail end of the litigation before the trial court, the applicant’s affidavit of protest was struck out for having been drawn by an unqualified person. In addition, the trial court found that in its capacity as a probate court, it could not enforce an alleged agreement between the deceased and or his Estate on one hand, with the applicant on the other hand. Finally, the trial court allowed the application dated **17th May, 2012** and confirmed **Grant of Letters of Administration** in terms of **paragraph 6** of the affidavit in support with no order as to costs.

MR. D. WARUTERE, learned counsel and **MR. MAINA KARINGITHI**, learned counsel all appeared before me at the hearing of the application. The former represented the applicant, while the latter represented the Respondent. Mr. Warutere got proceedings underway by submitting that the application before Court was dated **8th February, 2017**, that the same was predicated upon **Rule 4** of the **Rules** and **Article 59** of the **Constitution**. He submitted that the applicant was desirous of obtaining the Court’s leave to lodge an appeal out of time from a judgment rendered on **8th May, 2015**, and towards the said end the Notice of Appeal annexed to the applicant’s Supporting Affidavit be deemed as duly filed.

Counsel placed reliance on the grounds appearing on the face of the applicant’s motion contending that there was lack of communication between the applicant and an unidentified firm of advocates which had hitherto represented him at the trial court on account of closure of their offices, and that the intended appeal was arguable with high chances of success. Reliance was placed on the applicant’s Supporting Affidavit and Counsel’s Supporting Affidavit sworn on **8th February, 2017** respectively in support of the urgency in having the present motion heard and determined by this Court. He further submitted that the judgment of the trial court found that the applicant’s former Advocate did not have a valid practicing certificate, an anomaly which did not warrant the striking out of the pleadings he had drafted. Reliance was placed on the case of **NATIONAL BANK OF KENYA LIMITED V ANAJ WAREHOUSING LIMITED [2015] eKLR** for the foregoing submission.

In reply Mr. Karingithi, learned counsel submitted that the application was opposed, and that the respondent had filed an elaborate Replying

Affidavit. According to counsel, as at the time the matter came for hearing, the applicant was acting in person and there was no Advocate on record. Next, counsel turned on the subject of delay of about 2 years between **8th May, 2015** and **8th February, 2017** when the application was filed. He submitted that the said duration was inordinate, and that there had been no explanation for the same. As such the Court could not exercise its discretion.

Mr. Warutere had a last bite of the cherry by submitting that the learned trial judge considered a technicality in his decision, that the discretion provided by **Rule 4** of the **Rules** is for purposes of enabling the ends of justice to be met.

What do I make of the application, the affidavits on record, authorities cited, submissions by counsel and the law? **Rule 4** of the **Rules** and the exercise of my discretion thereunder looms large. It states as follows:-

“4.

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

The powers of the Court in deciding such an application are discretionary and unfettered. The onus rests upon the applicant to explain to the satisfaction of the Court that he is entitled to the exercise of discretion in his favour.

Owing to its recurrent nature, applications to extend time have since formed a corpus of case law such as ***MWANGI V KENYA AIRWAYS LTD (2003) KLR*** wherein the Court rendered itself as follows with regard to the matters which a single judge ought to consider when exercising discretion under **Rule 4**:-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9 sub-leg) gives the single judge unfettered discretion as long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered”. See also ***FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS-CIVIL APPLICATION NO NAI 332 / 04 (unreported)***.

In my considered view, the present application turns on the alleged lack of communication between the applicant and his former advocate.

The lack of communication notwithstanding a prudent litigant checks on his advocate and does not just sit back to await communication.

Besides, it would appear that at the time the judgment was rendered the applicant was acting in person. Further I am not persuaded with regard to the intended appeal’s high chances of success bearing in mind the trial court’s finding in its judgment to wit:-

“This being a probate court cannot enforce an alleged agreement between the deceased and or his estate with the protestor herein”.

When I place the said finding against the history of the dispute set out at the beginning of this Ruling, I cannot help but find that the intended appeal will be prejudicial to the respondent.

The upshot is that I find no merit in the arguments advanced by the applicant. Consequently, I dismiss the Notice of Motion dated **8th February, 2017** with costs to the respondent.

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

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR