



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 72 OF 2017

BETWEEN

TARCISIO KAGUNDA WAITATHU & 3 OTHERS.....APPLICANTS

AND

REGINA NYAMBURA WAITATHU.....RESPONDENT

(An application for extension of time to file Record of Appeal in an Intended Appeal from the judgment of the High Court of Kenya at Nyeri (Mativo, J.) dated 24th March, 2016

In

Succession Cause No. 475 of 2013

RULING OF THE COURT

The applicants, **TARCISIO KAGUNDA WAITATHU, JOHN WANG'OMBE WAITATHU, SIMON MUCHIRI WAITATHU** and **TERESA MUMBI GAKURU** filed a Notice of Motion dated 23rd June, 2017 and sought, *inter alia*, an order that they be granted an extension of time to file the Record of Appeal out of time. The motion was premised on the affidavit of **TARCISIO KAGUNDA WAITATHU**, the 1st applicant who deponed that judgment was delivered on 24th March, 2016; that on the same day (24th March, 2016) they filed a Notice of Appeal; that they applied for proceedings on 30th March, 2016 which proceedings were certified on 6th December, 2016; that the letter informing them that the proceedings were ready was issued on 21st February, 2017 and a certificate of delay was issued on 28th March, 2017; that on 21st May, 2017 the court registry rejected the filing of their Record of Appeal on the basis that it was late and finally that they have an arguable appeal.

The respondent, **REGINA NYAMBURA WAITATHU** filed a replying affidavit dated 19th December, 2017 and deponed that the Notice of Motion was an afterthought and further that the judgment which the applicant intended to appeal from was in accordance with the law of succession.

On 16th January, 2018 **Mr. Kingori** learned counsel for the applicant and **Regina Nyambura Waitathu** (the respondent) appeared before me.

Mr. Kingori in urging the motion relied on the 1st applicant's affidavit and grounds on the face of the application. It was his contention that the Record of Appeal was presented on 21st May, 2017 but the court registry declined to receive them. It was his submission that the certificate of delay having been issued on 28th March, 2017 his office was under the mistaken belief that the last date for filing was 28th May, 2017. He also contended that the applicant had good chances on appeal.

The respondent opposed the motion on the basis that the judgment was delivered on 28th March, 2016 and that it was now about 2 years since the judgment was delivered. She refuted the applicant's contention that they have good chances on appeal as according to her the decision of the superior court was just and fair.

I have considered the motion and the affidavit in support and in opposition as well as the arguments made before me.

Rule 4 of the Court's Rules provide as follows:-

“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.”

On the other hand **rule 82** of the rules require that an appeal be filed within 60 days of the date when the Notice of Appeal was lodged and further that where proceedings have been applied for within 30 days of the date of the decision, the period required for the preparation of the record shall be excluded.

In the particular circumstances of this case, a Notice of Appeal was lodged on the same day the judgment was delivered (24th March, 2016). On 30th March, 2016 the applicant applied for copies of the proceedings. This was within 30 days of the date of judgment as contemplated by the rules. In the certificate of delay dated 28th March, 2017, the Deputy Registrar certified that the period needed for the preparation of the record was from 24th March, 2016 to 21st February, 2017. In my view, this was not correct as the letter bespeaking the proceedings is dated 30th March, 2016. Be that as it may, the proceedings having been availed on 21st February, 2017, the applicant had 60 days less 7 days (from 24th March, 2016 to 30th March, 2016) hence a total of 54 days. The last date to file the appeal was on 14th April, 2017. However, the applicant's counsel presented the record of appeal on 21st May, 2017. This was late by about 35 days. The applicant's counsel has explained that this was due to a miscalculation on the part of his office. In my view the delay was not inordinate and the mistake is excusable. It is in view of the above that I exercise my discretion in favour of the applicant who is to file the appeal within 14 days of today's date, failing which the motion shall stand dismissed.

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

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR