



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 1 OF 2017

BETWEEN

PHILIP OKWERO OFISI.....APPLICANT

VERSUS

ELIZABETH ATIENO SHIUNDU.....1<sup>ST</sup> RESPONDENT

RISPER ACHOLA.....2<sup>ND</sup> RESPONDENT

AND

JULIANA MALOBA.....1<sup>ST</sup> INTERESTED PARTY

JOHN WABWIRE MALOBA.....2<sup>ND</sup> INTERESTED PARTY

*(Application for extension of time to file Record of Appeal out of time*

*from the ruling of the High Court of Kenya at Busia (Tuiyot J.)*

*dated 26<sup>th</sup> June, 2016*

in

HC. SUCC. CAUSE NO. 48 OF 1999)

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RULING

[1] By a Notice of Motion dated 4<sup>th</sup> January, 2017, **Philip Okwero Ofisi**, the applicant herein, has moved the Court for orders for extension of time to file his Memorandum of Appeal against the ruling of the High Court (Tuiyot J) delivered on 26<sup>th</sup> June, 2016. A copy of the judgment has not been availed to the Court. However, copies of the proceedings in Busia Probate and Administration Cause No. 48 of 1999 and a copy of a notice of appeal lodged in the High Court on 27<sup>th</sup> May, 2016, have been availed.

[2] In his affidavit in support of the motion, the applicant who was the objector in the administration cause, swears that he instructed his counsel one Leonard of Opiyo & Company Advocates, to file the memorandum of appeal but only came to learn later that this had not been done. He therefore blames the advocate for the failure to file the memorandum of appeal in time and urges the Court to indulge him, as he has a good appeal. He has also filed a draft memorandum of appeal in which he raises seven (7) grounds.

[3] Elizabeth Atieno Shiundu and Risper Achola, who are indicated as the respondents to the motion, have filed grounds of opposition through their advocate R. V. Mukoya & Company, objecting to the motion. The ground are that the motion is misconceived, an afterthought, and incurably defective; that it is based on falsehood and aims at misleading the Court; and that the chances of success of the appeal if any, has not been demonstrated.

[4] During the hearing of the motion, the applicant who was in person explained that he paid his advocate for the appeal to be prepared but later learnt that the advocate one Leonard had left the firm without preparing the appeal. Mr. Masake who appeared for the respondent, pointed out that the applicant had not demonstrated that he gave any instructions to an advocate and that the intended appeal is an afterthought and a waste of time as it has no merit.

[5] I have carefully considered this motion. It is trite that under Rule 4 of the Court of Appeal Rules, a single judge hearing a motion for extension of time has unfettered discretion in considering the application, save that the discretion must be exercised judicially. Mwangi vs Kenya Airways Limited [2003] KLR 486. This means that considering all the circumstances obtaining, and the interests of both parties, the decision to extend or not extend time must be just and fair.

[6] In this case, the judgment was delivered on 26<sup>th</sup> June, 2016. The notice of appeal, that is drawn and filed by the applicant in person, is dated 26<sup>th</sup> June, 2016 but indicated as lodged in the High Court on 27<sup>th</sup> May, 2016. Interestingly, it bears a stamp of the High Court of May, 2016 though date is not legible and another received stamp dated 30<sup>th</sup> May, 2016 at District Land Registry. It is evident that this notice is defective as it could not have been lodged before the judgment date. But the proceedings are also equally confused as the proceedings of 26<sup>th</sup> May, 2016 appear to indicate that the ruling was delivered on that date. In the absence of a copy of the ruling, and the applicant having indicated in the notice of appeal and the notice of motion, that the intended appeal is against the judgment dated 26<sup>th</sup> June, 2016, it is apparent that his application is incurably defective.

[7] Further, although the applicant blames an advocate for the delay in filing the memorandum of appeal, he has not demonstrated that he instructed any advocate. Having filed the notice of appeal in person, there should have been at least a notice of appointment and a receipt to confirm the late payment made to the advocate. The application for extension of time was made on 4<sup>th</sup> January, 2017 which is about six (6) months after the notice of appeal was filed. I find that this delay was inordinate and the applicant has failed to give a plausible explanation for the delay.

[8] The applicant has pleaded that he has an arguable appeal. However, in the absence of the ruling subject of the intended appeal, the arguability of the appeal is not demonstrated.

[9] For these reasons, I find that the applicant's motion must fail. It is accordingly dismissed. In the circumstances of this matter, I do not find it appropriate to award any cost. Each party will therefore meet their own costs.

**Dated and delivered at Kisumu this 26<sup>th</sup> day of April, 2018.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**