



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 256 OF 2016

BETWEEN

ALICE WAMAITHA (Suing on her own behalf and as a Co-administrator of the

Estate of Cecilia Wanjiru Kibiche (Deceased)APPLICANT

AND

JANE WANJIRU.....RESPONDENT

(Being an application for leave to file and serve notice of appeal out of time in an intended appeal against the ruling of the High Court of Kenya at Nairobi (Musyoka, J.) dated 23rd September, 2016

in

Succession Cause No. 1058 of 2005)

RULING

The applicant, **Alice Wamaitha** (Suing on her own behalf and as a Co-administrator of the Estate of **Cecilia Wanjiru Kibiche (deceased)**) applies through Notice of Motion dated 18th November, 2016 for leave to file and serve a notice of appeal out of time against a ruling of the High Court delivered on 23rd September, 2016. In grounds set out in support of the motion it is stated that the High Court delivered judgment on the said date but that the court file was immediately thereafter taken to the High Court at Kiambu before the applicant or her advocate had obtained a copy of the ruling to appreciate the import of the same; that it took a considerable length of time for the court file to be moved from Nairobi to the High Court in Kiambu and that by the time the applicant's counsel obtained a copy of the ruling the period for filing a notice of appeal had lapsed. It is further stated in the grounds that the delay in filing and serving the notice of appeal is not inordinate nor deliberate and was occasioned by factors beyond the applicant's control. Also that the delay is excusable and I am asked to exercise my discretion in favour of the applicant. Finally that the applicant has an arguable appeal and stands to be prejudiced and stands substantial and irreparable loss if I do not grant leave as the applicant would otherwise be disinherited from property she believes she is entitled to.

There is a supporting affidavit of the applicant where the same issues are repeated.

There is no replying affidavit to the motion.

The motion was urged before me by **Miss V.M. Wambua** learned counsel for the applicant but was opposed by **Miss Kaburu** learned counsel for the respondent.

Miss Wambua's submissions were a repetition of the grounds I have already set out and the matters set out in the affidavit. In further submissions learned counsel pointed out some annexures to the application which include letters by her law firm to the High Court following up on proceedings and the ruling. According to counsel the applicant applied for and obtained leave to appeal that being necessary because the matter in the High Court was a succession dispute. Ms. Wambua informed me that it was not until 16th October, 2016 when she was able to trace the High Court file in Kiambu. She submitted that the period from that day to 18th November, 2016 when the motion was filed was not inordinate as her law firm required that time to compile documents in the proposed appeal. For all that she asked me to exercise discretion and allow the application.

Miss Kaburu submitted in opposition to the motion that the motion had been overtaken by events because according to her the leave obtained from the High Court was enough and the applicant did not require this Court to extend time further. According to learned counsel the period from 16th October, 2016 when the applicant's counsel got the file at the High Court in Kiambu to 18th November, 2016 when the application was filed was long and unexplained. She asked me to dismiss the application.

I have considered the motion, the grounds set out, the affidavit in support and the submissions made before me.

The principles that govern exercise of discretion in an application like this one for extension of time to file a notice of appeal or appeal out of time were well captured in the case of Wachiuri Wahome v Festus Gatheru Wahome & 6 others [2016] eKLR where it was held:

“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 delay, (possibly) the chances of the appeal succeeding if the 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 facts: see Mutiso v Mwangi Civil Application No. NAI 255 of 1997 (UR), Mwangi v Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta v Murika M'Ithare and Attorney-General Civil Application No. NAI 8 of 2000 (UR) and Murai v Wainaina (No. 4) 1982 KLR 38.”

In the application before me the applicant explains that after ruling was delivered which was not read in substance but only the outcome of the same they could not trace the ruling as the court file was transferred to the High Court in Kiambu.

I have seen letters attached to the application where the applicant's lawyers were following up on the file. I am satisfied that counsel for the applicant made reasonable effort to follow up on the ruling of the High Court and the court file. I am also satisfied that the period from when the court file was traced to the filing of the motion a period of about 1 month is not inordinate at all. According to Ms Wambua the effect of the ruling would be to disinherit the applicant who is a daughter in law of the deceased owner of the estate. I am told that the applicant's husband who was a son of the owner of the estate died and it is arguable whether the applicant is entitled to inherit a part of the estate to which her late husband would have been entitled.

I am satisfied that the applicant has satisfied the principles on which we exercise discretion in an application for extension of time like this one. I allow the motion. The applicant will file notice of appeal within the next fourteen days and record of appeal to be filed within 30 days thereafter. The costs of the motion will abide the intended appeal.

Dated and delivered at Nairobi this 18th Day of May, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR