



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 70 OF 2017**

**BETWEEN**

**HOSEA KOSGEI KENDUIYWA.....APPLICANT**

**VERSUS**

**HELLEN CHEMELI KENDUIYWA.....1<sup>ST</sup> RESPONDENT**

**JULIAN CHEPTOO KENDUIYWA.....2<sup>ND</sup> RESPONDENT**

**RUTH JEBET KIPTOO.....3<sup>RD</sup> RESPONDENT**

**LILIAN CHEPKOECH KENDUIYWA.....4<sup>TH</sup> RESPONDENT**

**(An Application for extension of time to file a Notice and Record of Appeal  
against the ruling and order of the High Court at Kitale, (J. R. Karanja, J.)**

**delivered on the 12<sup>th</sup> July, 2012**

**in**

**KITALE SUCCESSION CAUSE NO. 85 OF 2004)**

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**RULING**

[1] This is an application brought under Rules 1 (2), 4 and 47 of the Court of Appeal Rules and Article 159 (2) of the Constitution for the main orders that:

**“1. ....**

**2. The Notice of Appeal filed herein be deemed as properly filed and served.**

**3. Leave be granted to applicants to lodge an appeal out of time against the ruling and order of the High Court at KITALE, (JUSTICE J. R. KARANJA) delivered on the 12<sup>th</sup> July, 2012 in Kitale Succession Cause No. 85 of 2004.”**

[2] The application is based on the grounds in the body of the application, the supporting affidavit sworn by the applicant and the numerous annexed documents. The application is also supported by the applicant’s further affidavit sworn on 9<sup>th</sup> October, 2017.

The application is opposed by the respondents on the grounds contained in the respective replying affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

[3] The applicant intends to appeal against the order/ruling of the High Court dated 12<sup>th</sup> July, 2012 which was in the following terms:

***“Application dated 17<sup>th</sup> January, 2005 is an old one. The grant should have been confirmed a long time ago or be rendered (sic) all together. Nonetheless the parties appears to have relied a great limp (sic) towards resolving the matter in privacy. Parties who give all the time to put in were respective mode of distribution not to confirmation (sic). However, it now emerges that the objectors have not complied. There should be no further delay in justice is denied (sic).”***

***Consequently the affidavit dated 17<sup>th</sup> January, 2005 is granted in terms of the amended mode of distribution filed herein in 23<sup>rd</sup> September, 2011.”***

[4] Although there are several typographical errors in the order/Ruling, the tenor is clear. The High Court confirmed the Grant of Representation in respect of the estate of Barngetyu Kenduiywa issued to Hellen Chemeli Kenduiywa (1<sup>st</sup> respondent herein) and distributed the estate to the beneficiaries.

The certificate of confirmation of the Grant annexed to the application shows the manner in which the several parcels of land comprising the estate were distributed to the beneficiaries.

[5] By an application dated 9<sup>th</sup> May, 2016, the applicant herein and his brother Philemon Cheruiyot Kenduiywa filed a joint application seeking, inter alia, the revocation of the Grant of Letter of Administration issued to the 1<sup>st</sup> respondent herein and confirmed on 12<sup>th</sup> July, 2012. The main ground of the application was that the applicants therein were never consulted on the mode of distribution of the estate due to omission of their advocate to file their proposed mode of distribution and that the distribution of the land, particularly Title No. Sinyerere/Sitatunga Block 3/Taito/95 (Sinyerere land) was detrimental to them.

The applicants further complained that the sub-division and distribution of Sinyerere land would dislocate them from portions of land which they had been occupying and developed.

[6] The application for revocation of the grant was dismissed by Chemitei, J. on 5<sup>th</sup> December, 2016. However in the exercise of the inherent jurisdiction of the court, the learned Judge made an order thus:

***“In executing the grant especially in undertaking the survey exercise care ought to be taken so that the development already on the ground by the beneficiaries ought to be as closely as possible not to be interfered with especially those dating back to 12<sup>th</sup> July, 2012 and each should approximately get the portion he/she has been utilising or residing.”***

[7] On 2<sup>nd</sup> February, 2017 the applicant and his brother Philemon Cheruiyot Kenduiywa filed a Notice of Appeal signifying an intention to appeal against the Ruling/Order of Karanja, J. dated 12<sup>th</sup> July, 2012. That is the Notice of Appeal which the applicant seeks to be deemed as properly filed and served.

Subsequently on 9<sup>th</sup> February, 2017 the applicant and his said brother filed an application in the High Court seeking leave to lodge an appeal out of time against the decision of the High Court dated 12<sup>th</sup> July, 2017 which confirmed the Grant.

The application was dismissed by Chemitei, J. on 24<sup>th</sup> May, 2017 on the ground that the High court had no jurisdiction to validate a notice of appeal filed out of time.

[8] Further, on 26<sup>th</sup> July, 2017 Philemon Cheruiyot Kenduiywa the applicant's brother filed Court of Appeal Civil Application No. 83 of 2017 at Eldoret seeking extension of time to lodge an appeal against the decision of Karanja, J. dated 12<sup>th</sup> July, 2012 confirming the Grant.

The application was dismissed by Okwengu, JA on 31<sup>st</sup> May, 2018. In dismissing the application the learned Judge said in part:

***“In this case, it is clear that there has been an inordinate delay of more than four years in bringing the application. The applicant has not given a reasonable explanation for the delay but has simply sought to shift the blame to his former counsel. But much as it is stated that he had instructed his former counsel, the applicant has nothing other than his word to confirm this. On the other hand the respondents have demonstrated that the succession matter has been pending for a long time, and that should the court extend time to enable the applicant file his intended appeal, it could further delay finalisation of the Succession dispute and this would be prejudicial to the respondents more so the first respondent who is 86 years old.”***

[9] The principles upon which the court exercises its unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time are settled. They were stated by this Court in **Wasike V Swala (1984) KLR 591** and in the authorities relied on by the applicant in his submissions. Article 159(2) (d) of the Constitution which requires courts to be guided by the principles, inter alia, that justice should be administered without undue regard to procedural technicalities is also relevant.

[10] The applicant has filed a draft memorandum of appeal. In essence, the applicant intends to contend in the appeal that the Grant was confirmed unprocedurally and without giving him an opportunity to be heard and that the resultant distribution of the estate would cause great injustice to the applicant.

The record of the proceedings in the High Court shows that the application for conformation of Grant was made on or about 17<sup>th</sup> January, 2005. The proceedings also show that the applicant and other beneficiaries were represented by a counsel and that between the date of the application and the date of the confirmation of the Grant, a period of approximately 7 years, the parties had been given an opportunity to resolve any dispute in the distribution of the estate amicably and that when this failed parties were given an opportunity to file objection to

confirmation of the Grant as proposed by the 1<sup>st</sup> respondent. The applicant who was represented by a counsel failed to file any objection so by the time of the confirmation of the Grant, there was no objection filed to the mode of distribution proposed by the 1<sup>st</sup> respondent as an administratrix.

Additionally, the applicant has made it clear in his further affidavit that he is not contesting the shares given to beneficiaries and that he is only contesting the actual placement of the beneficiaries on ground. The order of Chemitei, J dated 5<sup>th</sup> December, 2016 quoted at paragraph 6 above was designed to avoid any injustice that may be occasioned by demarcation of the shares of the beneficiaries. Moreover, the applicant and his brother have already impeached the order of the confirmation of the grant in the High Court on similar grounds that applicant intends to raise in the intended appeal and the application has already been rejected by Chemitei J.

It is noteworthy that the intended appeal is not against the subsequent order of the High Court dated 5<sup>th</sup> December, 2016.

I am not satisfied from the above circumstances that the intended appeal would be arguable.

[11] The applicant blames his former advocates for failing to file objection to the confirmation of the Grant and for failing to notify him of the order confirming the Grant.

The applicant states that he came to know of the order confirming the Grant in March, 2016. If that is so, the applicant delayed for nearly one year before he filed the notice of appeal and only filed the present application after his application for revocation of the grant had been dismissed.

The present application was filed over six years after the impugned order was made. This prejudicial delay has not been satisfactorily explained.

[12] The 1<sup>st</sup> and 2<sup>nd</sup> respondents depone that the confirmed grant has been implemented and new title deeds issued to beneficiaries. The applicant states that title deeds were issued without proper survey. It is apparent that the administratrix has vested the parcels of land, including Sinyerere land to the respective beneficiaries. In the premises, it would be prejudicial to the beneficiaries to allow the prolongation of the dispute.

[13] Lastly, this Court has already determined in Civil Application No. 83 of 2017 that time to appeal from the impugned ruling of 12<sup>th</sup> July, 2012 confirming the grant should not be extended. The applicant and his brother have been making joint applications. Their grievance is the same and the grounds for extension of time are the same. The reasoning of the Court in the dismissed application applies *Mutatis Mutandis* to this application.

[14] For the foregoing reasons, the application has no merit and is hereby dismissed. The respondents to recover the costs of this application from the estate.

**DATED and delivered at Eldoret this 20<sup>th</sup> day of September, 2018**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**