



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KANTAL, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 43 OF 2018 (UR 37/2018)

IN THE MATTER OF AN INTENDED APPEAL

AND

IN THE MATTER OF THE ESTATE OF GITEHI GACHOROGI ALIAS

KAMANDIRI KIONDO (DESEASED)

JOSEPH KARANJA GITEHI.....APPLICANT

VERSUS

JAMES KAMAU NENE.....1ST RESPONDENT

JOHN GIATHI GITEHI.....2ND RESPONDENT

JOHN NDERITU GITHINJI.....3RD RESPONDENT

(Being an application for extension of time within which the Notice of Appeal and Record of Appeal ought to have been filed and for service of the Notice of Appeal out of time and stay of orders from the Ruling and Order of the

(Hon. Justice J.N. Onyiego, J)dated 21.12.2017

In

The High Court at Nairobi (Milimani) Family Cause No. 1031 of 2012

R U L I N G

The application before me is vide a Notice of Motion brought under various provisions of our rules including **rule 4** thereof. The other rules cited including **rule 5 (2) (b)** are not relevant as I cannot deal with an application for stay of execution sitting as a single Judge. It is prayed in the relevant part that time limited for filing and serving Notice of Appeal from the ruling and order of the Family Division of the High Court delivered on 21st December, 2017 be extended. It is said in grounds in support of the motion and in an affidavit of one Joseph Karanja Gitehi, that the applicant was legally duty bound to file a Notice of Appeal within 14 days of delivery of ruling but that the applicant did not do so; that the applicant filed a Notice of Appeal out of time, that failure to file the same within time was an inadvertent mistake on the part of the applicant and what are called administrative set-backs at Milimani Court. It is further said that the application is made without delay and that the applicant was unable to obtain a copy of the ruling and further, that the court file was not returned to the Registry after delivery of ruling. Further, that the applicant later instructed an advocate to pursue a possible appeal.

The application is opposed.

James Amanu Nene, the 1st respondent, in a replying affidavit states amongst other things, that the applicant did not obtain leave from the High Court to file a Notice of Appeal; that the letter bespeaking proceedings was not copied to the respondents and that the application is

incompetent as the applicant did not seek leave to appeal the original judgment of the High Court.

John Giathi Gitehi, the 2nd respondent, in a replying affidavit states that the matter at the High Court was initiated way back in 1996; that a certificate of grant was issued on 8th January, 1998 and that the applicant was represented by lawyers at the High Court. He also says that the applicant has filed various applications and appeals which according to him are frivolous.

The application came for hearing before me on 8th November, 2018 when Mr. Angaya Amwata Advocate appeared for the applicant while Mr. Gitau Mwara Advocate appeared for the 1st respondent. Mr. Kimani Kagwima appeared for the 2nd and 3rd respondents.

Mr. Amwata submitted that the applicant did not get sufficient time after judgment to file appeal; that he was unable to get a copy of the court file which file was not at the Registry and for all that, I should allow the application.

In opposing the application, Mr. Gitau Mwara relied on the replying affidavit which I have already referred to and submitted that being a succession matter, there is direct no right of appeal and the applicant required to get leave of the High Court to appeal. Further, that there was no evidence on record that the applicant had applied for leave of appeal within the time required.

On his part, Mr. Kagwima relied on the replying affidavit of his client and associated himself with submissions of the 1st respondents counsel.

I have considered the application and the submissions made by the respective parties. In a Ruling of a single Judge which was confirmed upon reference to the full court in the case of **Fakir Muhamed vs Joseph Mugambi and 2 others [2005] eKLR** on an application for extension of time, the following passage appears:-

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "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 the 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 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 factors; See Mutiso vs Mwangi Civil Appl. NAI 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General Civil appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982]KLR 38."

Although I note that the motion was filed on 22nd February, 2018 which is about 2 months after the ruling of the High Court which in my view is not inordinate delay, I am required to also consider other principles apart from whether the application is brought without delay.

Mr. Gitau Mwara, counsel for the 1st respondent submits that the intended appeal cannot lie as the ruling arises from succession proceedings where leave to appeal to the court of appeal should be applied for at the High Court when the ruling or judgment is delivered.

Mr. Angaya Amwata, counsel for the applicant did not respond to that submission. I was surprised when he did not respond despite my prompting, surprise because it is an important legal issue whether leave to appeal is necessary or not.

It is true as submitted by counsel for the 1st respondent that leave to appeal is necessary. See the holding by this Court in the case of **Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya [2016]eKLR citing the case of Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja and Salome Njeri Karanja, CA Civil App. NAI 69 of 2004;** where it was held;

"We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes. So, what is our determination in this application" We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court."

There is no evidence before me that the applicant sought leave of the High Court to appeal to this Court. I am therefore left in doubt whether the intended appeal has any chance of success where an essential legal step has not been taken. In the premises in the face of that legal issue which the applicant has not satisfied, I need not consider the other principles that govern applications for leave to appeal out of time. I am not satisfied that I should exercise my discretion in favour of the applicant. I dismiss the application with costs to the respondents.

Dated and Delivered at Nairobi this 23rd day of November, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR