



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OTIENO-ODEK, JA IN (CHAMBERS))

CIVIL APPLICATION No. NAL 138 of 2018 (UR 115 of 2018)

BETWEEN

LEAH WAMBUI KURIA.....1st APPLICANT

ROBERT MUCHUNU KURIA.....2nd APPLICANT

PETER NJOROGE KURIA.....3rd APPLICANT

AND

JAME MUCHUMU *alias* JANE WAHU KAMAU *alias* JANE MUCHUNU ADAMS....1st RESPONDENT

KIAMBU DISTRICT LAND REGISTRAR.....2nd RESPONDENT

CHARLES THUO MUCHUNU

ERIC KIMANI MUCHUNU

DAMARIS NJOKI

WANJIRU WAMBARI

LILIAN NJERI SCHMIDI.....INTERESTED PARTIES

*(Being an application for extension of time to file and serve a Notice of Appeal and Intended Appeal against the Ruling/Order of the High Court of Kenya at Nairobi (L. A. Achode, J.) dated 20th June 2016*

*in*

*HC Succ. Cause No. 2974 of 2005 & HC Succ. Cause No. 214 of 2006)*

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RULING

1. Before me is an application dated 30th April 2018 for extension of time to file and serve a Notice of Appeal in an intended appeal against the Ruling of the High Court dated 20th June 2016. The application was filed on 10th May 2018 after a delay of 595 days. The delay needs sufficient explanation.

2. The application is supported by an affidavit deposed by **Mr. Robert Muchunu Kuria**. The ground in support as stated on the face of the Motion is that the applicants have valid grounds of appeal with enormous prospects of success; denying the applicants leave to extend time would be denial of natural justice; the impugned ruling was obtained by fraud, fraudulent misrepresentation and forgery; the respondents have engaged in an abuse of court process; there is miscarriage of justice; and it is in the interest of justice that extension of time be granted; and the respondents will not suffer prejudice if extension is granted.

3. The explanation for delay is that upon delivery of the impugned ruling on 20th June 2016, the applicants were aggrieved and filed a Notice of Appeal dated 21st June 2016. However, their then counsel advised that their grievance against the ruling would be resolved

faster if they opted for review of the ruling instead of lodging an appeal. Acting on the advice, on 13th October 2016, the applicants withdrew the Notice of Appeal dated 21st June 2016 and filed an application for review of the ruling delivered on 20th June 2016. The application for review was heard and determined on 5th February 2018. The review application was dismissed. Aggrieved by dismissal, the applicants have now come back to this Court seeking extension of time to file a fresh Notice of Appeal against the ruling delivered on 20th June 2016.

4. The central explanation for delay is that the applicants relied on professional advice from their advocate to withdraw the notice of appeal and pursue review of the ruling. The 595 days' delay was because the applicants were prosecuting the review application and now that the review is dismissed, it is opportune to proceed with the intended appeal.

5. At the hearing of this application, learned counsel **Mr. Fred Habakuk Nabutete** appeared for the applicants. Learned counsel **Ms Edna Gesare Oginda** appeared for the 1st respondent and learned **Mr. Ernest Githuka Ndungu** appeared for Interested Parties.

6. Counsel for the applicants urged this Court to consider the contesting parties are brothers and or grandchildren to **Mr. Robert Muchunu Mumbura** and **Ms Milka Nduta Muchunu** (both deceased). The dispute is a family dispute involving grant of letters of administration and distribution of estate of their deceased parents. Being a family dispute, this Court was urged to be reluctant to award costs against either party.

7. The applicants conceded there has been over 595 days of delay in making this application for extension of time; the delay has been explained in the supporting affidavit of **Mr. Robert Muchunu Kuria** dated 30th April 2018; the delay was due to the mistaken and honest advice given by counsel for the applicants that a review application would expedite the hearing and determination of the grievance against the impugned ruling and orders delivered on 20th June 2016; as it turned out, the application for review was dismissed on 5th February 2018 and the applicants have moved with haste to file the instant application for extension of time; at all times, the applicants have been desirous to appeal against the ruling delivered on 20th June 2016; the mistaken advice by counsel should not be visited upon a client; the 1st respondent is executrix of the estate of the deceased and has been distributing properties belonging to the deceased which were not included in the grant of letters of administration; the executrix has unlawfully included other properties not mentioned in the grant; if extension is granted, the applicants intend to make an application for stay of execution of the orders issued on 20th June 2016; there has been no inordinate delay from 5th February 2018 when the review application was dismissed.

8. Both the 1st respondent and the Interested Parties oppose the application for extension of time. In a replying affidavit dated 23rd November 2018, the 1st respondent concedes that the applicants filed a Notice of Appeal dated 20th June 2016 and later withdrew the said Notice vide Notice of Withdrawal dated 10th November 2016; that on 25th October 2016, the applicants filed an application to review the ruling delivered on 20th June 2016.

9. Counsel for the 1st respondent submitted no sufficient explanation for the delay of approximately 595 days there has been a further unreasonable delay in bringing the present application even after the review application was dismissed on 5th February 2018; between 5th February 2018 and 10th May 2018 when the instant application was filed, a period of over two months has lapsed and no explanation for this additional delay has been given. The 1st respondent urged if extension of time is granted, she stands to suffer prejudice. It was submitted that the 1st respondent as executrix is executing a Will dated 2006 and the applicant has not annexed anything to show the alleged properties being distributed were not in the Will of the deceased.

10. Counsel for the 1st respondent brought to the attention of this Court that a Notice of Appeal has been filed by the applicants against the ruling of 5th February 2018 that dismissed the application for review. In addition, there is another suit between the parties over the same subject matter pending before the Environment and Land Court at Thika being **ELC Case No. 682 of 2017**. Owing to multiplicity of suits, counsel submitted the instant application is an abuse of court process and if extension is granted, there will be two appeals before this Court over the same subject matter.

11. Learned Counsel **Mr. Githuka** for the Interested Parties opposed the application for extension of time. Alluding to the replying affidavit deposed by **Mr. Eric Kimani Muchunu**, counsel urged there has been an inordinate and unexplained delay of 595 days in filing the present application. The explanation that the applicants were pursuing the review application is not a sufficient reason; citing the persuasive decision of the High Court in **Gucokanirira Kihato Traders & Farmeers Company Limited vs. AG Nairobi HCCC No. 1251 of 2002**, counsel submitted the filing of a Notice of Appeal does not stop one from proceeding with a review application. It was urged if counsel made a mistake in advising his client, this is not sufficient excuse for extension of time.

12. Both the 1st respondent and the Interested Parties submitted there has been a further unexplained delay of an additional 94 days from 5th February 2018 when the review application was dismissed to 10th May 2018 when the instant application was filed. There is no explanation for the further delay. In addition, there is no draft memorandum of appeal to enable this Court appraise if there is an arguable appeal; there are no proceedings attached to the instant application. It was urged the applicants having elected to follow the review application rather than the earlier intended appeal, the choice and election is theirs and they should leave with the consequences. Colloquially, it was urged choices have consequences.

13. Counsel for the Interested Parties brought to the attention of this Court that there is another Originating Summons (OS) pending in Kiambu Law Court over the same subject matter. Counsel surmised that presently, there is one appeal pending before this Court; one OS pending at Kiambu High Court and another suit pending before the Thika ELC Court over the same subject matter. If extension of time is granted, there will be two appeals before this Court. It was urged multiplicity of suits and appeals should be discouraged.

14. Replying to the submission by the 1st respondent and Interested Parties, the applicants countered it is the respondents who filed the suits now pending before Thika ELC Court and Kiambu High Court. If anyone is abusing the court process, it is the respondents who have filed numerous suits all over. It was submitted that the suits pending at Thika and Kiambu Law Courts were filed by the 1st respondent to remove the caveats placed by the applicants on the disputed properties.

15. I have considered the Notice of Motion dated 30th April 2018, the grounds in support thereof, its supporting affidavit as well as the Replied Affidavits deposed by the 1st respondent and the Interested Parties. I have taken into account submissions by all counsel and the authority cited by the Interested Parties.

16. This is an application for leave to extend time to file and serve a Notice of Appeal. An application for extension of time must be made timeously without inordinate delay. In **Charo vs. Mwashetani & 3 Others (2014) KLR-SCK**, the Supreme Court in considering an application for extension of time stated:

**“In the emerging jurisprudence, the concept of ‘timelines and timeliness’ is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court’s eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.”**

17. An application to extend time is determined upon exercise of discretion by a single judge. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi**, (Civil Application No. Nai. 255 of 1997) (unreported); this Court stated how such discretion is to be exercised.

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

18. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, gave guidelines for exercise of discretion to extend time and stated as follows:

**“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.**

**“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:**

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;**
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;**
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;**
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;**
- 6. whether the application has been brought without undue delay; and**
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”** (emphasis supplied).

19. Bearing in mind the guidelines enunciated by the Supreme Court, the first issue for my consideration is whether the applicants have offered sufficient explanation for the delay of 595 days in lodging the instant application. The explanation given is that the applicants acted upon advice of their then advocate who advised them to pursue a review application rather than the initial intended appeal as signified by the Notice of Appeal filed on 21st June 2016 and which was later withdrawn. The applicants’ submitted that mistake of counsel should not be visited upon a litigant. In countering this explanation as insufficient, the 1st respondent and the Interested Parties submitted that a filing of Notice of Appeal is no bar to prosecuting an application for review.

20. In **Naomi Wangechi Gitonga & 3 others vs. Independent Electoral Boundaries Commission & 17 others [2018] eKLR**, the Supreme Court expressed that there is nothing to prevent a party from filing a notice of appeal even as he/she ponder the next course of action. In **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR**, this Court observed that a party has an absolute and unfettered right to withdraw his suit or appeal.

21. In the instant matter, the applicants exercised their right to withdraw the Notice of Appeal filed on 21st June 2016. In the persuasive dicta of **Bahati Shee Mwafundi vs. Elijah Wambua [2015] eKLR**, it was expressed a notice of withdrawal takes effect and brings the proceedings to an end on the date it is served upon the parties; the withdrawal has the effect of terminating the appeal. In this matter, the withdrawal of the Notice of Appeal was filed and served upon the 1st respondent; it took effect upon service and terminated the intended appeal. However, the withdrawal does not preclude the filing of a new Notice of Appeal so long as it is done timeously.

22. In **Bernard Kibor Kitur vs. Alfred Kiptoo Keter & another [2018] eKLR**, the Supreme Court expressed that when considering an application for extension of time, the Court considers whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time.

23. In this matter, it is urged the applicants relied on advice of counsel to pursue the application for review of the ruling dated 20th June 2016 instead of pursuing the initial appeal. In **Ghehona vs. Seventh Day Adventist Church of East Africa Union [2013] eKLR** it was expressed it would be unjust to punish a litigant for poor judgment by counsel if this is the reason for delay.

24. In **Phillip Chemowolo & Another vs. Augustine Kubede (1892-88) KAR 103 at 104**, Apaloo, JA observed that it does not follow that “because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.” In **Belinda Murai & Others vs. Amos Wainaina (1978) LLR 2782 (CALL)** Madan, JA stated that “the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.”

27. I am cognizant of the persuasive dicta by Bennett, J. in **Abasi Belinda vs. Frederick Kangwamu and another [1963] E.A. 557** when he expressed:

**“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”**

28. On the same point, the authors, **Chittaley & Rao in the Code of Civil Procedure (4thEdn) Vol.3, pg. 3227** in explaining the distinction between a review and an appeal opined:

**“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”**

29. Comparatively, in the Uganda case of **Sabiiti Kachope and 3 others vs. Margaret Kamuje, Supreme Court Civil Application, No. 31 of 1997**, Oder JSC, (as he then was) stated:

**“For applications of extension of time such as the present one, a mistake or negligence of the applicant’s counsel maybe accepted as a proper ground for granting relief such as the leave to file out of time.**

30. In another Ugandan case of **Julius Rwabinumi vs. Hope Bahimbisomwe Civil Application No. 14 of 2009** in which the applicants sought to file their memorandum of appeal nine (9) months out of time, it was held that where there is mistake of counsel, this can be considered to be sufficient grounds to grant an extension of time. In the case of **Seperia Kyamulesiire vs. Justine Bikanshire Bagambe, Civil Appeal No. 20 of 1995**, Justice Karokora, JSC expressed:

**“It is now settled that errors or omission by Counsel are no longer considered fatal to the applicant under Rule 4 of the Rules of this Court unless there is evidence that the applicant was guilty of dilatory conduct in the instructions of his lawyer.”** (See also **William Odoi Nyandusi -v- Jackson Oyuko Kasendi, Uganda Court of Appeal Civil Application No. 0032 of 2018**)

25. Persuaded by local and comparative jurisprudence cited above and having considered the explanation that the applicants relied on advice of their then counsel to pursue review and to withdraw the initial Notice of Appeal, I am persuaded to favourably consider the explanation. I note the applicants honestly relied on professional advice, however mistaken. I find this to be an honest and sufficient explanation for the 595 days’ delay.

26. Notwithstanding the foregoing finding, in the instant matter, the 1st respondent and interested parties submitted there is an additional unexplained delay of 94 days from 5th February 2018 when the applicants review application was dismissed to 10th May 2018 when the instant application for extension was filed. As was correctly stated by the Supreme Court in **County Executive of Kisumu vs. County Government of Kisumu & 8 others [2017] eKLR**, the additional delay must sufficiently be explained. The question that begs for an answer is whether this ‘further’ delay has been explained? In this application, I have examined the Notice of Motion and the affidavit in support thereof, regrettably, the applicants have not offered any explanation for the further delay of 94 days.

27. Another consideration in an application extension of time is prejudice to the respondent if extension is granted. The 1st respondent and the Interested Parties submitted that they stand to be prejudiced as there has been delay since 2006 for the beneficiaries to enjoy the fruits of distribution of the estate of the deceased. The applicants on the other hand submitted they are the ones who stand to be prejudiced if extension is not granted as the 1st respondent executrix is distributing properties not included in the grant of letters of administration.

28. In **Edward Njane Nganga & Another vs. Damaris Wanjiku 2016 eKLR** and in **Port Reitz Maternity vs. James Karanja Kobia Civil Appeal No 63 of 1997** it was held the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour - there must be a just cause for depriving the plaintiff that right.

29. This Court (Okwengu, JA) in **Annah Mwhiki Wairuru vs. Hannah Wanja Wairuru [2017] eKLR** while dismissing an application for extension of time in a succession dispute expressed herself as follows:

**“[17] Further, I appreciate that the matter concerns the personal status of the parties. In particular, whether the respondent is a dependant who should be provided for in the estate of the deceased. However, the issues raised by the applicant in the intended appeal can still be canvassed during the distribution of the estate and confirmation of the grant. I find that the circumstances of this matter are such that any further delay is quite prejudicial to the respondent, as she cannot have access to her share of the estate until this matter is resolved.”**

30. I have considered rival submission on the alleged prejudice as urged by the parties. There are various pending suits between the parties

arising from the same set of facts and on the subject of distribution of the estate of the deceased. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court and to demonstrate the prejudice that he/she stands to suffer if no extension is granted. Such a party has the burden to demonstrate the respondent shall suffer no prejudice if extension is granted. An applicant should go further to lay the basis upon which the court can make a finding that prejudice will be suffered. It is not sufficient to make vague and general assertion of prejudice without a prima facie demonstration thereof.

31. In this matter, neither the applicant nor the respondent has sufficiently demonstrated to my satisfaction the prejudice to be suffered by either party. In the supporting affidavit, it is stated that the dismissal of the review application has left the estate of the deceased exposed to waste and unlawful disposal; it is also stated that the 1st respondent has submitted a Bill of Costs to the applicants; and that the applicants will suffer loss and irreparable damage if extension is not granted. During submissions, each party claimed the other was in possession of the properties in dispute.

32. On balance of probability, it is the applicants who bear the burden to prove the respondent will not suffer prejudice if extension of time is granted. The applicants have not demonstrated this to my satisfaction. An application for extension of time is not designed to be a stratagem to avoid a Bill of Costs. Before me is an application for extension of time and not an application for stay of execution. The grounds urged by the applicant to support submission for prejudice are pertinent to an application for stay.

33. I have considered there is already a Notice of Appeal filed before this Court against the Ruling of 5th February 2018 dismissing the review application. I have taken into account that there are two other pending matters before Kiambu High Court and the Thika Environment and Land Court. All these pending matters relate to the same subject matter and the disputing parties are the same. It matters not who filed the suits as the subject matter is the same and controversy is between the same parties.

34. In view of these various pending suits, it portends an abuse of court process to exercise my discretion to grant extension of time to litigate the same issue before different courts. If the appeal lodged in this Court against the dismissal of the review application succeeds, the legal effect would be to open for review the ruling of the High Court delivered on 20th June 2016. If extension of time is granted, the legal effect is to open the ruling of 20th June

2016 for appeal. The applicant is trying his luck to bite the cherry not twice, not thrice but several times. Twice before this Court and once in the dismissed review application at the High Court and severally, in the suits now pending before the Kiambu and Thika Courts. This Court is not ready to be used in a ping pong merry go round attempt to bite the cherry several times. I decline to exercise my discretion to give legality to the attempted second or third bite of the cherry.

35. I have considered the ground stated on the face of the Notice of Motion that the intended appeal is arguable and has overwhelming chances of success. In this context, I do no more than cite Spry V-P in **Mugo vs. Wanjiru [1970] EA 481, 483**, where he said:

***“... I do not think the fact that an appeal appears likely to succeed can of itself amount to ‘sufficient reason.’”***

36. In so far as explanation for delay is concerned, there has been no explanation for the further delay of 94 days between 5th February 2018 when the review application was dismissed and 10th May 2018 when the instant application was filed. The applicant is duty bound to sufficiently explain this further delay and none has been forthcoming. There is no draft memorandum of appeal attached to the instant application; whether the intended appeal is prima facie meritorious cannot be ascertained in the absence of draft grounds of appeal.

37. For the various reasons stated above, I conclude and find there is no sufficient explanation for the further delay in filing the present application between 5th February 2018 and 10th May 2018. I decline to grant leave to extend time to file and serve a Notice of Appeal against the Ruling delivered on 20th June 2016. Accordingly, the Notice of Motion dated 30th April 2018 be and is hereby dismissed. Each party is to bear his/her costs in the application.

**Dated and delivered at Nairobi this 20th day of December, 2018**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**