



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 88 OF 2017

BETWEEN

ELIZABETH MUSILI NGAO.....APPLICANT

VERSUS

AQWILLINA NDUNGE NGAO.....RESPONDENT

(An application to extend time within which to serve Notice of Appeal dated 18th January, 2017 and filed in High Court on 20th January, 2017 from the Judgment of the High Court of Kenya at Nairobi (Machelule, J) delivered on 17th January, 2017

in

H.C. Succession Cause No. 500 of 2004)

RULING

Elizabeth Musili Ngao (the applicant) was the respondent in Milimani Succession Cause No. 500 of 2004, while **Aqwillina Ndunge Ngao** (the respondent) was the applicant. Both parties are described in the succession cause as co-wives and widows to the deceased **Stephen Kabibia Ngao**.

Judgment in that Succession Cause was rendered on 17th January, 2017, and the applicant promptly filed a Notice of Appeal against the judgment on 20th January, 2017. The Notice of Appeal was nonetheless not served upon the respondent within seven (7) days as prescribed by the Rules of this Court; but on 22nd February, 2017, without leave of the court. According to the applicant, the said delay was as a result of an oversight by learned counsel for the appellant, and was not deliberate.

In her affidavit in support of the application sworn on 20th April, 2017, by the appellant's counsel, she says that she just assumed that the Notice of Appeal had been served on the respondent's counsel. She urged the court to excuse her, and not shut the applicant out of the case for an omission that she was not responsible for.

According to learned counsel, the applicant has an arguable appeal and she should be given an opportunity to ventilate her case. She says that the respondent will not suffer any prejudice if the application is allowed.

The respondent has opposed the application vide her affidavit sworn on 24th May, 2017. She says that no good or sufficient reason has been given for the delay in serving the Notice of Appeal. She says that the applicant is just intent on delaying the matter, which has been in court for the last 12 years. Learned counsel Ms. Muendo and Ms. Mutemi for the applicant and respondent respectively reiterated and expounded the contents of the rival affidavits in their oral submissions.

Learned counsel for the respondent also called in aid this Court's decision in **Joseph Ngwele Nduswa vs Ahmed Abubakar T/a Bajaber Service Station and Another; 1998 eKLR**, and **David Maina Mwangi and 2 Others vs Peris Wanjiku Kamara [2017] eKLR**.

In the latter case, the delay in question was five (5) years and can therefore, be easily distinguished from the present case; while the former case involved a delay of about three (3) months.

I have considered the application, the rival affidavits and the submissions of both counsel. I have also considered the two cited authorities but as pointed out earlier, they involved longer periods of delay than the delay in the present case. It goes without saying that under **Rule 4 of the Rules of this Court**, extension of time is at the discretion of the Court. As usual however, the said discretion must be exercised judicially, and within some settled parameters. Among the guidelines which this Court has dutifully followed when considering an application such as the instant one are the length of the delay; the explanation given for the delay; (possibly) the chances of the appeal succeeding if the application is allowed and the degree of prejudice if any to the respondent.

There is of course the all-encompassing "overriding principle" which parties try to seek shelter under particularly when they ran out of good or sufficient reasons. See **Mutiso vs Mwangi [1997] KLR 630**; and **Fakir Mohamed vs Joseph Mugambi & 2 Others – Civil Application Nai 332 of 2004 (UR)**.

Having considered the circumstances of this case, I find that the delay of 22 days is definitely not one that can be shrugged off. Nor can it be said to be inconsequential given the fact that the matter has been in court for 12 years. I am also perturbed by the fact that this application was only filed after the applicant learnt that there was an application to strike out the Notice of Appeal.

However, I note that this is a succession matter involving close family members. It is important therefore that the matter be ventilated fully to avoid a situation where one party might feel locked out. While not condoning laxity or intentional delay in these matters by a party who feels they have a favourable judgment, it is important to allow the aggrieved party to pursue its claim to its logical conclusion. Succession matters in my view, by their very nature call for wider latitude and consideration when exercising the court's discretion because of the acrimony usually involved between the competing parties. Where therefore the delay is not too inordinate as in this case, the court will be inclined to accommodate the applicant in circumstances that may be seen to have fallen short of the threshold set for ordinary civil suit. This however must be considered on a case to case basis as the justice of the case demands. Learned counsel has asked the court to award the respondent thrown away costs in the event it allows this application. I have considered the circumstances of this case and I am persuaded that this is a good case to award thrown away costs given the length of the delay and the fact that the applicants were only nudged into action by the respondent's filing of the application to strike out the Notice of Appeal.

For the foregoing reasons, I will allow this application and order that the notice of appeal be served on the respondent within seven (7) days from the date hereof. I also order that the applicant pays to the respondent through her counsel on record thrown away costs of Ksh. 20,000 within seven (7) days of the date hereof failing which the Notice of Appeal will stand struck out. In view of the fact that this is a family matter, I order that each party bears its own costs of this application.

Dated and delivered at Nairobi this 29th day of September, 2017.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR