



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: G.B.M. KARIUKI, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. NYR. 64 OF 2016**

**BETWEEN**

**CHARLES MWANGI GITUNDU.....1<sup>ST</sup> APPLICANT**

**GITHINJI NGURE 'DEC' .....2<sup>ND</sup> APPLICANT**

**AND**

**CHARLES WANJOHI WATHUKU.....RESPONDENT**

*(Being an appeal from the Ruling of the High Court of Kenya*

*at Nyeri (Makhandia, J.) dated 3<sup>rd</sup> June, 2009*

in

***Succession Cause No. 60 of 1997)***

\*\*\*\*\*

**RULING**

1. This ruling relates to the application by Notice of Motion dated and filed in Court on 30<sup>th</sup> September 2016. Messrs **Charles Mwangi Gitundu** and **Githinji Ngure**, the 1<sup>st</sup> and 2<sup>nd</sup> applicants respectively (who are herein referred to as “**the applicants**”) were objectors in High Court (at Nyeri) Succession Cause No. 60 of 1997 in which **Charles Wanjohi Wathuku**, (the respondent in the said Notice of Motion) was the petitioner. The application shows that on 26<sup>th</sup> February 2009, the applicants were found in contempt of court orders and (were) invited to show cause why they should not be punished. On 3<sup>rd</sup> June 2009, the High Court (Makhadia J, as he then was) delivered a ruling in which he ordered that for the applicants to fully purge their contempt, they would be expected to pay to the estate of the deceased Kshs 4,074,899/= being the value of an earth mover and a further Kshs 4,908,457.50/= being the income it would otherwise have generated over the years making a grand total of Kshs 8,983,356/=. The court ordered the applicants to pay that amount forthwith, failing which their properties would be sequestered and sold to recover the aforesaid amount. For disobeying the court orders, the applicants were each fined Kshs 20,000/= and in default to serve 3 months imprisonment.

2. Aggrieved, the applicants gave a Notice of Appeal dated and lodged in Court on 4<sup>th</sup> June 2009

manifesting their intention to challenge the order on appeal. The applicants also moved to this Court in an application dated 8<sup>th</sup> June 2009 seeking an order for stay of execution of the order by Makhadia J. pending the hearing and determination of an intended appeal. The applicants were successful in their application following the ruling delivered in NYR. Civil Application No. 178 of 2009 (UR 120/2009) on 11<sup>th</sup> December 2009 which granted an order for stay in terms of prayer No. 1 of the said Notice of Motion.

3. The application before me shows that the respondent, Charles Wanjohi Wathuku, filed in this Court an application by Notice of Motion dated 3<sup>rd</sup> March 2016 seeking, *inter alia*, first an order that the Notice of Appeal dated and lodged on 4<sup>th</sup> June 2009 in the High Court Succession Cause No. 60 of 1997 “is deemed to have been withdrawn following the failure to institute the requisite appeal under Rule 82 of the Court of Appeal Rules, 2010 or under Rule 81 of the former Court of Appeal Rules revoked on 17<sup>th</sup> December 2010”. In a ruling dated 6<sup>th</sup> July 2016 this Court granted the first prayer in the motion (dated 3<sup>rd</sup> March 2016) with the result that the Notice of Appeal dated and lodged on 4<sup>th</sup> June was deemed to have been withdrawn.

4. Githinji Ngure, one of the two applicants is said to have died on 2<sup>nd</sup> July 2015. Charles Mwangi Gitundu, the surviving applicant in the application before me dated 30<sup>th</sup> September 2016 now seeks in the Notice of Motion dated 30<sup>th</sup> September 2016 leave to file and serve both Notice of Appeal and Record of Appeal. The grounds appearing on the face of the motion for making the application include a statement that the Notice of Appeal dated 4<sup>th</sup> June 2009 was deemed as withdrawn following this Court's aforesaid ruling delivered on 6<sup>th</sup> July 2016 in Civil Application No. NYR. 9 of 2016 [Charles Wanjohi Wathuku versus Githinji Ngure and Charles Mwangi Gitundu]; that the proceedings are now ready and so no more delay may occur; that the delay and time lost has been fully explained by the certificate of delay and the affidavit in support of this application; that the applicant believes that his intended appeal has very high chances of success owing to the amount of money involved and the way the figure of Kshs 8,983,356/= has been arrived at.

5. In the affidavit sworn on 30<sup>th</sup> September 2016 by Charles Mwangi Gitundu in support of the application, the applicant deponent avers that he applied for copies of proceedings on 4<sup>th</sup> June 2009; that he filed a notice of appeal on 4<sup>th</sup> June 2009 (which was on 6.7.2016 deemed as having been withdrawn); that the applicants' advocates received all the proceedings on 2<sup>nd</sup> August 2016; and that a copy of certificate of delay is attached to the application marked “CMG6”. The certificate of delay shows that the proceedings were ready for collection on 17<sup>th</sup> November 2010 and the applicant's Advocates were notified of this but the ruling was supplied on 2<sup>nd</sup> August 2016. The applicant avers that he is entitled to make this application and that the delay was not of his (applicant's) making.

6. I have perused the application by Notice of Motion dated 30<sup>th</sup> September 2016 and the written submissions filed by the applicant(s) on 12<sup>th</sup> May 2017, and by the respondent on 18<sup>th</sup> May 2017 as well as the applicant's List of Authorities filed on 4<sup>th</sup> May 2017, and the respondent's List of Authorities (complete with case digest) filed on 4<sup>th</sup> May 2017.

7. The applicant seeks an order for leave to appeal out of time under Rule 4 of this Court's Rules. The Court has under Rule 4 of this Court's Rules unfettered discretionary power to extend time to appeal. The policy of the Court is to lean towards the exercise of its discretionary power to extend time to appeal where, *prima facie*, an applicant shows that he or she has an arguable appeal and that the delay in seeking extension of time can be excused and the respondent would not suffer harm that cannot be compensated by an award of costs if time is extended. This policy was echoed by Apaloo JA, (as the then was), in **Gitau vs Muriuki [1986] KLR 211**.

8. The factors to be considered in an application under Rule 4 (*supra*) include the length of the delay; the reasons for the delay; whether the applicant has an arguable appeal; the degree of prejudice to the other party if time is extended; the public importance of the matter in appropriate cases; and generally the

requirements of the interest of justice under Article 48 of the Constitution which requires the State to ensure access to justice for all persons. Regard to human errors or mistakes ought not to be a reason for declining to extend time even including errors by counsel (as happened in **Gulam Hussein vs. Cassmand & Shashikant Ramji [Civil Application No. Nai 1 of 1981]** where C. B. Madan, JA (as he then was), held that errors by a legal advisor can be pardoned.

9. In addition, in considering an application for extension of time under Rule 4 (supra), the Court ought to be satisfied where the delay is considerable and the applicant seems to have an arguable appeal, that the applicant was not indolent but acted with dispatch.

10. In this application, the decision that the applicant intends to challenge on appeal was made on 3<sup>rd</sup> June 2009 by Makhadia J, (as he then was). The applicant secured an order for stay against it on 11<sup>th</sup> December 2009 in NYR Civil Application No. 178 of 2009 [UR 120/2009]. After that, the applicant seems to have gone into a slumber and it was not until the respondent moved this Court in NYR. Civil Application No. 9 of 2016 seeking to have the Notice of Appeal dated and lodged on 4<sup>th</sup> June 2009 deemed to have been withdrawn that the applicant woke up and filed the application (dated 30.9.2017) now before me which is the subject of this ruling.

11. The applicant in this application has explained why it took such a long time to lodge appeal after giving the notice of appeal on 4<sup>th</sup> June 2009. The reasons are not convincing when one looks objectively at the span of time involved. But no matter, the applicant avers that on 2<sup>nd</sup> August 2016, all the proceedings were to hand. He also avers that the ruling itself was duly certified on 9<sup>th</sup> May 2016 (as averred in paragraph 11 of his affidavit sworn on 30.9.2016 in support of the motion). The picture emerging shows that the proceedings were ready for collection on 17<sup>th</sup> November 2010 but the applicant's advocates collected the same on 2<sup>nd</sup> August 2016. The impugned ruling was duly certified on 9<sup>th</sup> May 2016 (vide paragraph 9 of the applicant's said affidavit in support of the motion). In spite of this, it was not until 30<sup>th</sup> September 2016 that the applicant lodged the application for extension of time.

12. It is patently clear that the applicant was tardy and flippant and without sufficient cause failed to observe the rules of procedure. He failed to act with dispatch. The delay was unreasonable. It has not been satisfactorily explained. I so find. The new dispensation ushered in by Article 159(2)(d) (i.e. justice shall be administered without undue regard to procedural technicalities) did not do away with the principle of fairness which is the basis in our jurisprudence nor did it oust the need for consistency and precedent. It was correctly emphasized by Lord Radcliffe in **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218** at pg 241 that *“proper use of rules of procedure shortens the hearing and reduces costs”*. The intended appeal is not shown to be arguable. The applicant hinges his case on arguability of the appeal on the fact that the amount imposed by the learned Judge in the impugned ruling is large and on how it was made up. He has not shown the point of law on which he would peg the appeal. The circumstances attendant to this application do not show that the applicant deserves the exercise of the discretionary power under Rule 4 in his favour. I so hold. In short, I find no merit in the application.

13. In the result, I dismiss the application with costs to the respondent.

14. This Ruling could not be delivered earlier because the submissions filed by counsel for the parties reached me as the Judge seized of the matter only on 13<sup>th</sup> December 2017. Counsel for the parties had on 8<sup>th</sup> May 2017 requested for a ruling to be given on notice after the filing of the submissions which they indicated they would not highlight.

***Dated and delivered at Nairobi, this 20<sup>th</sup> day of December, 2017***

**G. B. M. KARIUKI SC**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**