IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: NAMBUYE, J.A (IN CHAMBERS))

MISCELLANEOUS APPLICATION NO. 11 OF 2015

IN THE MATTER OF ESTATE OF KOSIANDO GATERU MWANIKI (DECEASED)

BETWEEN

SIMON MWANIKI GATERU..... APPLICANT

AND

CEASARE WAWERU GATERU.....1ST RESPONDENT

JOSEPH WARUTHI GATERU.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nakuru (Mshila, J.) dated 31st July, 2015

in

H. C. Succession Cause No. 145 of 2009)

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RULING OF NAMBUYE JA

Before me is a notice of motion dated the 2nd day of November, 2015 and lodged in the Court's sub registry at Nakuru on the 6th day of November, 2015. It is expressed to be brought under Rule 41 of the Rules of the Court 2010, Sections 95 and 3A of the Civil Procedure Act and Order 50 Rule 67 of the Civil Procedure Rules. Initially four (4) reliefs were sought. Prayer three (3) was however found incompetent and abandoned.

The applicant basically seeks leave of Court to appeal against the judgment of Hon Lady Justice Abigail Mshila delivered at Nakuru on the 31st day of July 2015 and second, leave to file a notice of appeal out of time upon the granting of prayer 1, together with an attendant order for costs of the application to be provided for.

The application is grounded on the grounds on its body and the content of the supporting affidavit

together with all the annextures annexed thereto. The respondents Ceasare Waweru Gateru and Joseph Waruthi Gateru though served filed no replying affidavits but attended court and made oral representations in opposition to the application.

Learned counsel Wanjiru Wachira made representations on behalf of the applicant, while the named respondents made representations on their own behalf.

Miss Wachira reiterated the contents of the grounds on the body of the application, and the supporting affidavit together with the annextures annexed thereto. It is Miss Wachira's argument that the applicant is not to blame for the failure to timelously initiate the intended appeal process because one, the file containing the judgment went missing immediately upon the delivery of the judgment and was therefore not readily available for perusal and consultation with the applicants then advocate on the record on the way forward.

Second, the applicant changed advocates. The incoming advocates could not place their papers on the record with a view of progressing with the intended appeal process as the file was not available to them. Three, it was not until the 23rd day of October 2015 that the file was availed to them, they moved with speed and presented the application under review hardly two weeks from the date the file was traced. The applicant is therefore not guilty of any inordinate delay in initiating the appeal process.

Miss Wachira continued to urge further that the annexed correspondence bear witness that the applicant made frantic efforts to initiate the intended appeal process timeously, but it is the High Court registry which prevented him from doing so.

On the merits of the application, Miss Wachira urged that the intended appeal is not frivolous. The applicant has serious issues to raise on appeal and considering that the intended appeal is with family members, it is only proper that the applicant be afforded an opportunity to ventilate his grievances on appeal. The respondents stand to suffer no prejudice as they can be compensated for by way of costs. It will also be in their best interest and fairness to both sides that issues in controversy be crystallized on appeal with an opportunity to both sides to restate their cases.

To buttress her arguments, Miss Wachira referred me to the case of Mwangi versus Kenya Airways Ltd [2003] KLR 48 for the following propositions; (i) matters which the court takes into account in deciding whether or not to grant an extension of time are (a) the length of the delay, (b) the reasons for the delay; (c) possibly the chances of the appeal succeeding if the application is granted; and (d) the degree of prejudice to the respondent if the application is granted; (ii) the chances of the appeal succeeding if the application is granted is merely stated as something for a 'possible' consideration, not that it must be considered; (iii) the annexing of pleadings and a judgment is not a legal requirement in such an application; (iv) there is no requirement under Rule 49 of the Rules of the Court that an applicant should show "sufficient cause" before the judge grants an extension of time; (v) the list of factors a court would take into account in deciding whether or not to give an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules, gives an unfettered discretion and so long as the discretion is exercised judiciously, a Judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.

The case of **Titus Koceyo versus Mathew O. Oseko T/A Oseko & Company Advocates & another [2010] eKLR** for the proposition that to limit such matters to be taken into consideration which would be whether to grant or withhold the relief of extension of time to those enumerated above would be tantamount to fettering the discretion of a judge as the Rule itself gives an unfettered discretion. The case of **Stanley Kaharu Mwangi & 2 others versus Kanyamwi Trading Company Limited [2015] eKLR** for the proposition that a plausible and satisfactory explanation for the delay is the key that unlocks the courts flow of discretionary favour. There has to be valid and clear reasons upon which judicial discretion can be exercised. Lastly the case of **Ruth Muthoni Wangai versus Boniface Mwangi Wangai & another [2015] eKLR** in which Nambuye JA drawing inspiration from the case of **Aviation Cargo Support Limited versus St Mark Freight Services Ltd [2014] eKLR** reiterated the following propositions; (i) the order when or not to grant extension of time or leave to file and serve a record to

appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice but with each case depending on its own merit; (ii) for the court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that he/she came to court as soon as capacitated; (iii) that in normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not and should not be blind to this fact. When this happens the reason why it occurred should be satisfactorily explained to the court including steps taken to ensure compliance with the law.

In response to the applicant's submissions Mr. Ceasare Waweru Gateru, the 1st respondent opposed the applicants application on the grounds that the applicant has just chosen to engage them in unending court battles over family property well knowing that they (both respondents) are entitled to a share of the family estate. Second, the High Court judgment was fair and just as it gave each beneficiary an equal share of the family estate and all the disputants joint trusteeship over the share of their sibling who disappeared without trace to so hold either until he resurfaces or is declared dead and in the event of him being declared dead then this share would be shared equally amongst the disputants.

In Mr. Ceasare's view, the applicants move to initiate the intended appellate process is nothing but a ploy to steal a match over the respondents with regard to the joint trusteeship over the missing siblings share and equal distribution of the estate amongst them.

Mr. Ceasare continued to urge that the applicant should not be indulged to pave the way for the finalization of the execution process already on course.

Mr. Joseph Warithi Gateru, the 2nd respondent associated himself fully with the submissions of Ceasare and also urged me to dismiss the applicants application to allow the execution process with which the applicant is already a party to proceed to its logical conclusion.

My invitation to intervene on behalf of the applicant has been invoked under Rule 42 of the Rules of the Court, 2010, Section 95 and 3A of the Civil Procedure Act (supra) and Order 50 Rule (6) of the Civil Procedure Rules. Rule 42 of the Rules of the Court 2010 simply donates a general power to a litigant to access the court by way of an application, whereas Section 3A of the CPA donates the inherent power of the court. Sections 95 of the CPA and Order 50 Rule (6) donates general power to the court to extend time for the performing of any task mandated by the Act. Section 2 of the CPA defines a "court" as meaning the High Court and the subordinate court, meaning that sections 3A and 95 of the CPA as well as Order 50 Rule (6) of the CPR have no application to the appellate process before me and therefore they should not have been invoked by the applicant as access provisions for the relief sought from me.

The question I have to pause to myself is whether the applicants' failure to cite the correct Rule of access for the relief sought dis entitles him to the relief sought. The answer to this question is in the negative.

Authority for this is Article 159 (2) (d) of the Kenya Constitution 2010 which enjoins me to render substantive justice as opposed to technical justice in the discharge of my judicial function.

The invocation of this principle is not however absolute. It has caveats which I have to bear in mind. In **Jaldesa Turle Dabelo versus Electoral & Boundaries Commission & another [2015] eKLR** the caution I have to bear in mind is that where there is a clear provision for the redress of any grievance prescribed by an Act of Parliament that provision should be strictly followed; second, that Article 159 of the Constitution was neither aimed at conferring jurisdiction where none exists nor was it intended to derogate from express statutory procedures for the initiation of causes of action before courts. Neither was it meant to to be a panacea for any procedural short falls (see Patricia Cherotich Sawe versus Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR), save that the donation of the jurisdiction under this Article is unfettered especially where procedural technicality pose an impediment to the administration of justice as was stated in the case of **Lemankani versus Harun Meltamei Lempaka & 2 others [2014] eKLR.**

Section 3A of the Appellate Jurisdiction Act Cap 9 laws of Kenya can also be called into play to save the applicants application from any would be fatal technicality. This section (3A of the Appellate Jurisdiction Act) enshrines the overriding objective principle of this court namely the facilitation of the just expeditious, proportionate and affordable resolution of appeals guided by the Act. This principle confers on the court considerable latitude on the exercise of its discretion in the interpretation of the law and rules made thereafter. See the case **City Chemist (NBI), Mohamed Kasabuli versus Orient Commercial Bank Ltd Civil Application No. Nai 302 of 2008 (UR 1999/2008).**

It also emboldens and enables the court to be guided by a broad sense of justice in achieving fair, just, speedy, proportionate and time and cost saving disposal of cases before it but without uprooting established principles and procedures. The principle also energizes the process of the court to ensure that the interpretation of any of the provisions of the Act and the Rules made thereafter are "O2" compliant. See **Hunter Trading Company Limited versus ECF 011 Kenya Limited Civil Application No. Nai. 6 of 2010 (UR 3/2010).**

The foregoing principles of law breathes life on the applicant's application and guarantees it a merit disposal. The applicable Rule of access for the relief sought is therefore Rule 4 of the Rules of the Court. It provides:

> ***"The court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court or of a superior court for the doing of any act authorized or referred by these Rules whether before or after the doing of the act and a reference in these Rules to any such time shall be construed as a reference to that time as extended"***

The principles guiding me in the exercise of the mandate donated by Rule 4 above are as have been crystallized by a wealth of case law as pronounced by this court some of which have been fronted by the applicant's learned counsel as guides. There is no need for me to rehash these. I wish to adopt those fronted by the applicant's learned counsel as demonstrating the correct position in law. In summary, these principles are that the right of appeal is both recognized and protected by the appellate process and should therefore be exercised freely. Where it is intended to be withheld on account of a failure to observe or to take a procedural step in the appeal process, such withholding should only be sanctioned in instances where the inconvenience or prejudice to be suffered by the opposite party cannot be compensated for by way of costs.

When confronted with such competing interests in the same way as seen in the application under review, all that I am enjoined to do is to follow the footsteps and guidelines set out in the case law assessed above. That is, apply the threshold set by the above case law to the peculiar circumstances of the application under review and then make a determination.

The threshold set by the assessed case law is simply to determine the length of the delay, the reasons for the delay, possibly the arguability of the intended appeal, any public policy issues or any prejudice that may be suffered by the opposite party incapable of compensation by way of costs. Further, there is liberty to consider any other relevant factor (s) that would ensure ends of justice to both parties so long as these are in consonant with the overriding objective principle of the court.

There is no dispute that the judgment intended to be impugned was delivered on the 31st day of July 2015. In terms of Rule 75 of the Rules of the Court, the applicant ought to have filed the notice of appeal on or before the 13th day of August, 2015 if he so wished to impugn the said judgment. He did not beat that deadline, and that is the reason why he is now before me seeking a reprieve.

The guiding principles set out above obligates him to give a plausible explanation for the delay in return for the discretionary favour from me. The explanation fronted by him is that both the judgment and the file were not immediately available both to him and his then advocate on the record for them to peruse, digest the reasoning of the learned judge and then make an informed decision as to whether to appeal or not.

The applicant continued to urge that he changed advocates but his own efforts and that of the incoming advocate to lay hands on the file also bore no fruits. It was not until the 23rd day of October 2015 when the said judgment and file were availed to him and the advocate currently on record for him managed to peruse and then digest the reasoning of the learned judge in said judgment and made an informed decision that they had genuine grievances against it and therefore there was sufficient grounds for raising an appeal against the said judgment hence the filing of the application under review.

In support of the above assertions, the applicant has annexed correspondences between both the advocate then on record for him and the current advocate on record for him seeking the availing of both the file and the judgment to him.

In her submissions before me, learned counsel submitted that these correspondences went unanswered, a position which has not been controverted by the respondents maybe by reason of them being lay men not schooled in the law. The above disadvantage not withstanding, I have no reason to doubt the submissions of learned counsel as supported by the deposition in the supporting affidavit as well as the annextures annexed thereto as stating the correct position as to what transpired between the applicant and the court resulting in the presentation of the application under review.

In my view the applicant has given an uncontroverted, plausible reason for delay. I also accept his assertion that he moved promptly to present the application under review within two (2) weeks of capacitation. He can not therefore be said to have been indolent.

As for the arguability of the intended appeal, I find that although this is not a primary consideration in an application of this nature, the applicant has made efforts to exhibit his grievances against the learned judge's judgment. I have perused it, in my view it raises an arguable appeal. By arguable, I do not mean one that will necessarily succeed but one that a court of law properly addressing its mind to it will find it reasonable enough to call upon the opposite party to respond to it.

Other relevant factors to be considered are that the dispute involves family members. Indeed the High Court has made a pronouncement on it, but this is no justification for withholding an opportunity for the applicant to ventilate his grievances in a higher forum. As Nambuye, JA observed in the case of **Ashit Patani & 2 Others versus Dhirajlal Patani & 2 Others [2014] eKLR,** it is preferable that family disputes be ended on a harmonious note as opposed to an acrimonious one. Such a situation can only be achieved if the parties are afforded a second opinion on the issues in controversy as between them.

As for prejudice or inconvenience to be suffered by the opposite party, none has been alluded to by the respondents as they informed me that each party is residing as they have been residing before and that the execution process has already been set in motion.

Before I conclude, I wish to state that I received no submissions on the plea for leave to appeal. No appellate process provision of law mandates me to do that. I think that this plea is directed at the wrong forum. If any leave is required to be obtained before the lodging of the intended appeal, then the applicant has liberty to seek the same from the court appealed from, have that position regularized before moving to initiate the appeal process.

Since I am not sure whether leave to appeal is required or not, I have no alternative but to confine myself to the relief that falls within my jurisdiction, that is extension of time to initiate the appeal process.

In the result and for the reasons given above, I allow the applicants application on the following terms:-

(1) The applicant has leave of Court to file and serve the Notice of Appeal within fourteen (14) days of the date of the ruling.

(2) The Record of Appeal to be lodged within sixty (60) days from the date of the filing of the Notice of Appeal.

(3) Costs of this application to be in the intended appeal, but if none is filed then the respondents to have attendants costs to be agreed or assessed by the Deputy Registrar of this Court.

Dated and delivered at Nakuru this 27th day of April, 2016.

R. N. NAMBUYE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR