IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. 7 OF 2016

(CORAM: WAKI, JA (IN CHAMBERS))

BETWEEN

WACHIURI WAHOME.....APPLICANT

AND

FESTUS GATHERU WAHOME.....1ST RESPONDENT

ALICE WANJIRA NJOROGE.....2ND RESPONDENT

REGINA WANJA MUNGAI.....3RD RESPONDENT

GLADYS WANGUI MWANGI.....4TH RESPONDENT

MARY WAITHIEGENI WAHOME.....5TH RESPONDENT

PATRICK MBOGO WAHOME.....6TH RESPONDENT

JOHN NDURA WAHOME.....7TH RESPONDENT

(Being an application for leave to file Notice of Appeal and Appeal out of time in the intended appeal against the Ruling of the High Court of Kenya at Nyeri (Sergon, J.) dated on 2nd day of June, 2010

in

Succession Cause No. 284 of 1996 consolidated with

Succession Cause No. 490 of 2009

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RULING

1. The application before me does not make for easy reading and comprehension. Whether by design or lack of expertise in compiling court documents, the applicant left out many relevant documents which would have served his cause better. As it is, all I have before me is a bunch of five Rulings without the

benefit of the applications, supporting documents and proceedings which were considered to give rise to those Rulings. That said, however, for a lay person who the applicant is, he commendably argued his application and assisted the Court with a list of five authorities. I will do the best I can with the documents availed to me.

2. The motion taken out by **Wachiuri Wahome** (Wachiuri) seeks an order under ***Rule 4*** of the Rules of this Court for extension of time to challenge on appeal a ruling of Sergon J. delivered six years ago on 2nd June 2010. Wachiuri is entangled with his six siblings in the distribution of the two estates of their father and mother. Their father, ***Samuel Wahome Gatheru,*** died first in 1994 and their mother, ***Rebecca Muthoni***, was appointed as the sole administrator of the estate in ***Succession Cause No. 284 of 1996***. The grant was confirmed on 21st July 2000 and the entire estate went to the mother. Subsequently, it seems, some of the children, including Wachiuri, filed a complaint and the grant was revoked in 2008. The distribution of the estate was then revised to cover the mother and all the children. Lately however, in May 2013, three daughters in the family filed an application complaining that the male children were discriminating against them over the estate of their father and sought revocation of the grant unless their interests are catered for. That matter is still pending.

3. The mother died on 16th July 2008 before the administration of the estate of the father was finalized. Some of the children applied to administer her estate in ***Succession Cause No. 490 of 2009*** and were allowed to do so, but Wachiuri and one of his brothers filed an objection, the determination of which is still pending as the matter is partly heard. It is in the course of the proceedings in that Succession Cause, which was initially consolidated with ***Succession Cause No 284 of 1996*** but were later separated, that several rulings were made by different Judges including **Sergon J.** who made rulings on 2nd June 2010, 7th October 2010 and 23rd September 2011. As the application before me relates to the Ruling made on 2nd June 2010, I will restrict myself to that Ruling (hereinafter, ***"the impugned ruling").***

4. The impugned ruling arose from an application by Wachiuri in S.C No. 284 of 1996, to be allowed to administer four assets of the father's estate which he listed as unadministered. He filed that application on 16th November 2009 although the court noted that another identical application was also filed by him on 2nd December 2009. But one of his brothers, **Patrick Mbogo** (Mbogo) opposed the application swearing that their mother did not leave any unadministered assets in the estate of their father. The listed properties, Mbogo pointed, out were registered in the name of their mother and therefore they can only be dealt with as part of her estate. Wachiuri then produced registration documents confirming that two of the properties were in the mother's name, one in Mbogo's name and only one was in the father's name, but admittedly belonged to the mother. On those facts, Sergon J. dismissed Wachiuri's application in the impugned ruling.

5. If Wachiuri was aggrieved by that dismissal, he did not show it by filing a notice of appeal to this Court. He says instead, he tried to apply for setting aside orally on 16th March 2012 at the hearing of ***S.C No. 490 of 2009*** before Wakiaga J. and he believed the order was set aside. However, the only order made by Wakiaga J. on that day was that:

> ***"The summons for confirmation of grant dated 23/10/2008 and the protest filed on 19/3/2010 to be heard by way of oral evidence on 16th July 2012 before this court."***

The hearing continued as ordered when Wachiuri testified and it is still pending further hearing.

6. On 29th January 2015, Wachiuri filed a formal application before Ngaah J. seeking to have, not only the impugned ruling, but also all rulings delivered by Sergon J. in both Succession matters vacated and any reference to Sergon J's ruling in any other ruling be expunged. That was because, in his view, Sergon J. had accepted in a ruling dated 23rd September 2011 on an application made by Wachiuri to disqualify himself, that he had been misled by the respondent's advocate when he dealt in error with an application dated 23rd April 2010. Sergon J. thereafter recused himself from handling the Succession Causes any further and handed over to Wakiaga J.

7. Ngaah J. considered the application and on 30th October 2015 dismissed it stating that the mention of the impugned ruling by Wakiaga J. was not a mistake but a deliberate informed decision which a court of coordinate jurisdiction could not set aside; that the recusal by Sergon J. from hearing one application did not mean everything done before the recusal must be undone; that the recusal addressed the future and the Succession Cause was still live for hearing; and that if Wachiuri was dissatisfied with any ruling prior to Sergon J's recusal, he ought to have challenged it in the normal manner and not seek to expunge it.

If Wachiuri was not satisfied with that decision, he did not show it by filing a notice of appeal to this Court in accordance with the Rules. Instead, he filed the motion now before me four months later in February 2016.

8. In extensive submissions before me, Wachiuri conceded that there was a delay of almost six years but contended that it was not inordinate since the history of the matter justified it. He went ahead to relate the history at length and his understanding all along that the orders of Sergon J. including the impugned ruling had been set aside the moment the Judge recused himself. He submitted, and cited several authorities for those submissions, that there was a mistake made by the court itself in giving the orders it gave and it was just that they should be set aside; that there would be no prejudice to the respondents if the impugned ruling was set aside; that the order sought was an equitable remedy; that the court has unfettered discretion to grant the application; that the exercise of discretion should acknowledge that the parties are not on equal footing; that **Article 50** of the **Constitution** guaranteed the right to be heard; and that there were peculiar circumstances in this matter where there were two sets of contradictory rulings affecting the two Estates.

9. In response to those submissions, learned counsel for the respondents **Mr. Muchiri wa Gathoni** submitted that the application had no factual or legal basis. That is because Sergon J. was not misled by any party or person before making his decision in the impugned ruling. The erroneous information referred to by the Judge was in respect of a Ruling delivered by him on 7th October 2010 and there was no reason to disturb the impugned ruling which was earlier in time. At all events, he pointed out, the matter pending hearing was on the mother's estate and the impugned ruling simply stated a fact that the four assets in question were no longer part of the father's estate. Any issues arising would thus be settled in that hearing and therefore the setting aside of the impugned ruling does not add value to the process other than causing further delay in concluding the administration of the two estates.

10. I have considered the application, the submissions of the parties and the authorities laid before me. The principles applicable in considering an application under **Rule 4** are now old hat and I take them from my Ruling which the full court affirmed in ***Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appl. 332/04*** thus:

> ***"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 the 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 Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attoney General, Civil Application No. Nai. 8 of 2000 (ur) and Murai vs Wainaina (NO. 4) [1982] KLR 38".***

11. I am also aware that there is a duty imposed on the Court under ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. As explained in the case of **City Chemist (Nbi) & Ano. vs Oriental Commercial Bank Ltd Civil Application No. NAI 302 of 2008** (UR 199/2008):

"The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective."

In the same case, however, the court cautioned thus:-

"That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application."

12. Those Sections of the **Appellate Jurisdiction Act** came first in legislative time but have found legitimacy in **Article 159** of the **Constitution 2010** which deals with judicial authority and the administration of justice without regard to technicalities of procedure. The Supreme court has had occasion to interpret Article 159 and did so in the case of ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR*** where it agreed with the dicta of Kiage, JA in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR*** stating:

"… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"

The Supreme Court further emphasized:

"Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR".

13. With those principles in mind, I now advert to the application before me. A period of six years taken to move forward a judicial process is on the face of it, inordinate. But it is not the longevity alone that determines that a delay is inordinate. The explanation for it, however long, may avail an applicant if it is cogent. I perceive in this matter that the applicant pleads in one breath that he was always under the impression that the impugned ruling had been set aside hence the reason why he did not think more of it until his sisters sought to rely on it in their application made in May 2013. In another breath he pleads ignorance of procedure and says he realized he needed to make this application when Ngaah J. dismissed his application for setting aside the impugned ruling and opined that an appeal was the right procedure. Either way, it is my view that the explanation given for the delay cannot avail the applicant.

14. In the first place, the applicant has always been aware of the ruling and expressed no desire to challenge it on appeal. The explanation that he orally applied before Wakiaga J. for setting aside is not

borne out by the record since Wakiaga J. simply made an order for hearing of the matters before him as reproduced above. There is nothing to show that the impugned ruling was either in issue before Wakiaga J. or that Wakiaga J. created the impression that he had set aside any Ruling of Sergon J. At any rate, if that was the impression carried by the applicant all along, it would have been unnecessary to make a formal application before Ngaah J. to have the same Rulings set aside. The applicant does not seem to have sought advice on the procedure he ought to have followed and he cannot blame the court or anyone else for the inordinate delay he finds himself in.

15. The emphasis made by the applicant is that it is in the interests of justice that this application be granted because the impugned ruling was made by a Judge who subsequently disqualified himself for having been misled by one of the parties to the dispute. But the application before me relates only to the impugned ruling and not any other rulings made by Sergon J. The impugned ruling was not the subject matter of the disqualification and on the face of it relates to factual matters which even the applicant himself supported by production of documents. As the matter of the two estates is still alive before the trial court and all parties will be heard, I see no prejudice to the applicant as he will be able to lead any factual evidence in his possession for evaluation by the trial court. On the contrary it would be prejudicial to the estates of the two deceased persons, which has so far taken 20 years to administer, due to incessant wrangles between the children, to be delayed further.

16. On the whole, I am not inclined to exercise my discretion in favour of the applicant and I order that this application be and is hereby dismissed. As the matter involves the same family, I make no order as to costs.

Dated and delivered at Nyeri this 6th day of July, 2016

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR