



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. MUSINGA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 49 OF 2012

BETWEEN

ERICK MUNGAI KINYANJUI.....1ST APPLICANT

PAULINE WAIRIMU KINYANJUI.....2ND APPLICANT

PETER NJIHIA KINYANJUI.....3RD APPLICANT

MARY WANJA KINYANJUI.....4TH APPLICANT

AND

LUCY WANJIKU NGANGA.....1ST RESPONDENT

JANE NJERI NGANGA.....2ND RESPONDENT

(An application for extension of time to file and serve notice of appeal, memorandum and record of appeal out of time in an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Wanjiru Karanja, J.) dated 16.6.2011

in

H.C Succession Cause No. 1935 of 2000)

RULING OF THE COURT

1. The applicants' application dated 16th January, 2012 is brought under **rule 4** of this **Court's Rules**. It seeks extension of time to file and serve notice of appeal, memorandum and record of appeal in an intended appeal from the ruling of the High Court delivered on 16th June, 2011. The applicants also seek to have a notice of appeal that they filed on 28th June, 2011 deemed to have been duly filed in time.

2. The short affidavit sworn by **Pauline Wairimu Kinyanjui**, the second applicant, shows that the applicants, being dissatisfied with the High Court ruling, applied for certified copies of the ruling on 20th July 2011 but the proceedings were not supplied until 16th August, 2011.

3. Since 20th February, 2012 when this application was filed, it has come up for hearing on a number of occasions but could not be heard for one reason or the other.

4. When the application came up for hearing on 5th September, 2016, only **Mr. Tim Okwaro**, the applicants' advocate, was in attendance.

The court ascertained that the respondents' advocates, **M/s Mbichire & Company Advocates**, had been served with a hearing notice on 22nd August, 2016 but their representative had not attended court.

5. The court directed Mr. Okwaro to prosecute his clients' application, notwithstanding the absence of the respondents' advocate.

6. The applicants' counsel urged the court to grant the orders sought, considering that the delay in filing the memorandum and record of appeal was occasioned by the court in failing to supply the proceedings in time.

7. **Mr. Sagini**, holding brief for Mbichire & Company Advocates, walked into my chambers shortly after **Mr. Okwaro** had closed his brief submissions. Mr. Sagini informed the court that he had been instructed to seek an adjournment of the application so as to enable the respondents' advocate file written submissions in opposition to the application. The court declined to grant the adjournment sought as it was not merited.

8. It is not in dispute that in considering an application for leave to file and serve a notice and record of appeal out of time, the court exercises its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, excusable mistake or error. In exercising that discretion, the court takes into consideration the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. See **PAN AFRICAN PAPER MILLS (E.A.) LTD versus OLAKA [2001] KLR 8**.

9. The notice of appeal was filed in time, twelve days after delivery of the impugned ruling. The applicants did not waste any time in applying for certified copies of the High Court proceedings but there was a delay of about two months before the proceedings were supplied. The applicants cannot be faulted for that delay.

10. Although the applicants have not exhibited a draft memorandum of appeal or made an effort to demonstrate that the intended appeal is meritorious, that omission per se cannot disentitle them from grant of the orders sought, taking into consideration that the application is otherwise well merited.

11. Consequently, I grant the orders as sought by the applicants. I further direct that the memorandum and record of appeal be filed and served within fourteen (14) days from the date of this ruling.

Parties shall bear their own costs of the application.

Dated at Nairobi this 16th day of September, 2016.

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR