



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. MUSINGA, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 186 OF 2015 (UR 151/2015)

BETWEEN

JOHN MWATIAPPLICANT

AND

NASEEM KASSAM.....1ST RESPONDENT

ZUBEDA NANJI.....2ND RESPONDENT

(Application for extension of time to file and serve a notice of appeal and file a record of appeal out of time in the intended appeal from the ruling/decree of the High Court at Nairobi (Maraga, J) dated 24th day of October, 2011

in

H.C Succession Cause No. 559 of 2007)

RULING

1. This is an application brought under **rule 4** of the **Court of Appeal Rules**. The applicant seeks extension of time to file and serve a notice of appeal and the record of appeal out of time. The ruling sought to be appealed from was delivered on 24th October, 2011.

2. A notice of appeal was filed on 6th December, 2011. The notice was however not served upon the respondent and no record of appeal was ever filed. The applicant states that he does not know why his erstwhile advocates, Njeru Gichovi & Company, failed to pursue the appeal. The application for extension of time was filed on 9th July, 2015 by **Anthony P. Khamati**, advocate.

3. Although the applicant attributes the delay in filing the appeal to “frequent disappearance” of the trial court file, there is no evidence to that effect. The other stated reasons for the delay are “slow pace of preparing certified proceedings and ruling’ and “the conduct of the advocates previously on the record”. The aforesaid reasons were not substantiated at all. The affidavit in support of the application is hardly half a page.

4. **Mr. Mbugua**, learned counsel who held brief for **Mr. Khamati** for the applicant, submitted that the

intended appeal has high chances of success.

5. The application was opposed by the respondents. There is on record on replying affidavit sworn by the 2nd respondent. **Mrs. Owino**, learned counsel for the respondents submitted, *inter alia*, that the application is frivolous and an abuse of the court process. She pointed out that there were no valid reasons for the delay in filing and service of the notice of appeal, that the delay is inordinate, and that the intended appeal has no prospects of success at all, since the estate of Aziz Kassam (*deceased*) had already been distributed as per the deceased's will and in terms of a lawful court order. The applicant had sought revocation of the Grant of Probate of the deceased's will, alleging that he was a dependent of the deceased.

6. The High Court dismissed that application and subsequently dismissed all other applications filed by the applicant, holding that he had no valid claim to the deceased's estate.

7. The applicable principles in an application for extension of time to file an appeal are well known. The court exercises its unfettered discretion and in so doing it has to consider, *inter alia*, the length of the delay; the reason for the delay, the chances of success of the intended appeal; and the degree of prejudice that is likely to be occasioned to the respondent if the application is allowed. See **GITETU versus KENYA COMMERCIAL BANK LTD [2009] KLR 545.**

8. The delay in filing the notice of appeal was 35 days. That delay was not explained at all. This court has severally stated that any delay, however short it may be, ought to be well explained by a party who desires to have this Court exercise its discretion in his/her favour.

9. The certificate of delay shows that the proceedings were ready for collection on 10th June, 2015. Since then the record of appeal has not been filed. This application was filed on 9th July, 2015, 29 days after collection of the proceedings. Again there is no explanation for that delay.

10. I have carefully perused the High Court proceedings as well as the various rulings on record. I entertain grave doubts about the chances of success of the intended appeal.

11. For these reasons, I am not inclined to grant the applicant leave to file the intended appeal out of time. The application dated 1st April, 2015 is dismissed with costs to the respondents.

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