



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, J.A IN CHAMBERS)

CIVIL APPLICATION NO.72 OF 2016

BETWEEN

DANSON MUGWI NJOROGE1ST APPLICANT

JAMES ALLAN KAMAU.....2ND APPLICANT

JANE NYAMBURA NJOGU.....3RD APPLICANT

AND

LUCY NJOKI NJOROGE.....RESPONDENT

(An application for enlargement of time for filing of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Kimaru, J.), dated 19th April, 2013 in Succession Cause No.2806 of 2007

RULING

[1] By a Notice of Motion dated and filed on 31st March, 2016 **Danson Mugwi Njoroge, James Allan Kamau, Jane Nyambura Njogu** (hereinafter referred to as the applicants), have moved this court under Section 3A & 3B of the Appellate Jurisdiction Act, Rules 4 and 47 of the Court of Appeal Rules (2010) and Section 39(3(b) of the Arbitration Act.

[2] The applicants seek *inter alia* leave to file and serve a record of appeal out of time; and leave to lodge an appeal against the ruling of Kimaru, J., delivered on 19th April, 2013 in Succession Cause No.2806 of 2007.

[3] The application is anchored on grounds stated on the body of the motion and an affidavit sworn by one of the applicants **Danson Mugwi Njoroge**. In brief, on 21st January, 2008 letters of administration for the estate of the late **Rhoda Njoki Njoroge**, were issued to the applicants. Thereafter, **Lucy Njoki Njoroge** who is the respondent herein, filed summons for revocation of the grant that was issued to the applicants. The summons for revocation was heard and a ruling delivered by Kimaru, J., on 19th April, 2013 allowing the summons to the extent of nullifying the grant issued to the applicants and ordering another grant to issue in the names of the 3 applicants and the respondent jointly. The learned judge further ordered that the respondent and her children be included as dependants of the deceased.

[4] Being aggrieved by that ruling, the applicants filed a notice of appeal against the ruling on 2nd May, 2013. On the same day the applicants also filed an application for leave to appeal against the ruling of 19th April, 2013. By a ruling dated 4th June, 2014 Kimaru, J., granted the applicants leave to appeal even though he was of the view that leave was not necessary.

[5] The applicants who live in Canada explain that they assumed that their counsel one Kefa Ombati filed the memorandum of appeal and record of appeal after the leave was granted on 4th June, 2014. The applicants only came to realize in December, 2015 whilst following up the matter that the documents had in fact not been filed. It was then that the applicants engaged their present counsel who lodged an appeal as well as the current application seeking to have the documents deemed as properly filed.

[6] The applicants plead that the delay in lodging the appeal was occasioned by factors beyond their control. They further contend that they will suffer substantial loss if the orders sought are not issued as they will be shut out unheard. In arguing the appeal Ms. Kimani, Counsel for the applicants urged the Court not to visit the mistake of Counsel on the applicants.

[7] The respondent opposed the motion through grounds of opposition filed on 8th June, 2016 in which it is contended that the application is defective and lacks merit. The respondent points out that the applicant has already filed a record of appeal and cannot therefore apply retrospectively for leave to file the record of appeal out of time. The respondent also maintains that the applicants have not produced any evidence to show that they have been living in Canada.

[8] I have given careful consideration to this application taking into account all submissions made by counsel. Rule 4 of the Court of Appeal Rules 2010 states as follows:

“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 required 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.” (Emphasis added).

[9] It is clear from a plain reading of this rule that extension of time can be granted either before or after the doing of the act in regard to which the extension of time is sought. Therefore the fact that the applicants sought leave of the Court after filing the memorandum of appeal and the record of appeal, does not preclude the Court from granting the leave retrospectively so that the appeal is deemed as properly filed.

[10] It is well established that in exercising power to extend time under Rule 4 of the Court of Appeal Rules a single judge has unfettered discretion, but that this discretion must be exercised judicially. (***Origo & Another vs Mungala [2005] 1KLR 178; Gitetu vs Kenya Commercial Bank Ltd [2009] KLR 545.***)

[11] Thus, in exercising the discretion the single judge must address several factors that impact on the judicial exercise of the power. Such factors include: the length of the delay and the reason for the delay; the prejudice if any likely to be suffered by the respondent if the extension of time is allowed; and whether the appeal is arguable. In this case, leave to file the appeal was granted on 4th June, 2014 and the application before this Court was made on 31st March, 2016.

Therefore the period of delay is about 2 years. The applicants have explained that they are all residents in Canada and that they entrusted their former advocate with lodging the appeal and believed that he had done so. Although nothing was placed before this Court to confirm that the applicants reside in Canada, ***Danson Mugwi Njoroge***, stated this fact under oath. A diligent advocate would no doubt have advised him to annex a copy of his passport or permit to confirm this fact. Nonetheless, I have no reason to doubt the veracity of what was deposed. It is evident from the fact that a notice of appeal was filed immediately after the ruling and an application for leave to appeal that the applicants intended to pursue their right of appeal. In the circumstances of this case, the delay was not so inordinate and the explanation given for the

delay is plausible.

[12] Although the applicants have filed a memorandum of appeal and record of appeal, the same has not been availed to me nor has the applicants addressed the issue of the arguability of the appeal. From the ruling dated 19th April 2013, that is subject of the intended appeal, it is evident that the dispute concerns the respondent's rights to the estate of the deceased. Although the learned judge nullified the grant that was issued to the applicants, the applicants are still protected because the order made is for another grant to be issued in their joint names together with the respondent. No prejudice is therefore likely to be suffered by the applicants as the issue of the beneficiaries and the beneficiaries' shares in the estate of the deceased will be addressed by the Court during the confirmation of the grant. I therefore find that in the circumstances of this case it may not be appropriate for me to exercise my discretion in the applicants' favour.

[13] Accordingly, the applicants' motion dated 31st March, 2016 is dismissed. In the circumstances of this case, I do not find it appropriate to award any costs and therefore each party shall bear their own costs. Orders Accordingly.

Dated and Delivered at Nairobi this 15th day of September, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR