



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL (APPLICATION) NO. NAI 300 OF 2014

BETWEEN

JEPHTER OSORO OPANDE

RATEMO NYARANGI

KEPHA MOGOI.....APPLICANTS

AND

SAMMY NYARANGI

BECKI BOYANI NYARANGI.....RESPONDENTS

(Application for extension of time to file a Notice of Appeal and Record of Appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Musyoka, J) dated 23rd May 2014, in H.C. SUC. C. NO. 565 OF 2009)

R U L I N G

This Notice of Motion dated 26th September 2014 seeks orders for extension of time to be granted under **Rule 4** of the **Court of Appeal Rules 2010** within which to lodge a Notice of Appeal and record of appeal out of time against a ruling of Musyoka, J delivered on 23rd May 2014.

The dispute concerns the estate of the late Margaret Nyarangi Maragwa, who died on 25th October 2008, where representation was sought by Ratemo Nyarangi Moga and Jephther Osos Opande for the execution of a will purportedly executed by the deceased on 15th February 2008, and where a list of assets which was the subject of disposal was annexed to the will and filed in Nairobi **HCSC No. 565 of 2009**. An objection to this grant was lodged on 28th May 2009, by the administrators of the estate of James Onyiengo Nyarangi in **Nairobi HCSC No. 1092 of 1991** which sought orders:

a. That the assets listed in the petition for grant of probate in the estate of Margret Nyarangi be expunged as they did not form part of her estate;

b. That the executors of the will of Margaret Nyarangi do surrender any property titles and allotment, share certificates, documents of title, logbooks, bonds, bank account records, pass

books, and other documents relating to the assets listed in the petition; and

c. That the court do find that the administrators, together with Anthony Nyarangi are the only heirs and beneficiaries of the estate of James Onyiega Nyarangi and Margaret Maragwa Nyarangi.

In a ruling delivered on 23rd May 2014, the learned judge found that the assets listed in the certificate of confirmation of the estate of James Onyengo Nyarangi, did not form a part of the estate of Margaret Maragwa Nyarangi and ordered that they be removed from the schedule of assets making up that estate, and that as the said property did not form part of Margaret Maragwa Nyarangi's estate, the executors of the will made on 15th March 2008 should surrender to the administrators of the estate of James Onyengo Nyarangi within thirty (30) days of the ruling all the documents of title in their possession relating to the assets listed in the confirmation of grant dated 12th July 1999 and issued in **HCSC No. 1092 Of 1991**.

In the application for extension of time the applicants have advanced several grounds supported by the sworn affidavit of **Jephter Osoro Opande** dated 26th September 2014, who deponed that the ruling was delivered on 23rd May 2014, and that immediately thereafter his advocate wrote to him on 26th May 2014 to inform him of the outcome of the High Court ruling. The letter did not reach him, and he only became aware of the outcome of the application, when he saw an article in the Daily Nation of 15th June 2014 reporting the ruling of the High Court. It was then that he contacted his advocate on record to express his dissatisfaction with the ruling, and to instruct them to file an Appeal, only to be informed by his advocate that the period for filing the Appeal had already lapsed. Nevertheless, his advocate immediately filed a Notice of Motion dated 18th June 2014 in the High Court seeking extension of time to file the appeal. Upon realizing that it had been filed in the High Court, instead of this Court, his advocate subsequently sought leave to withdraw the application from the High Court, so as to file the application in this court. The deponent concluded by stating that the delay was not intentional, inordinate or unreasonable, and that he stood to suffer irreparable loss if the application was not granted.

In a replying affidavit sworn on 18th December 2014 by **Sammy Nyarangi** on behalf of the respondents, it was deponed that all the applicants had mobile telephones, and therefore there should have been no difficulty in their advocate contacting them; that the delay in filing of the appeal was due to the advocate's indolence and that in any event the ruling was brought to the attention of the applicants well before the article on the ruling appeared in the Daily Nation. In his view, the appeal was not arguable as the matter concerned a dispute over the will of the late of Margret Nyarangi Maragwa which purported to bequeath property that belonged to the estate of James Onyengo Nyarangi, her late husband.

When the application came up before me, **Mr. Ngeresa** holding brief for Mr. Mose learned counsel for the applicants repeated the averments in the supporting affidavit, and when pressed to explain why the appeal was not filed on time, counsel informed the court that communication with the applicants was strictly by way of letters, and no other.

In reply, **Mr. D.P. Mugambi**, learned counsel for the respondents submitted that the appeal did not have any likelihood of success, as the properties listed in the will of Margaret Nyarangi (deceased) were not capable of being bequeathed by her estate, as they belonged to the estate of James Onyengo Nyarangi (deceased), who was the registered owner of the assets included in the will. Counsel continued that the reasons for delay advanced by the applicants were incredible, as the explanation of the purported breakdown in communication between the applicants and their advocate was unacceptable, particularly in this age of advanced mobile telephone communication.

In essence, this is an application for extension of time under **rule 4** of this Court's Rules, and in determining an application such as this ordinarily, I need not go beyond considering the requirements set out in the often quoted case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi C.A. NAI 255 of 1997 (unreported)**

in these words:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

And this Court’s decision in the case of ***Mongira & Another v Makori & Another [2005] 2 KLR 103 at pp 106-107*** concerning the exercise of a single judge’s discretion where the Court again citing the case of ***Leo Sila Mutiso (supra)*** stated thus:-

“Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general,” Rule 4 gives the judge an unfettered discretion and so long as the discretion is exercised judicially a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

Turning to the issue of delay and the reasons thereof, the judgment was delivered on 23rd May 2014. This application was filed on 26th September 2014. As no notice of appeal was filed, the delay can be computed as 166 days. One of the reasons advanced for the delay was that, the applicants were not informed of the ruling by their advocate, but only came to learn of it in the Daily Nation. Their advocate on the other hand, contends that the only letter communicating the ruling did not reach the applicants, and that this was the sole mode of communication between the advocate and his client. I find it rather farfetched to believe that, given the current level of advanced telecommunications in Kenya, including email and other data technology, that the applicants and their advocate’s both situate in the capital city of Nairobi, would limit the mode of communication between them to strictly postal communications. It is also noteworthy that despite this, no written reminders were sent by the advocate as a follow up to the lack of response from the applicants, and that the applicants in turn did not deem it necessary to remain in contact with their advocate. Given this untenable state of affairs, it is possible, that the applicants would probably never have known the fate of their application, save for the remote chance of reading about it in a newspaper report. Clearly, there was indolence and laxity on the part of the applicants and their advocate, which in the circumstances is difficult to excuse, and I find that it does not sufficiently explain the delay in this case.

The other reason advanced was the erroneous filing of the application for extension of time in the High Court, instead of this Court. I would have found this to be more plausible explanation, if indeed I was convinced that there was such an erroneous filing in the first place.

I say this because, attached to the supporting affidavit of ***Jephiter Osoro Opande***, is a Notice of Motion addressed to the High Court dated 18th June 2014, together with an undated and unsworn supporting affidavit of the same ***Jephiter Osoro Opande***. The application neither bears any court stamp to show that it was received by the High Court Registry, and nor is it dated to show when it was received. A hearing date is indicated as 9th July 2014. The next document is a Notice of Withdrawal dated 21st August 2014, this time with a Probate Registry stamp bearing the date 25th August 2014. The notice reads:

“Take Notice that the Applicant intends to withdraw an application dated 18th June 2014 herein against the respondents.”

Though the issue of this flawed application was not raised by the respondent, it is evident to me that, without the High Court acknowledgement and date stamp on the documents purportedly filed, it is doubtful that the so called Notice of Motion of 18th June 2014 was at any time filed in the High Court. Furthermore, it is poignant that the affidavit of ***Jephiter Osoro Opande*** is undated and unattested. To my

mind, if indeed the application was filed as attested, the delay between the time of filing and withdrawal of the application would have been 68 days, which may have been sufficient to explain part of the delay. But without a dated court stamp confirming receipt of the application, it would seem that the it was never filed, and the only conclusion that can be drawn is that, the flawed application, the affidavit and the appendixes were misconceived and decked with untruths, designed to mislead the Court into believing that the erroneously filed application was the cause of the delay in filing the appeal.

In ***John Koyi Wakule vs Moses Masika Wetangula & 2 Others [2010] eKLR*** this Court considered the effect of untruthful explanations included in such affidavits and stated thus,

“The issue of untruthful affidavit had been raised before the single judge but it appears that he never considered that point. We do not think the learned judge would have granted the application if he had considered the fact that the affidavit in support of the application which was intended to explain the delay was untruthful. An application seeking exercise of the court’s discretion must be supported by an honest explanation. It is a serious matter to mislead the court by untruthful affidavits.” In *Mzamil v. Ansari (supra)* this Court said:-

“In view of the inconsistencies and contradictions in Asige’s affidavit bristles, we do not think the application for extension of time can succeed. Sufficient reason cannot be established on the basis of an obviously incorrect affidavit.”

“The application for extension was supported by what was obviously incorrect and untruthful affidavit. Whether we call it an error of principle or a misapprehension of a point of law or a plainly wrong approach, we agree with Mr. Shah that we ought to interfere with the exercise of the discretion of the learned single judge.”

Since the impugned application seeking to explain the delay is untruthful and unreliable, I decline to rely on it as the basis of explaining any part of the delay occasioned in filing an appeal. As such, I consider that no sufficient material was placed before me to explain the delay, or the reasons for that delay. In these circumstances, I find it impossible to exercise my unfettered discretion in favour of granting the extension sought.

On the chances of the appeal succeeding, save for the statement that the appeal raises triable issues, the application does not specify the issues intended to be raised on appeal. Additionally, no draft Memorandum of Appeal was included in the record setting out the proposed triable issues. Without there being any indication of the matters to be appealed, there is no possibility of ascertaining the nature of the appeal, or even the chances of success. Finally, when all the foregoing circumstances and discrepancies are taken into account, I cannot rule out the likelihood of prejudice being visited upon respondents.

For these reasons, I order that the applicant’s application for extension of time to institute the appeal be and is hereby dismissed with costs.

Dated and delivered at NAIROBI this 6th day of FEBRUARY, 2015.

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR