



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: MURGOR J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 111 OF 2013 (UR 187/2013)**

**BETWEEN**

**CHEBET KIMUGAI.....APPLICANT**

**AND**

**MARGARET CHEPKIKOR CHARITO..... RESPONDENT**

*(Application for extension of time within which to file and serve a Notice of appeal and Record of Appeal out of time arising from the ruling of Karanja J.R., J delivered on 12<sup>th</sup> March 2013 at Kitale*

*in*

***Kitale High Court Succession Cause***

***No. 35 of 2002)***

**\*\*\*\*\***

**R U L I N G**

By a Notice of Motion dated 13<sup>th</sup> May 2013 the applicant, has applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** within which to lodge and serve a record of appeal against a ruling of Karanja J.R., J delivered on 12<sup>th</sup> March 2013.

Briefly, the dispute relates to a grant of letters of administration to the respondent in respect of the estate of her late husband, Julius Charito Lopor (the deceased). The applicant contends that the grant of letters to the respondent was fraudulently obtained, and has applied for revocation or annulment of the grant. Specified as the only asset of the estate was the property known as Plot No. 288 West Pokot Siyoi comprising about 10 hectares, which the applicant contends belonged to her late father, and which was registered in the name of the deceased who was an adopted brother of the applicant and her eight sisters. The applicant's main complaint is that they were excluded from the administration of the estate of their late father, of which they were demanding a share.

In her affidavit in support of this Notice of Motion, the applicant contends that the ruling delivered on 12<sup>th</sup> March 2013 was brought to her attention on 8<sup>th</sup> April 2013, after which she immediately instructed her advocate to file an appeal. The delay in filing the Notice of Appeal was caused by the delay in

obtaining a copy of the typed ruling.

In an affidavit sworn by the respondent, **Margaret Chepkorir Charito**, on 18<sup>th</sup> June 2013, it was deponed that the applicant did not indicate when she received a copy of the ruling, and has not explained the reason for delay in filing the Notice of Appeal, which delay is inordinate.

**Ms. Arunga** learned counsel for the applicant appeared before me on 29<sup>th</sup> October 2014, but there was no appearance of the Walter Wanyoni learned counsel for the respondent, despite their having been served on 17<sup>th</sup> October 2014.

In her submissions, counsel contended that the application was grounded on six grounds, in that the ruling was delivered on 12<sup>th</sup> March 2013, and that thereafter, the file was taken for typing of the ruling. On 15<sup>th</sup> March 2013 the applicant's counsel wrote to the Registrar requesting for a copy of the ruling so as to facilitate the filing of a Notice of Appeal. A further request was made for copies of the ruling on 23<sup>rd</sup> March 2013, which ruling was not issued until 8<sup>th</sup> April 2013. Counsel further submitted that the learned judge had conceded that the applicant resides on the land which belonged to her father, and that the land is registered in the respondent's name. That the applicant should have an opportunity to ventilate the issues raised in draft Memorandum of Appeal which have a high chance of success. Counsel relied on the case of **Peter Kamau Njuguna vs Stephen Magichu and 3 others, Civil Application Nai. No. 53 of 2001 (unreported)** which concerned a land dispute.

In **Patel vs Waweru & 2 Others (2003) KLR 361** at pp. 362 –3 this Court had the following to say in respect of rule 4 of this Court's Rules:-

***“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI – Civil Application NO. NAI 251 of 1997 (unreported) this court stated:-***

***“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”.***

The ruling was delivered on 12<sup>th</sup> March 2013, whereupon the applicant's advocate sought to obtain a copy of the ruling from the Deputy Registrar. This was not obtained until the 8<sup>th</sup> April 2013, as the file was said to have been retained in the Judge's chambers for typing. On the 15<sup>th</sup> March 2013, three days after the ruling was delivered, the applicant's advocate wrote to the Deputy Registrar, with a reminder on the 25<sup>th</sup> March 2013, requesting for a copy of the ruling. The applicant says that the copy of the ruling was not made available until 8<sup>th</sup> April 2013, well after the lapse of the 14 days for filing of the Notice of Appeal.

At this point, having made the effort to obtain the ruling, I would be prepared to surmise that the applicant, not being cognizant of the court's verdict at the time, required a copy the ruling so as to decide whether or not to file an appeal. In these circumstances, a Notice of Appeal filed immediately after the ruling was obtained, would be deserving of the Court's consideration in the exercise of its discretion to extend time, even though, I must hasten to add, this may not be reason enough.

Sadly however, this was not the case. No Notice of Appeal was filed, and this application was not filed until the 13<sup>th</sup> May 2013, a further 35 days after the ruling was obtained. The explanation advanced by the

applicant is that the delay was caused by the failure of the Deputy Registrar to timeously provide the copy of the ruling.

Needless to say, there is no request for the proceedings on the record, and neither is there any evidence that such request was served on the respondent. This could be the reason why no certificate of delay was available on the record to confirm that the delay was indeed occasioned by the Deputy Registrar.

Yet, having said that, when the total delay of 62 days is considered in the light of the period stipulated for filing of the Notice of Appeal as well as the record of appeal of 74 days, it is evident that had the Notice of Appeal been filed, the applicant would have been well within the period stipulated for filing of the record of appeal. Having regard to the circumstances surrounding the filing of the intended appeal, I am willing to concede that the applicant has not been indolent, and ought not to be penalized for the failures on the part of her counsel.

There is no doubt that this is a succession dispute, at the heart of which is a dispute over land, and the applicant is aggrieved as herself and her sisters have been excluded from participating in the distribution of her late father's estate.

In the case of ***Joseph Barasa Boiyo vs. Sophia Nafula Joram – Civil Application No. Nai. 170 of 2001 (unreported)***, this Court sitting on a reference from decision of a single Judge in similar circumstances, stated:

***“The matter in issue relates to land to which both parties make claim. It is in the best interest of justice that the dispute be canvassed before this court so as to bring the matter to its final end”.***

Will the respondent be subjected to any real prejudice?

In ***Mwaniki Njoroge Kamau & Another vs Lee Sheth Poong Civil Application No Nai 55 of 1998 (unreported)*** Lakha, JA stated,

***“As it often happens, the application highlights two principles, each in itself is salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.”***

In the instant case, when the applicant's circumstances are weighed out against any likely prejudice to the respondent, it is my view that the balance leans in favour of the applicant. The applicant resides on the suit property with her children and her sisters. I see no real prejudice that the respondent will suffer should I extend the time for the time for the filing of this appeal, so as to enable the dispute to be determined with finality.

Accordingly, I will exercise my unfettered discretion to allow the application. I order that the time for filing and serving of the Notice of Appeal and the record of appeal is hereby extended by fourteen (14) days from the date hereof.

***DATED and DELIVERED at ELDORET this 26<sup>th</sup> day of May, 2015.***

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**