



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL (APPLICATION) NO. 317 OF 2013

BETWEEN

FRANCIS KAAGU KARICHU.....APPLICANT

AND

JOHN MBURU KARICHU..... 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 Mushilla A., J dated 17th May 2013 and delivered by Ngenye Macharia delivered on 29th May 2013 at Eldoret

in

Eldoret High Court Succession Cause

No. 182 of 1996)

RULING

The applicant, **Francis Kaagu Karichu**, has applied by way of a Notice of Motion dated 29th October 2013 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 Mushilla A., J dated 17th May 2013 and delivered by Ngenye Macharia, J, delivered on 29th May 2013.

The dispute relates to a grant of letters of where by way of a Chamber Summons dated the 23rd November 2009, the applicant and Dominic Mwaura Karichu as objectors, sought to have the grant of letters of administration and the ensuing confirmation of grant in respect of the estate of Peninah Wangari Karichu (deceased) set aside and further, that the respondent, his agent and or servants be restrained from surveying, subdividing and or carrying out any dealings and/or transactions on Title No Laikipia/Ol'Arabel/265, (**the suit property**). It was the applicants' contention that the suit property was registered in the deceased's name.

In the ruling, the learned judge dismissed the application having found that the respondent and his late brother, Peter Ngugi Rarichu purchased and registered the suit property in the deceased's name, which she then held in trust for the respondent and his late brother.

The applicant, brings this affidavit on various grounds, more particularly that, he is dissatisfied with the decision of the learned judge for reasons that amongst other issues, it did not take into account the shortcomings and discrepancies in the procedures adopted when applying for letters of administration.

In his affidavit in support of the application sworn on 29th October 2013, the applicant contended that he filed a notice of appeal on 6th June 2013, after which he requested for a copy of the judgment and the proceedings. The applicant then stated that he also applied for the formal order dismissing his application, which he did not receive; that he received the judgment and proceedings on 10th July 2013, whereupon he noticed that various court forms were missing. As a result, he immediately wrote to the Deputy Registrar on 22nd August 2013 requesting for, P & A 12 form, and all other accompanying forms, chief's letter, a list of beneficiaries and their consent to the appointment of administrator, correspondence with the Principal Magistrate and the relevant Gazette Notice, and it was not until 11th October 2013, that the Registrar supplied him with the documents requested.

It was the applicant's further contention that he also requested for various court orders that were missing from the proceedings, and despite making payment to have the orders extracted, the orders were not issued and neither was he issued with a certificate of delay.

The applicant, who appeared in person relied on the contents of his aforesaid affidavit of 29th October 2013 which he repeated as the basis of his submissions.

On his part, when **Mr. G.N. Kitiwa** learned counsel for the respondent opposed the application. He sought to rely on a replying affidavit of the respondent, **Johnson Mburu Karichu**, but the applicant objected as he had not been served on him. Counsel conceded that he would not rely on the replying affidavit, and would argue instead on matters of law. Counsel stated that, the Notice of Appeal was filed on 6th July 2013, and that the applicant received the proceedings on 10th July 2013; that as the appeal was against the orders of Mushilla, J, and not against the earlier court orders, their extraction was unnecessary. Counsel continued that the letter of 11th October 2013 indicated that the applicant had already been supplied with the proceedings and the judgment, and that copies of the additional documents could have been obtained from the court file by the applicant. Counsel concluded that a certificate of delay was also unnecessary as the proceedings and judgment were issued within the stipulated period.

In his response, the applicant contended that the orders were essential to his case, which was the reason for his having sought to extract them as formal orders. He further stated that despite the delay, he eventually received the requested documents on 11th October 2013. The applicant concluded that the appeal concerns land, and that the ruling had rendered the whole family homeless.

In an application for extension under Rule 4, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the court should exercise this discretion judiciously, and in accordance with the guiding principles, having regard to the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court granted the extension sought, as outlined in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi**– Civil Application No. Nai 251 of 1997 where the court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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 record shows that the applicant received the proceedings and the copy of the ruling on 10th July 2013. His contention is that he did not file the record of appeal within the stipulated period as he was still pursuing the other essential court documents including the P & A 12 form, the other accompanying

forms, the chief's letter, a list of beneficiaries and their consent to the appointment of administrator, letters to the Principal Magistrate and replies and the Gazette Notice.

A request for proceedings and the judgment requires the Deputy Registrar to supply the typed rulings and judgment within a stipulated period. A certificate of delay is subsequently obtained from the Deputy Registrar in cases where these documents are produced outside of the period stipulated by the rules of this Court. In this case, the proceedings and judgment were supplied within the stipulated period, and therefore the applicant's demand for a certificate of delay is unwarranted. But having said that, on 22nd August 2013, the applicant requested for copies of additional documents from the court file that were not sent to him until 11th October 2013.

Rule 87 specifies the documents that are to be contained in the record of Appeal. These include *inter alia* the pleadings, affidavits, judgment, certified decree or order, and notice of appeal. In addition rule 87 (k) requires,

“such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant.”

This matter pertains to an application for letters of administration, where the supporting documentation comprised of the various court forms which are the basis of the application for letters of administration, and the confirmation of grant. They would form an integral part of the record of appeal, and it is evident that without them, the record of appeal would be incomplete. The documents were not supplied to the applicant until 11th October 2013. This delay was not of his making, as upon request, the copies of these documents should have been made available to him within a reasonable time.

Following receipt of the documents, on 11th October 2013, the applicant filed this application before me on 11th November 2013. The period between the date of the ruling and the date of this application was 5 months. When the stipulated 60 days for filing the record is excluded, the period of delay that can be computed is 3 months. Though there is no explanation for the one month delay in filing this application following receipt of the requested documents, upon taking into account the tenacity with which the applicant has sought to bring the application, I do not consider that he was indolent, and find that the reason for delay has been satisfactorily explained.

Turning to the chances of success of the appeal, the applicant has filed an extensive draft memorandum of appeal comprising a staggering 74 grounds. Central to the dispute is the distribution of the suit property registered in the deceased's name. The applicant has questioned the manner in which the suit property was distributed, bearing in mind the provisions of the Law of Succession, Cap 160 of the Laws of Kenya. I consider that the issues to be canvassed are weighty, and require to be ventilated and determined by this court. 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.”

I consider it unlikely that the respondent would suffer undue prejudice if the application is allowed. If anything, a determination with finality of a land dispute of this nature by this Court can only be of benefit to parties.

For this reason, I will exercise my unfettered discretion to allow the application. I order that the time for filing and serving a Record of Appeal is hereby extended by fourteen (14) days from the date hereof.

DATED and DELIVERED at ELDORET this 25th day of June, 2015.

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR