



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 4 OF 2013

BETWEEN

CHARLES NDWIGA KANYERIA.....APPLICANT

AND

AUGUSTINE MUTURI MAIRANI.....1ST RESPONDENT

MWANIKI MAIRANI.....2ND RESPONDENT

(Being an Application for extension of time to file appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Embu (Ongudi J,) dated 18th December, 2012

in

H.C.C.A. NO. 13 of 2010)

RULING

By his application dated 18th March 2013, the applicant seeks an order that he be allowed to file appeal out of time and that **“the draft appeal be deemed properly filed.”** That motion is expressed as brought under **Section 3A** and **3B** of the **Civil Procedure Act**, order **12 Rule 7**, order **22 Rule 25** and order **45** of the **Civil Procedure Rules**. Those provisions are inapplicable but I will deal with the application as if properly brought under **Rule 4** of the Court of Appeal Rules.

The application is said to be based on the grounds appearing on the face of the motion as follows;

- a. *That of paying for the proceedings on 7th January 2013 in the firm of Githinji Karuri & Co. Advocates. I later learnt that the counsel had failed to request the same from court.*
- b. *That upon realizing that proceedings were typed, I prepared petition and memorandum of appeal ready to file only to realize that the Appeal had been overtaken by time.*
- c. *That I have a good appeal which raises triable issues.*

- d. *That the delay in filing appeal was not intentional and the applicant is desirous of defending the suit .*
- e. *That after realizing that I took a step to pay again in court personally and paid for the same proceedings.*
- f. *That I got copies of the said proceedings on 11th March 2013.*
- g. *That upon delay of the counsel and again proceedings to be typed both caused my delay.”*

The appeal is supported by the applicant’s affidavit sworn on 15th

March 2013 in which he deposes, in a nutshell, that he paid money for the High Court proceedings to the firm of Githinji Karuri & Co. Advocates but the said firm failed to obtain them. He accuses firm of impropriety **“as it cannot act for the client in this matter as that shall lead to conflict of interest,”** whatever that means. He goes on to state that he proceeded to request and pay for proceedings personally on 11th February 2013 but received them a month later on 11th March 2013. He swears that **“upon realizing the days to appeal [were] elapsing [he] tried to push the court but in vain”** and that **“the proceedings delayed to be typed (sic) due to reasons well known by the court.”** He concludes by averring that his appeal has high chances of success as shown in the draft memorandum of appeal.

The two respondents filed an affidavit opposing the application. Augustine Mairani (Augustine) swore that the application was an afterthought as it was filed **“more than 60 days after the right of appeal had expired”** and it was moreover vexatious, frivolous and an abuse of the process of the court. He averred that the applicant had abandoned the application by filing an application for review at the High Court in Embu which was dismissed on 10th December 2014 which shows that all he is interested in is denying the respondents their birth right. He charged that the applicant is a hindrance to the cause of justice and is merely buying time since he is using the suit land and denying Augustine his legal rights as the legal owner of **LR.No.Kyeni/Mufu/4207** a copy of the title whereof he attached.

To that affidavit the applicant swore a **“reply”** in which he reiterated his earlier affidavit and deposed that the respondents had not indicated any reasons why the application should not be granted.

When the parties came before me for the hearing of the application, they all elected not to address me, and relied instead on the affidavits aforesaid. Having carefully considered the said affidavits, I come to the conclusion that whereas the applicant deposes that he made payment for proceedings to his former advocates on 7th January 2013, there is no evidence placed before me that he did.

There is no explanation at all as to why the proceedings were not applied for at the same time the notice of appeal was filed. What is more, even when the applicant, according to his deposition, requested for proceedings on 11th February 2013, there is no averment, and certainly no evidence that the request for proceedings, assuming it was in writing, was ever copied to the respondents as ought. The typed proceedings themselves are a mere ten or so pages and one must wonder why it took a month to have them typed. The applicant avers, without more, that he tried to **“push the court but in vain,”** an expression I have difficulty understanding. Nor are the reasons for delay in typing known to this Court as he avers. There are no particulars given of that **‘pushing.’** There are no letters written by way of reminder and there are no visits to the registry alleged by the applicant as a follow up to the request for proceedings.

Indeed, it is not lost to me that whereas the applicant states that he received the proceedings on 11th March 2013, he took a further seven days before filing this application. That does not, to my mind, evince the diligence expected of a person who knows he is late and is desirous of putting matters right in timely fashion. He may be a layman but it was also open to him to have filed the record, albeit out of time, and then filed an application to enlarge time. He did not do so.

I have considered the response to the application and noted that Augustine already has a title to **Kyeni Mufu/4207** as he has deposed without controvert. I have also perused the judgment of the learned Judge in which she stated that the applicant had been given an opportunity to be heard by the trial Magistrate. Both courts also found that the applicant was essentially making a case for a distribution of his late father's estate in a manner that would have favoured him at the expense of the rest of the deceased's sons without the applicant laying a basis or tendering any evidence in support of such patent discrimination. These are concurrent findings of fact, which this Court as a second appeal would have no jurisdiction to interfere with unless based on no evidence or on a misapprehension of the evidence or patently perverse.

This has not been alleged in the memorandum of appeal and so, while cognizant that I am not the full Court that would hear the applicant's appeal were it to get to that, I am unable at this point, to state that he does have a good or meritorious appeal as he alleges.

I do think that bearing in mind the principles that have been crystallized by this Court for the exercise of discretion under **Rule 4** of the Court of Appeal Rules, which remains wide and unfettered (See **GITHUAKA –VS- NDURURI** [2004] KLR 67 and **WAWERU & ANOTHER –VS- KIRORI** [2003] KLR 448) this application fails. There was long and inordinate delay in the circumstances of this case. The explanation offered by the applicant in blaming the former advocate, and the court as well, did not come across as candid. Nor was it satisfactory or convincing. There is grave doubt as to the substance of the proposed second appeal to this Court. There will definitely be prejudice suffered by the respondents who, on the face of it, have been kept, and will continue to be kept, from their fair portion of their deceased father's estate by an applicant who seeks, it would appear from what the two courts have held, not equality or equity, but unexplained preferential treatment.

Taking all of those circumstances together, and bearing in mind that I exercise my discretion on the basis of sound principle and not mere whim or sympathy, I find that the application before me is unmeritorious.

It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nyeri this 31st day of July, 2015

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR