



**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: KIAGE JA (IN CHAMBERS)**

**CIVIL APPLICATION NYR. 11 OF 2015**

**BETWEEN**

**ELIUD CHIRA MURIITHI )**

**NANCY WAMBUI MURATHI )**

**ELIZABETH WANJIKU NGARI) .....APPLICANTS**

**AND**

**KINYUA MURIITHI NGARI..... RESPONDENT**

*(An Application for extension of time to file and serve Notice of Appeal, from the Judgment of the High Court of Kenya at Kerugoya (Limo, J) dated 20<sup>th</sup> February, 2015*

in H.C. Succession Cause No. 553 of 2013)

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**RULING**

The Applicants have by their motion dated 21<sup>st</sup> April 2015, brought under **Rule 4** of the **Court of Appeal Rules** and **Section 3A** and **3B** of the **Appellate Jurisdiction Act**, sought an order for extension of time for filing a notice of appeal and record of appeal out of time. They pray that their notice of appeal dated 20<sup>th</sup> April 2015, signifying their intent to appeal against the judgment of the High Court at Kerugoya (R K Limo, J.) delivered on 20<sup>th</sup> February 2015 be deemed as duly

filed.

The grounds on which their plea is based appear on the motion as follows;

**“ (i) That the applicants were represented by an advocate in the High Court.**

**ii. That after judgment was made on 20<sup>th</sup> February, 2015 they instructed the advocate to appeal against the same immediately.**

- iii. *That their then advocate on record did not file a notice of appeal within 14 days as by law required.*
- iv. *That the applicants were aggrieved and dissatisfied by the judgment of the High Court and they have good grounds of appeal.*
- v. *That the mistakes of the applicants' advocate should not be visited upon them.*
- vi. *That the respondent shall not suffer loss that cannot be compensated by costs.*
- vii. *That it is meet and just to allow this application."*

In support of the motion is filed the affidavit of Nancy Wambui Murathi sworn on 21<sup>st</sup> April 2015 on behalf of all three applicants in which she expounds on the grounds aforesaid and attaches receipts to show they paid “**a deposit on legal fees**” to the advocate and a draft memorandum of appeal to show that they have good grounds of appeal. She avers that it would be unfair for them to be locked out of the appeal yet they seek to canvass very emotive and serious legal issues.

The respondent opposed the application by his affidavit sworn on 8<sup>th</sup> May 2015 in which he raises the following issues;

- That the applicants never sought or obtained leave to appeal which is a prerequisite as no appeal lies as of right.
- That all the applicants did after the judgment was request for proceedings but they did not even copy the letter to the respondent's advocates.
- That the applicants filed the notice of appeal over 60 days after the judgment which was way above the 14 days allowed by the Rules without giving grounds.
- That the application is an afterthought calculated to delay execution in a matter that has been pending since 1983.
- That the proposed appeal lacks merit as the judge applied Kikuyu customary law in distributing the estate of the deceased who died before the law of Succession Act came into effect.

At the hearing of the application before me the applicant, who were unrepresented, were content to rely on the motion and the supporting affidavit to which they added nothing. They also had not filed any affidavit to counter the averments in the replying affidavit.

For the respondents, learned counsel Mr. Kahigah emphasized that the delay of 60 days in filing the notice of appeal was inordinate. He added that the explanations given in the nature of blaming their advocates, was wanting as there was no evidence that the applicants ever instructed the said advocate to file an appeal. At any rate, he was their agent and his letter bespeaking proceedings, not copied to the respondent, though dated 3<sup>rd</sup> March 2015, was not date-stamped by the court until 12<sup>th</sup> March 2015. By that the time for filing the notice of appeal had elapsed. He submitted that the applicants were undeserving of this Court's favourable discretion which must not be exercised capriciously. He referred to the case of **MUTISO –VS- MWANGI** [1997] KLR 630 which was cited by Nyamu JA. in **JOSEPH KAROBIA GICHERU –VS- MICHAEL GACHOKI GICHERU** CIVIL APPLICATION NO. NAI 55 OF 2011.

Mr. Kahigah next submitted that in a succession judgment, the High Court is the final arbiter unless leave to appeal is sought and obtained for that court or this Court under **Rule 39**. Counsel submitted that leave was mandatory and without it, any grant of this application would be an exercise in futility. Any such appeal would be unmeritorious anyway, in counsel's view, as the learned Judge was right to apply Kikuyu customary law as opposed to the Law of Succession Act since the deceased died before that Act

came into force. He concluded that it would be prejudicial to the respondent for this matter to be kept alive yet it has been pending for decades.

To these submissions the respondents replied that they went to their advocate the very next day after the judgment and instructed him about the appeal. They then paid the monies he asked for but he did not act. They prayed that they be given an opportunity to ventilate their grievances so that they could get an equal share of their fathers' land.

It is trite that an application for extension or enlargement of time is a plea to the Court's discretion. That discretion is wide and unfettered. It is intended to be exercised in a judicious manner to meet the ends of justice. It is to be based in clear principle not mere caprice, personal inclination or sympathy on the part of the Court. In **MUTISO –V-S MWANGI** (Supra) it was stated, and I agree, that on an application such as the one before me, some of the matters I would consider include;

- i. The length of the delay;
- ii. The reason for the delay;
- iii. Possibly, the chances of the appeal succeeding: and,
- iv. The degree of prejudice to the respondent if the application is granted.

In the matter before me, the applicants filed their notice of appeal some 60 days after the impugned judgment of the High Court. That period of time is certainly inordinate considering the 14-day time limit set by the Rules. There is, however, an explanation proffered which is that the applicants promptly instructed their then advocate to appeal. They say they visited his chambers the very next day and even paid part of the requested legal fees on 3<sup>rd</sup> March 2015, which was

within the 14 days. Indeed, on that day the advocate did write a letter requesting proceedings which, however, did not get to be presented to the High Court until 12<sup>th</sup> March 2015. They explain that it is only later, on 20<sup>th</sup> April 2015 that they found out that the advocate had not taken action as instructed. They filed a notice of intention to act in person and the notice of appeal that very day and filed this application the very next day.

I am satisfied that as far as their own personal conduct is concerned, the applicants acted with promptitude and that when they discovered they had been let down by their advocate, they took the matter in hand and moved with alacrity. I do not think it would conduce to the doing of justice in this case for me to turn them away and tell them to seek what redress they wish against their former advocate.

Having looked at the draft memorandum of appeal, I cannot dismiss the points sought to be canvassed as frivolous. They are certainly arguable and I am inclined to allow the applicants to ventilate them before the Court.

Whereas it is true that the litigation before the parties has been long-drawn out, I am mindful that in this Station of the Court of Appeal, appeals are heard and determined in near real time and further delays are not expected.

In the result, I allow this application and direct as follows;

1. The Notice of Appeal dated 20<sup>th</sup> April 2015 be and is hereby deemed to be properly filed.
2. The applicants to file and serve the record of appeal within thirty (30) days of the date hereof.
3. The applicants to pay the respondent's costs assessed at Ksh.5,000 within fourteen (14) days of the date hereof failing which execution to issue.

**Dated and delivered this 29<sup>th</sup> 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**