



IN THE COURT OF APPEAL

AT ELDORET

CIVIL APPLICATION NO.NAI. 80 OF 2015

(CORAM: GATEMBU, JA. (IN CHAMBERS))

BETWEEN

GRACE CHEBET SISIMWO1ST APPLICANT

BEN STEPHEN SISIMWO 2ND APPLICANT

LUKA SISIMWO3RD APPLICANT

SIMON MENGICH SISIMWO 4TH APPLICANT

JAMES SISIMWO 5TH APPLICANT

VERSUS

EVERLYNE CHERUKKUT SISIMWO ...1ST RESPONDENT

AMY CHEBOSIS SISIMWO 2ND RESPONDENT

(An application to grant the application leave to file and serve the Record of Appeal out of time arising from the Judgment of the High Court of Kenya at Bungoma (Hon. A. Mabeya, J.) dated 7th April, 2014

in

SUCCESSION CAUSE NO. 89 OF 2002)

RULING

1. This Ruling relates to the applicants' motion dated 17th March 2015 presented under Rule 4 of the Rules of the Court seeking leave to file and serve the notice of appeal, the memorandum of appeal and the record of appeal out of time.
2. The applicants intend to appeal against the judgment of the High Court delivered on 7th April 2014 in which the court distributed the estate of Stephen Baron Sisimwo, deceased.
3. During the hearing of the application before me, learned counsel for the applicants Mr. C. Areba

referred me to the grounds appearing on the face of the application and to the supporting affidavit of Ben Stephen Sisimwo. Counsel stated that a notice of appeal was promptly filed after delivery of the judgment on 7th April 2014; that on the same date the applicants applied for typed proceedings from the lower court but the same were not made available until March 2015; that immediately thereafter the applicants filed this application as the time prescribed for filing the memorandum and record of appeal had since lapsed.

4. Despite notice of hearing of the application having been served on the firm of J. O. Makali and Company Advocates, there was no appearance for the respondents during the hearing of the application before me. There was also no replying affidavit filed in response to the application.

5. I have considered the application, the affidavit in support and the submissions by counsel. Rule 4 of the Court of Appeal Rules, 2010 provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

6. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice.

7. In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** Waki JA stated:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

8. Guided by those principles, I note that the applicants promptly filed a notice of appeal dated 7th April 2014 in the High Court at Bungoma although it is not clear whether that notice was served on the respondents. On the same date, the advocates for the applicants applied for copies of the proceedings and the judgment from the lower court. The letter bespeaking the typed proceedings does not on the face of it show that it was copied to the respondents. The applicants say that they did not receive the proceedings until March of 2015 and immediately lodged the present application.

9. The applicants have also attached a draft memorandum of appeal. Based on that draft, I do not think the intended appeal is frivolous.

10. In the foregoing circumstances, I am satisfied that the applicants have made out a case for me to exercise my discretion in their favour. I accordingly allow the applicants’ motion dated 17th March 2015. I direct the applicants to file and serve the memorandum of appeal and the record of appeal within thirty (30) days from the date of delivery of this ruling. If they have not already done so, the applicants shall serve the notice of appeal on the respondents within seven (7) days from the date of delivery of this ruling.

11. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Eldoret

this 10th day of December, 2015.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR