



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO NYR. 36 OF 2015

BETWEEN

RUTH MUTHONI WANGAIAPPLICANT

AND

BONIFACE MWANGI WANGAI1ST RESPONDENT

TERESA WANGAI.....2ND RESPONDENT

(An application for extension of time to file Notice of appeal and record of appeal in an intended Appeal from the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) Dated 6th March, 2015

in

NYERI H.C.SUCC. CAUSE NO.332 OF 2011

IN THE MATTER OF THE ESTATE OF SOLOMON WANGAI KIMITA (DECEASED)

RULING OF NAMBUYE, JA

1. Before me is a Notice of Motion expressed to be brought under rule 4 of the Court of Appeal Rules 2010. It basically seeks leave of Court for the applicant **Ruth Muthoni Wangai** to file both a Notice of Appeal and a record of appeal against the judgment of the High Court delivered by **Jairus Ngaah, J** on the 6th March, 2015 with attendant costs in the intended appeal. It is grounded on the grounds in its body, a supporting and supplementary supporting affidavit filed pursuant to leave granted by Nambuye, JA on the 19th day of October 2015.
2. **Mr. K. Wachira**, learned counsel for the applicant has urged me to allow the application on the grounds that the judgment sought to be impugned was delivered in the absence of the applicant and by the time she came to learn of its delivery on 14th April, 2015, obtained a copy of the judgment on 18th April, 2015 filed a Notice of Appeal on 20th April, 2015 and obtained a typed copy of the proceedings on 18th of August, 2015 time for the lodging of both the Notice of Appeal and record of appeal had lapsed. There was also delay in supplying her a copy of the typed proceedings as borne out by the certificate of delay annexed to the supplementary supporting affidavit. In Mr. Wachira’s view, the applicant has demonstrated seriousness in her

- desire to seek a second opinion on the matter, first by exhibiting a draft memorandum of appeal and second, by moving promptly though erroneously to put in a Notice of Appeal without leave and applying for a typed certified copy of the proceedings to enable her file a record of appeal.
3. It is further his argument that the respondents who are family members will suffer no harm if the issues in controversy between them are revisited by a higher court as the family will continue residing as it has always done prior to the pronouncement of the judgment intended to be impugned; and that the facts put forth before me in support of the application have satisfied the ingredients for granting of the relief sought under Rule 4 of the Rules of this Court.
 4. The application has been opposed by a replying affidavit and reply to supplementary affidavit deposed by the 1st Respondent **Boniface Mwangi Wangai** on his own behalf and on behalf of the Co-respondent **Teresa Nyagichuhi Wangai**. In summary, **Boniface** concedes that the judgment sought to be impugned was not delivered on the 27th February, 2015 as previously scheduled. A notice was however pinned on the notice board rescheduling the delivery of all judgments scheduled for that date to 6th March, 2105. He argues that the applicant was aware of this rescheduling as immediately after the delivery of the judgment in her absence on the 6th March, 2015 she arrived and was present when the registry staff explained to them the content of the judgment and advised them to access a copy of the judgment to read on their own.
 5. It was further **Boniface's** argument that he was surprised when the applicant deposed in her supporting affidavit that she only came to learn of the delivery of the judgment on the 20th April, 2015 on which day she filed a Notice of Appeal. **Boniface** continued that the applicants intended appeal as exhibited in the Draft Memorandum of Appeal is frivolous as all that the High Court did was to share out the estate of the deceased equally between the two households of the deceased; that the certificate of delay exhibited is suspect, first, because of the lack of the Deputy Registrars' signature and second failure to exhibit a receipt to show when the applicant applied and paid for a certified copy of the proceedings.
 6. In response to the respondent's submissions **Mr. Wachira** reiterated that the respondents had supported the applicant's assertions that judgment was not delivered on 27th February, 2015 as previously scheduled and no notice was issued for a fresh delivery date of the said judgment. Reiterated that the applicant moved diligently to file a Notice of Appeal though out of time and without leave that is why it was not served on the respondents. I was also invited to note that the applicant is illiterate and not very conversant with the need to comply with time lines within the intended appeal process. She is also not wholly to blame for the predicament she now finds herself in, and that she has genuine concerns that needs to be revisited in the intended appeal which has high chances of success.
 7. My invitation to intervene has been sought under rule 4 of the Rules of this Court. It provides:-

“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 a time should be construed as a reference to that time as extended”

8. In ***Aviation Cargo Support Limited versus St. Mark Freight Services Ltd (2014) eKLR*** G.P.M. Kariuki JA simply put it as follows:-

“The order when or not to grant extension of time or leave to file and serve a record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable. In normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and

zealous. The courts are not blind to this fact. When this happens the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”

See also ***Peter Gatahi Kamaithia versus Secretary Public Service Commission and 20 others [2014] eKLR*** for the proposition that the considerations when deciding whether to grant or withhold a relief for extension of time are not exhaustive and so long as the discretion is exercised Judicially a judge would be entitled to consider any other factor outside those envisaged under the said rule so long as the factor is relevant to the issue being considered. ***Dominic Musei Kombo and 2 others versus Kyule Makau [2015] eKLR*** for the proposition that the merits of the intended appeal are also a relevant factor for consideration. ***Julius Kamau Kithaka versus Waruguru Kithaka Nyaga and 2 others*** for the propositions that the discretion under rule 4 is unfettered but it has to be exercised judiciously not on whim, sympathy or caprice. The matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay; second, the reason for the delay; third (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.

9. See also ***Paul Wanjohi versus Dancun Gichane Mathenge [2013] eKLR*** for the proposition that where demands of justice dictate so in an application of this nature, it will be prudent for a court of law to allow an application to enable parties ventilate their respective positions on merit because the right to a hearing has not only been a well protected right in our constitution but also acts as the corner stone of the rule of law. Lastly, the case of ***Joseph Gachuhi Muthengi versus Mary Njuguna [2014] eKLR*** for the proposition that the extension of time is not a right of a party but a discretionary remedy that is only available to a deserving party, who has discharged the burden of laying a basis to the satisfaction of the court that the court should exercise its discretion to extend time in his or her favour, a rule the court applies on a case to case basis when determining whether a reasonable explanation has been given for the delay; or otherwise, whether there will be any prejudice suffered by the respondent if the extension is granted, and lastly whether in certain cases public interest should be a consideration for extending time.
10. Instances where the exercise of the discretion is likely to be with held are such as those that were found obtaining in the case of ***George Mwenda versus Mama Day Nursary and Primary School Nyeri CA No.4 of 2014 (UR.2/14)*** wherein a request for leave to extend time was declined because in ability to raise legal fees was not perse a suitable reason; and secondly the delay was inordinate as the applicant had taken a whopping twenty (20) months to raise the legal fees for the filing of the appeal.
11. See also ***Aviation Cargo Support Limited versus St. Mark Freight Services Limited [2014] eKLR*** Where, in declining leave to extend time, the learned Judge reasoned that (i) certified copies of typed proceedings had been availed before the expiry of sixty (60) days permitted by the Rules of the court for the lodging of the record of appeal; (ii) no explanation was given as to why the application to seek leave for the extension of time was not lodged soon after the expiry of the sixty (60) days period and instead the applicant waited for six (6) months before presenting the application to court; (iii) no explanation was given as to why the applicant had waited for six (6) months before presenting the application for the extension of time; (iv) the unexplained delay was in ordinate;(v) an aspiring appellant ought to be zealous and to take the initiative to comply with the law; (vi) the applicant who had legal representation throughout did not even draw a decree; (vii) the applicant’s conduct was inconsistent with pro-activeness; (viii) the date when the proceedings were paid for had not been indicated; (ix) the overriding objective principle which enjoins a court of law to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals once filed on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out does not operate to aid the indolent.
12. In ***Christopher Mugo Kimotho versus The Hon. Attorney General [2009] eKLR***, in withholding the relief sought, the learned Judge reasoned that the factors the court ought to take into account in extending time within which to file a notice of appeal or record of appeal were not to be applied as a matter of course, but depending on the circumstances of each case; (ii) no explanation had been given as to why the applicant took 13 days after the date of judgment to apply for a certified copy of the proceedings; (iii) no explanation had been given as to why the application for

extension of time had not been presented soon after the retrieving of the certificate of delay which had allegedly been misplaced in the learned counsels office; (iv) it was doubtful as to whether the applicant had indeed applied for a certified copy of the proceedings and judgment as no letter for such a request had been exhibited making it impossible to compute the time of delay to be taken into account in order to comply with the provisions of the courts Rules; (v) the omission to exhibit a letter seeking a supply of a typed copy of the proceedings and judgment amounted to a serious hitch which stood in the way of the applicant such that he could not clearly explain the delay in not lodging the record of appeal within the prescribed period.

13. In the light of the above principles what I am enjoined to do in this application in determining whether to grant or withhold the relief sought is to determine the length of the delay the applicant has taken in seeking reprieve from the date she was capacitated to do so; the reasons for the delay; (possibly) whether the applicant has an arguable appeal; the degree of prejudice to the other party if time were to be extended; the public importance of the matter in appropriate cases; and generally the requirements of the interests of justice under Article 48 of the Constitution.

14. On the basis of the facts before me, I am satisfied that the judgment then slated for delivery on 27th February, 2015 was rescheduled to 6th March, 2015 in the absence of the parties and only a notice to that effect was pinned on the notice board. In my view such pinning of a notice was not sufficient notice to the applicant considering her undisputed assertion that she is illiterate. In the circumstances an oral explanation of the rescheduling of the date for the delivery of the judgment or a formal notice to that effect should have sufficed. It is undisputed that the applicant made effort to file a Notice of appeal even though without leave. The explanation given for non-service was plausible as it was correctly put that service of the same would have served no purpose as it had been filed out of time. It is also correctly observed by the respondents that the certificate of delay exhibited is unsigned, it is not accompanied by a receipt neither has a receipt evidencing payment for a certified copy of typed proceedings has been exhibited. The advocate is to blame for these omissions. He ought to have placed all documents at his disposal before me. I however have no doubt they were applied for and supplied as I have been verbally informed that the applicant has them now in her custody ready for the filing of both the notice and record of appeal should she be indulged by me.

15. As for the general requirements of the interests of justice, it is my considered view that interests of justice in the circumstances of this application would demand that the applicant be allowed an opportunity to exercise her undoubted right of appeal in order to crystallize the rights of the competing family members. The delay in presenting the appeal within the stipulated sixty (60) days was not wholly attributable to the applicant. It was partly attributed to the circumstances highlighted above. Upon capacitation on 18th August, 2015 with a copy of the proceedings, she filed the application under review on the 25th August, 2015. She therefore took seven (7) days to seek a reprieve from the date of capacitation. Taking the totality of the circumstances under review, it is my view that there has been no inordinate delay; the applicant has given a plausible and excusable explanation for the delay; it will be in the best interests of justice to both parties that issues that were in controversy between them at the High Court be revisited on appeal and lastly such an exercise of discretion in favour of the applicant in the peculiar circumstances of this case will not amount to encouraging the flouting of clearly laid down Rules of this Court with impunity. No prejudice will be suffered by the respondents as no family member has been displaced from portions previously under use by them.

16. In the result I am inclined to allow the application on the following Terms:

1. The intended Appeal to be filed and served within twenty one (21) days of today since the applicant already has proceedings.
2. In default of number (1) above leave granted to stand lapsed.

Dated and Delivered at Nyeri this 2nd day of December, 2015.

R.N. NAMBUYE

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JUDGE OF NAMBUYE

I certify that this is

a true copy of the original

DEPUTY REGISTRAR