



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NAI. 297 OF 2011

NEWTON WANJOHI MWAI (Legal Representative of

STANLEY MWAI NJIRAINI).....APPLICANT

VERSUS

EPHANTUS NGARI NJIRAINI.....RESPONDENT

(An application to file appeal out of time against the ruling of the High Court of Kenya at Nyeri, (Sergon, J.) delivered on 20th May, 2011, in an Application dated 17th December, 2009 against the Judgment delivered on 14th May, 2009 (Kasango, J)

in

H.C. Succ. Cause No. 35 OF 2000)

R U L I N G

[1] The Notice of Motion dated 16th November, 2011, brought under **Rules 4, 5 (2) (b), 41 and 42** of the **Court of Appeal Rules**, was argued before me. The applicant, Newton Wanjohi Mwai, is the legal representative of the estate of the late Stanley Mwai Njiraini deceased. He is seeking for leave to lodge an appeal out of time against the ruling/order of Sergon, J., delivered on 20th May, 2011, on the grounds:

- (a) That on 14th May, 2009, Justice Mary Kasango delivered the judgment herein dismissing the applicant's application for revocation of grant dated 23rd January, 2003.***
- (b) That the applicant filed an application for review and setting aside the above said Judgment on 17th December, 2009, which application was dismissed by Justice J. K. Sergon on 20th May, 2011 and an order to that effect issued on 28th September, 2011.***
- (c) That the applicant filed a notice of appeal and applied for certified copies of proceedings on 6th June, 2011 respectively.***
- (d) That the said proceedings were supplied on 7th October, 2011, by which time for filing the appeal as prescribed by law had already expired.***

(e) That the applicant is apprehensive that the respondent is in the process of executing the said judgment and orders and his intended appeal shall be rendered nugatory.

(f) That the applicant has an arguable appeal with high chances of success.

[2] The application is supported by an affidavit sworn by the applicant on the 16th November, 2011. The only reason indicated for the failure to file the record of appeal within the time required by this Court's Rules is stated at Paragraphs 4 and 5 of the said affidavit as follows:-

4. ***“That being dissatisfied with the said ruling, I filed a Notice of Appeal against the same on 6th June, 2011 and also applied for certified copies of proceedings (sic) of the application on 27th June, 2011.....***
5. ***That due to pressure of work at the registry, the certified copies of the proceedings above said were supplied to me on 7th October, 2011, by which time for filing my intended appeal had expired (annexed and marked NWM4” is a copy”.***

[3] During the hearing of this application, I sought to know from Mr. Mwaura, learned counsel for the applicant why the applicant did not file the record of appeal within the sixty days after the proceedings were ready on 7th October, 2011 which was within the time frame. Mr. Mwaura stated that the applicant had no money to pay legal fees for his counsel to file the record of appeal; therefore, they filed the present application seeking for leave for extension of time.

[4] Mr. Kimita, learned counsel for the respondent opposed this application. He relied on the respondent's replying affidavits sworn on 12th February, 2012, and 29th July, 2013, which states that the application is incompetent because there is no valid Notice of Appeal upon which the applicant can be granted leave to file a record of appeal. This is because the ruling by Serگون, J. that the applicant wishes to appeal against was delivered on 20th May, 2011 and the Notice of Appeal was filed on 6th June, 2011. Also the applicant applied for the proceedings on 27th June, 2011, that is after about 37 days. Moreover, the contention by counsel for the applicant that his client was financially challenged and that is why he did not file the record of appeal within time, is not mentioned in the applicant's supporting affidavit. The certificate of delay was issued on 7th October, 2011, when time for filing the record of appeal started running. Thus, when this application was filed on 18th November, 2011, the applicant was within the time set by the rules to file a record of appeal. Regarding the merit of the appeal, Mr. Kiminda argued that the order sought to be appealed against was the one where the applicant's application for review was dismissed. The subject matter was a succession cause where Kasango, J. determined the estate of a deceased person. The estate was distributed to the beneficiaries who received their respective titles and allowing leave will cause them prejudice. The applicant is a grandson of the deceased and his father had been given his share of the estate during the deceased's lifetime. Mr. Kiminda urged me to dismiss this application.

[5] The law regarding the principles to be considered in respect of an application such as this brought under **Rule 4** of this Court's Rules is now well settled. The powers of the court are discretionary but like all discretionary powers, the same must be exercised judicially and not capriciously. It must be exercised upon reasons and not at the whims of the court. In exercising such powers, the principles guiding the court and which need to be considered are first the delay, secondly the reason for the delay or the explanation for the delay. Thirdly, whether the intended appeal is arguable (without of course holding a mini appeal) and lastly, whether the respondent will suffer prejudice.

[6] In this matter before me, it turns out that time for filing the appeal had not run out when this application was filed. This is because the certificate of delay was issued on 7th October, 2011, and this application was filed on 18th November, 2011. Time for filing the record of appeal was available to the applicant until or about the 7th December, 2011.

Mr. Mwaura's response to this anomaly was that the applicant had no money to file the record of appeal

that is why he filed the application for leave instead. The issue of the applicant's financial inability is not stated in the affidavit. Nonetheless, lack of money or impecuniosities' on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. See the case of **FRANCIS MWAI KARANI v ROBERT MWAI KARANI, C A NO. NAI. 246 OF 2006**. It also beats common sense that the applicant had the financial ability to file an application for extension of time but not to file the record of appeal.

[7] In my humble view, the applicant has not been able to give reasons that are cogent, consistent and credible as to why the record of appeal was not filed within time. Secondly the applicants counsel did not also offer a response as to why the Notice of Appeal was also filed late and what he intended to do with it. There was also inordinate delay on the part of the applicant in applying for the proceedings a delay of about 37 days was not explained. Besides, the order the applicant seeks to appeal against was regarding an application for review where Serگون, J. declined to review the orders of Kasango, J., which was based on set principles of law. This being an auxiliary order and not the main matter, I am not convinced that it meets the threshold of an arguable appeal. Finally, another factor which was not responded to by counsel for the applicant, and it is a valid one, is the contention that the respondent would suffer prejudice because the estate of the deceased was distributed to the respective beneficiaries after the trial Judge heard all the parties in the dispute.

[8] My overall evaluation of this application and for reasons aforestated leads me to one inescapable conclusion that there are no grounds or basis for me to exercise my discretion in favour of the applicant. In the result, this application lacks merit and it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 29th day January, 2014.

MARTHA K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy to the original.

DEPUTY REGISTRAR