



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: J.MOHAMMED, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 226 OF 2012**

**BETWEEN**

**GEORGE ITOTIA NG'ANG'A ..... APPLICANT**

**AND**

**MARY WANJIRU KIMARU**

**LUCY WAHU BORO**

**SAMUEL MBURU NGANGA**

**JAMES KARINGE NGANGA**

**STEPHEN MUNIU NGANGA ..... RESPONDENTS**

**(Being an application for extension of time to file & serve Record of Appeal out of time from the Ruling & Order of the High Court of Kenya at Nairobi [G.BM. Kariuki, J] dated 14th June, 2012**

**in**

**H.C. SUCC. CAUSE NO. 2221 OF 2008)**

**\*\*\*\*\***

**RULING**

This is an application by *GEORGE ITOTIA NGA'NG'A* (hereinafter the "applicant") dated 29th August 2012 expressed to be brought under *Rules 4,*

*42 (1) (2) and 43 (1) of the Court of Appeal Rules, 2010* seeking, the following orders:-

- (1). That this Honourable Court be pleased to order that time be and is hereby extended to appeal out of time.***
- (2). That the annexed draft Memorandum of Appeal be deemed as properly filed upon payment of the requisite fees and be deemed to have been filed within such extended time.***

The application is supported by the applicant's affidavit sworn on 29th

August 2012.

The gist of this application are from the following facts which can be extracted from the ruling of G.B.M Kariuki, J (*as he then was*). The applicant moved the High Court by way of summons in *Succession Cause No. 2221 of 2008* seeking the following orders:

***“1. That the Kiambu land registrar be ordered to cancel all the titles registered against the original title no. Limuru/Bibirion/876 and the title revert back the name of the deceased Justus Nganga Riunge.***

***2. That the Title No. Limuru/Bibirion/876 be distributed as per the certificate of confirmation of grant dated***

***27th day of July, 2009 and grant of letters of administration with written will annexed issued on***

***28th January, 2009 which is in accordance with the wishes of deceased's will dated 3rd December, 1972.”***

The applicant's argument in the High Court was that his father Justus Nganga Riunge (Deceased) had two wives who had predeceased him. He was survived by children from both houses. He argued in the High Court that he was entitled to inherit the land left by his father since he was the first born son. That his wish was to have the land distributed according to his late father's will. The learned Judge after evaluating the evidence and facts dismissed the application as lacking merit and an abuse of court process. The above ruling in the High Court was delivered on *14th June, 2012* while this application was filed over two months later, on *4<sup>th</sup> September, 2012*.

A clear reading of the above provisions indicates that for an appeal to the Court of Appeal to be competent; first, A "*Notice of Appeal*" must be filed or lodged within 14 days of the date of the decision appealed from, secondly that the said Notice must be served within 7 days after lodging of the notice of appeal on all persons directly affected by the appeal. Thereafter a "*Record of Appeal*" must be filed within 60 days of the date when the Notice of appeal was lodged and served, unless provisions of the proviso to *Rule 81 of the Court's Rules* were invoked.

When the application came up for hearing Mr. George Itotia Ng'ang'a argued the application in person while learned counsel, Mrs. E. Njuguna held brief for Mwicigi Kinuthia & Company Advocates for the Respondents.

In support of his application Mr. Itotia's submission was that he agreed to distribute the suit property as per his deceased father's will. He submitted that all his brothers had agreed to the same and that the said agreement was signed by his brothers and witnessed by the local chief. He explained that the delay in filing the instant application was because he had sought the intervention of the Chief Justice in this matter.

On her part, Mrs. Njuguna, opposed the application and relied on the Replying affidavits of Mary Wanjiru Kimaru (*the 1st Respondent*) sworn on 18th April, 2013 and that of Lucy Wahu Boro (*the 2nd Respondent*) sworn on 8th July 2013. Counsel also relied on *Sections 72, 75 and 76(1) of the Civil Procedure Act, Order 43 Rule 1 and 2 of the Civil Procedure Rules, Sections 47, 48, 49 and 50 of the Law of Succession Act* and this court's decision in *NIAZSONS (K) LIMITED V. CHINA ROAD & BRIDGE CORPORATION (KENYA), CIVIL APPEAL NO. 187 OF 1999.*

Counsel submitted that the applicant's application dated 7th August,

2009 in H.C.C.C. Succession Cause No. 2221 of 2008 for orders of cancellation of

all titles registered against the original *TITLE NO. LIMURU/BIBIRIONI/876* was dismissed by the learned Judge G.B.M Kariuki (*as he then was*) for lack of merit. That Succession Cause No. 2221 of 2008 was found to be *res judicata* as there was another matter in the *District Magistrate's Court 3 of 1997* in Limuru involving the same properties. In the said case, the applicant gave evidence as the first born son of the deceased and was awarded one acre of land after subdivision. To that end, *LIMURU/BIBIRIONI/876* ceased to exist. It was sub divided into several plots in *16th January, 1978* as follows:

1. *LIMURU/BIBIRIONI/1401* was given to *Francis Thuo-deceased*
2. *LIMURU/BIBIRIONI/1402* -*Salome Nyakirima-deceased*
3. *LIMURU/BIBIRIONI/1403* -*Samuel Mburu Nganga-3rd Respondent*
4. *LIMURU/BIBIRIONI/1404* -*George Itotia- the applicant*
5. *LIMURU/BIBIRIONI/1405* -*Thamaru Njeri -deceased*

That *LIMURU/BIBIRIONI/1402* was later divided into four portions on *9th October, 2003* into *3018* for *Lucy Wamuita Kimondo* (deceased),

*3019* for *Mary Wanjiru Kimaru*, *3020* for *Pauline Wangari Kimani* and *3021* for who is not a party to the suit and *3021* to *Regina Ruguru* (deceased). Further, on *17th October, 1986* *LIMURU/BIBIRIONI/1405* was subdivided into three portions of *125/375* to *Stephen Muniu Riunge*, *James Karinge Nganga* and *Salome Njeri Nganga*. In 1991 *Salome Nyakirima* passed on. Her daughters commenced succession of her estate in HCCC Succession Cause Number 520 of 1992 in which the applicant objected to the distribution of *LIMURU/BIBIRIONI/1402*. The objection was dismissed vide a judgment delivered on *31st October 2001* by Lady Justice Rawal. The applicant thereafter filed an application in the court of appeal for extension of time within which to file an appeal in Civil Application No. 38 of 2006 which was dismissed by a single Judge [*Deverell, JA*] on *11th August 2006*. A Further reference to a full bench was also dismissed on *25th May of 2007*.

I have carefully considered the application, the supporting affidavits, the submissions of the appellant and learned counsel for the respondent, and the law.

***Rule 4 of the Court of Appeal Rules on extension of time 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 doing 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.”***

The principles guiding the court on an application for extension of time premised upon *rule 4 of the Rules* are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are now clear. See

*MUTISO V MWANGI, CIVIL APPLICATION NO. NAI. 255 OF 1997 (UR),*

*MWANGI VS KENYA AIRWAYS LTD. [2003] KLR 486, MAJOR JOSEPH MWERERI IGWETA VS MURIKA M'E THARE & ATTORNEY GENERAL, CIVIL APPLICATION NO. NAI. 8 OF 2000 (UR) AND MURAI VS. WAINAINA,*

(NO. 4) [1982] KLR 38". See also FAKIR MOHAMMED VS JOSEPH MUGAMBI & ANOTHER, C.APP. NAI. 332/04 (Unreported) where the Court

of Appeal rendered itself thus:

***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" as removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider too 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 the 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."***

The matters to be considered are not exhaustive and each case must be considered on the basis of its own facts and complexities. In MWANGI VS KENYA AIRWAYS LTD, [2003] KLR 48, the Court having set out

matters which a single Judge should take into account when exercising the discretion under Rule 4, rendered itself thus:

***"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered"***.

On the issue of compliance with the rules of this Court, the case of

RATMAN VS CAMARASAMY, [1964] 3 All ER 933, Lord Guest stated at page 935:

***"The Rules of the Court must prima facie, be obeyed and in order to justify the court extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation"***.

The foregoing sets out the manner in which this Court is to consider applications brought under Rule 4 of the Rules. In this case, the present application was filed on 4th September 2012 while the ruling subject of this application was delivered on 14th June 2012 causing a delay of about 2 months and 20 days.

In my view, no plausible explanation or material evidence was placed before the court why the Notice of Appeal and the Record of Appeal were not filed within time. The only explanation appears on the supporting affidavit sworn by the applicant at paragraph 4 as follows (sic):

***"4. That I wrote a letter to the Honorable Chief Justice on thinking that I had already appealed but the Chief Justice office replied to me and advised that I lodge an appeal to the court of appeal. Whereby the time of doing that had already lapsed. A copy of the said letter is herewith attached and a reply thereto marked GIN-1."***

The applicant also annexed a copy of his electronic communication with the Judiciary Ombudsman's Office Service Desk ticket #10052287 dated 27th June, 2012 where he wrote as follows:

***"I am dissatisfied with the ruling made by Hon. Justice G.B.M Kariuki on June 2012. I applied for a grant of letters of administration was issued on 28th January 2009. I then filed an application seeking to have the title issued to the respondents be cancelled but Hon. Judge***

***continued to deliver his ruling based on the argument of the respondents advocate. I believe the whole process of the respondents obtaining the title documents was unlawful.***

***Sir i request for your intervention and call for the file and let it be heard afresh before another judge.”***

In Response, the Ombudsman's office on 22nd July, 2012 informed the applicant as follows:

***“The Hon. C.J does not interfere with court rulings. The client should exercise his right to appeal if indeed aggrieved by the decision of the court.”***

The applicant has not given any plausible explanation at all why after the ruling was delivered on 14th June, 2012, he did not file the Notice of Appeal until 7th of August, 2012 which is outside the 14 days period as required by law. Further, he has not satisfactorily explained why after filing the Notice of Appeal out of time, he did not file the application for extension of time until 4th of September, 2012. It is evident that the letter to the Chief Justice was dated 21st June, 2012, while the response from the office of the Chief Justice was sent to the applicant on 22nd July 2012.

This Court must also consider the interest of the respondent, as justice must look both ways. An appeal ought to be filed timeously and in accordance with the law otherwise it may cause undue prejudice to other parties who have a legitimate expectation that the litigation had come to an end when no appeal was filed within the stipulated period. The court must balance the interests of the Applicants with those of the Respondent. This was aptly stated in the case M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where this Court rendered itself thus:

***“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”***

The record also shows that the applicant has made several applications of this nature before this court though differently constituted. The applicant has previously filed an application for extension of time to appeal against the decision of the ruling of Rawal J.(as she then was), that application was made over 14 months after the decision; he also filed the review application on 17th November, 2003, one year after Shah, JA had dismissed the application for extension of time on 3rd October 2003; he also filed an application for extension of time in *Civil Application No. 38 of*

*2006* where D.S Deverell, JA dismissed the application; the applicant further sought a reference to a full court under *rule 54 of the Rules* which was dismissed.

The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA, in MONICA MALEL & ANOR VS. R ET AL, ELDORET CIVIL APPL. NO. NAI 246 OF

*2008*, stated thus:

***“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”***

In exercising discretion, it should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in HAYWOOD V COPE,

(1858) 25 BEAV 140:

***“...the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks a equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”***

As to whether this appeal is arguable, a three judge bench of this court while ruling on an application under reference by the applicant for extension of time under rule 54 in Civil Application No. Nai 38 of 206 on 25th May, 2007, held that:

***“Having regard to the fact that the applicant did not challenge the title of Salome Nyakirima for 28 years from 1978 when she was registered until her death, the intended appeal in our view, is frivolous.”***

The facts of this case as they were then have not changed. I therefore find support in the above holding that the case is frivolous and not arguable. This matter has been in court since 1977 and some of the subject properties have been subdivided and sold to third parties. The respondents and other parties will, therefore, be prejudiced by further delays in this matter. In my view, that is sufficient prejudice which cannot be compensated by way of damages.

For those reasons, I find no merit in this application. I decline to exercise my discretion in favour of the applicant and I dismiss the Notice of Motion dated 29th August, 2012, with costs to the respondents.

Dated and delivered at Nairobi this 14th day of February, 2014.

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR

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