



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NAI. 290 OF 2012

BETWEEN

- 1. **ZEALIA WANJIRU MOGUKU**
- 2. **GITHAIGA MBUTHIA****APPLICANTS**

AND

FLORENCE WANGECHI KABIRI.....RESPONDENT

(An application for leave to file and serve the Record of Appeal out of time from the Ruling of the High Court of Kenya at Nyeri (Sergon, J.) dated 30th September, 2009 at Milimani

in

H. C. Succ. Cause No. 478 of 2003)

RULING

1. By an application filed on 7th November, 2012, the applicants seek extension of time under **Rule 4** of the Rules of this Court to file and serve the Record of Appeal. The applicants are aggrieved by the decision of the High Court (J. K. Sergon J.), given on 30th September, 2009, dismissing their application for revocation of grant of letters of administration issued to Florence Wangechi Kabiru, the Respondent in respect of the estate of Gathitu Githaiga deceased.
2. The grant or refusal of extension of time under rule 4 of the rules of this Court is a matter of discretion by the Court. The factors for consideration in exercising that discretion include the length of delay involved; the reasons for delay; the degree of prejudice if any that will be caused to the other party if the application is allowed and a consideration whether the applicant has an arguable appeal. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997** and **Maritim vs. Kibaru [2005] eKLR**.
3. Based on those principles therefore the applicants need to demonstrate that the length of delay involved in the circumstances of this case is not inordinate and offer cogent reasons for the delay. The applicants also need to demonstrate that they have an arguable appeal.
4. At the hearing of the application on 6th May, 2014, Mr. H. K. Mahan, learned counsel, appeared for the applicants. Being satisfied based on the affidavit of service on record that the Respondent was duly served with notice of hearing on 24th April, 2014, I proceeded to hear the application in

the absence of the respondent who did not attend the hearing.

5. In support of the application Mr. Mahan drew my attention to the grounds appearing on the face of the application, the contents of the supporting and supplementary affidavits sworn by Zealia Wanjiru Moguku on 7th November, 2012, and 20th June, 2013, respectively and the replying affidavit sworn by the respondent on 5th January, 2013.
6. Mr. Mahan submitted that the Ruling of the High Court dismissing the applicants application for revocation of grant of letters of the applicant to the respondent was delivered on 30th September, 2009; that a notice of appeal was filed on 1st October, 2009; that leave of the High Court to appeal was required and an application in that regard was made and leave was granted by the High Court on 15th October, 2012; that in granting leave to the applicants to appeal, the High Court directed the appeal to be filed within 14 days; that immediately after the order of the High Court giving leave was made, he wrote to the first applicant Zealia Wanjiru Moguku seeking instructions in order to lodge the appeal but the 14 days provided lapsed before his client could revert to him; that the present application was presented without delay on 7th November, 2012.
7. According to Mr. Mahan the intended appeal has high chances of success in that in light of **Section 66** of the **Law of Succession Act** the High Court wrongly held that the applicants had to be excluded from inheriting in the estate of the deceased; and that the application ought to have been allowed under **Section 26** of that **Act**. In that regard counsel invited me to peruse the draft memorandum of appeal annexed to the application.
8. Adverting to the contents of the replying affidavit of the respondent, counsel submitted that the same does not at all deal with the matters pertaining to the application for extension of time.
9. I have considered the application, the affidavits in support, the respondent's replying affidavit and the submissions by learned counsel. In her affidavits in support of the application, Zealia Wanjiru Moguku has set out the steps the applicants took following the dismissal of the application on 30th September, 2009, by the High Court. A notice of appeal was promptly filed and the applicants thereafter embarked on seeking to obtain leave of the High Court to appeal; that their application for leave to appeal was not determined until 15th October, 2012, when they were granted 14 days to lodge the appeal. Whereas the applicant could have moved with greater speed in presenting the application for leave to appeal before the High Court which was not done until 29th March, 2010, I am satisfied the subsequent delay in presenting the present application on 7th November, 2012, was not inordinate and is satisfactorily explained in the applicant's supplementary affidavit.
10. On the question whether the intended appeal is arguable, the less I say about this the better. As this Court stated in **Wasike vs. Swala, [1984] KLR 591**, an arguable appeal need not be one with overwhelming probability of success. I am however unable to say that the intended appeal is frivolous. In **Muchungi Kiragu vs. James Muchungi Kiragu and another Civil Application No. Nai. 356 of 1996**, this Court expressed the view that except where the delay is inexcusable, it is wrong to shut out an applicant out of court and to deny him or her the right of appeal where the intended appeal is arguable. It has also not been demonstrated that the respondent will suffer prejudice if the applicants are granted leave to file the record of appeal.
11. For those reasons, I allow the application. The applicants shall within 45 days from the date of this order file and serve a record of appeal.
12. The respondent shall in any event have the costs of this application.

Dated and delivered at Nyeri this 13th day of May, 2014.

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR