



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J.A. (In Chambers))

CIVIL APPLICATION NO.NAI 243 OF 2013

BETWEEN

REBECCA WAMBUI NJOROGE.....APPLICANT

AND

ALICE WAGIKUYU NJOROGE.....RESPONDENT

(An application for extension of time to lodge notice and record to appear out of time from the

Ruling of the High Court of Kenya at Nairobi (Musyoka, J.) delivered 12th June, 2013

in

H.C. SUCCESSION CAUSE NO.2600 OF 2000)

RULING

The application by notice of motion dated 6.9.2013 came up for hearing before me sitting as a single Judge pursuant to rule 53(1) of the Rules of this Court. It was made by Rebecca Wambui Njoroje, the applicant under Rule 4 of this Court's rules. It sought four orders as follows:

- 1. The learned trial Judge erred in law and in fact in dismissing the appellant's application for review dated 9th August 2012.*
- 2. The learned trial Judge erred in Law and in fact in failing to order the distribution of the estate of the deceased as per the provisions of the law of Succession Act Cap 160 Laws of Kenya.*
- 3. The learned trial Judge erred in law and in fact in failing to consider that some of the properties were not part of the Estate of the deceased.*
- 4. The learned trial Judge erred in law and in fact in failing to consider the principle of fairness when dealing with the application for review.*

The application was supported by an affidavit sworn on 6.9.2013 by the applicant. It is discernible from the motion that it was made on the ground that the applicant's counsel who had been instructed to lodge

appeal against the ruling dated 12.6.2013 did not do so and consequently the time for lodging appeal ran out, hence the instant application for extension of time. The applicant avers that the intended appeal is arguable and has substantial points of law with overwhelming chances of success and that the delay in coming to court to seek extension of time was not inordinate.

Miss Mwhiki Njuguna, learned counsel for the applicant told the Court that the applicant's advocates on record in High Court Succession Cause No.2600 of 2000 were Kioko Munyithya & Company whom she instructed to lodge appeal immediately after the delivery of the ruling on 12th June 2013. Ostensibly, she believed and trusted that her advocate then on record would act on her instructions and lodge appeal. As she waited for the process to be conducted, she kept on going to her said advocates offices to check the progress on the matter and on 31st July 2013. She insisted on "*knowing the position of my case and having the file.*" Apparently, she was not satisfied with the information she was getting from her advocates then on record. It is then that it was revealed to her that no appeal had been lodged. She immediately started looking for another advocate to take up the matter on her behalf. She does not state the date on which she retained M/s Mwhiki Njuguna & Co. advocates to act for her instead of Kioko Munyithya & Co. Advocates. Her advocates on record perused the court file and ascertained that no steps had been taken to pursue the appeal but they did not disclose the date firstly when they were retained to act, and secondly, when they perused the court file. It is discernible that after 31st July 2013 when the applicant discovered that her erstwhile advocates had not lodged appeal, the applicant came to court on 13.9.2013 when she filed the instant application. That was after a period of about one month and two weeks during which the applicant sourced her present advocates who in turn perused the court file and prepared the application now before the Court. Ms Njuguna has urged the Court to allow the application and grant the orders sought because the delay was not inordinate and the intended appeal has chances of success. In this regard, she drew the attention of the Court to the draft memorandum of appeal and submitted that the appeal is arguable.

Mr. Kamau, learned counsel for the respondent did not object to the application. He left the matter to Court. The respondent for whom he appeared had not filed a replying affidavit.

I have perused the application and considered the submissions of the learned counsel for the applicant. This Court has unfettered power under rule 4 of its rules to extend time. Rule 4 states:

"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."

The discretionary power of the Court under rule 4 is required to be exercised judicially with the object of serving justice to the parties. The policy of the Court is to sustain an appeal.

As long ago as 1986, Apaloo JA, as he then was, stated in **GATU V. MURIUKI [1986] KLR 211** that:

"the Court ought to be inclined to exercise its discretion to enlarge the time to appeal where the applicant has shown prima facie that he has an arguable case for consideration."

More recently, Githinji JA in **WASIKE V. KHISA [2004] KLR 197** re-echoed this when he held that "*the discretion of the Court under rule 4 is unfettered and must be exercised judicially and that it is not every delay in taking appropriate step required that would disentitle a party to extension of time. It is only unreasonable delay which is culpable, he stated, that would disentitle an applicant to an order for extension of time and whether or not delay is unreasonable depends on the circumstances of each case.*"

The jurisprudence that has emerged from decisions of this Court on interpretation of rule 4 shows that the factors to be considered in deciding whether to exercise the discretionary power in favour of an applicant include the length of the 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 including the need to facilitate access

to justice under Article 48 of the Constitution and also the need to ensure under Section 3A (1) of the Appellate Jurisdiction Act, Cap 9, that the overriding objective of the Act (Cap 9) and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act. For the purpose of furthering the overriding objective pursuant to Section 3A (supra), the Court is enjoined to handle all matters for the purpose of attaining the aims set out in Section 3B (1) of the Act which include the just determination of the proceedings.

In **Gulam Hussein N. Cassamand and Another v. Shashikant Ramji** (Civil Application No. Nai 1 of 1981) the Court acknowledged that human errors or mistakes including errors by legal advisors can constitute acceptable excuse for not acting within the timelines set in the rules or the orders of the Court. In that case, C. B. Madan, JA, as he then was, held that errors by a legal advisor can be pardoned.

I am prepared to accept the explanation given by the applicant why notice of appeal was not given when it should have been given. I also observe that the applicant was diligent and kept an eye on her advocates to see whether progress was being made and as soon she discovered that all was not well, she took action and retained a new firm of advocates to act for her. Her advocates on record acted with dispatch and within a period of one month and 13 days filed the instant application. I am persuaded that in these circumstances, I ought to exercise my discretion in favour of the applicant seeing no prejudice will be suffered by the respondent whose counsel did not object to the application.

Accordingly I allow the application by notice of motion dated 6th September 2013 and I order that time for giving notice of appeal is extended to and will be until 14 days from today and service shall be in accordance with the rules. The applicant shall therefore file notice of appeal within 14 days and serve it within 7 days. The record of appeal shall be filed within 21 days from the date of service of the notice of appeal. The costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 20th day of June 2014.

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR