



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, J.A. [IN CHAMBERS]

CIVIL APPLICATION NO. NAI. 132 OF 2014 (UR 107/2014)

BETWEEN

CHARLES W. RUBIA.....1ST APPLICANT

MICHEAL RUBIA.....2ND APPLICANT

MAURICE RUBIA.....3RD APPLICANT

AND

ELIZABETH WANJIKU NJONJO.....1ST RESPONDENT

BRIAN MWITURIA.....2ND RESPONDENT

(An application for leave to appeal out of time under the provisions of Rules of the Court of Appeal Rules in an intended appeal from the decision of the High Court of Kenya at Nairobi (Musyoka, J.) dated 11th April, 2014

in

H. C. SUCC. C. NO. 2377 OF 2008)

RULING

The notice of motion dated 11th June, 2014 has four main prayers all seeking extension of time to enable the applicant file an appeal out of time against the Ruling of W. Musyoka, J. dated 11th April 2014 in Nairobi H.C. Succession Cause No. 2377 of 2008.

The ruling which is interlocutory in nature, dismissed the applicants' application seeking *inter alia* an order to substitute **Maurice Kamau Rubia** (one of the applicants and an objector in the succession proceedings) as a joint administrator in place of **Charles Wanyoike** (another applicant). The succession cause in question relates to the Estate of the late **Bernard Njonjo Rubia** who was the 1st applicant's son. **Elizabeth Wanjiru Njonjo**, the 1st respondent is the widow to the deceased while **Brian Mwituria** (2nd respondent) is said to be the deceased's son by another woman.

As is the case in many succession cases, the parties have issues with the distribution of the Estate. It is not necessary to delve into the nitty gritty of this matter for purposes of this application but it is important to scour the surface in order to put this application in its proper context. After the deceased died, the 1st respondent, in her capacity as the widow filed the succession cause. She and the deceased had no children together and so she ranked highest in order of priority as the possible administratrix and heiress.

The applicants herein raised an objection to the Grant of Letters of Administration being granted to her, saying that she had failed to disclose that the deceased was also survived by a father and four brothers. They wanted to be made co-administrators to the Estate.

Meanwhile, before the Grant of Letters of Administration was issued, the 2nd respondent filed an application for provision as a dependant of the deceased claiming the status of a son. Following these applications, the court (Kimaru, J.) issued the grant of Letters of Administration to the deceased's widow, father (1st applicant) and the 2nd respondent.

Before the property could be distributed, the deceased's father made an application to be substituted with his son as a co-administrator. This is the application that was heard and dismissed by Musyoka, J. in the ruling now the subject of an intended appeal.

It is instructive to note that the issue of distribution of the Estate has not even been done. According to the applicants the ruling was supposed to be delivered on 4th April, 2014 but it was not and it was thus adjourned to be delivered on notice. The same was delivered on 11th April without formal notice to the parties. I say formal notice because apparently, counsel for the respondents kept in touch with the registry and they managed to find out the date of delivery of the ruling and so they were present when the ruling was delivered.

The applicants were not and by the time they found out about the delivery, they were already out of the prescribed time to file the notice of appeal. This is what prompted this application. The fact that the ruling was delivered in absence of the applicants and their respective counsel is stipulated by all the parties. It is in my view not necessary to go into those details. The impugned ruling was rendered on 11th April, 2014. According to the applicants' counsel they learnt about the same on or about 5th May 2014, obtained the ruling on 7th May, 2014 and filed the notice of appeal dated 5th June, 2014 on 7th June, 2014.

This delay according to Mr. Githara, learned counsel for the applicants was not inordinate and the same has also been sufficiently explained. Ms Kavagi and Mr. Makumi, learned counsel for the 1st respondent and 2nd respondent respectively submitted that the delay of about 34 days was inordinate and has not been sufficiently explained. Their thrust however, was on the submission that the applicant should wait for the property to be distributed if unhappy with the distribution, they should file a substantive appeal against the decision of the High Court.

In response to that submission Mr. Githara told the court that the applicants would be prejudiced if the ruling in question is not set aside before they go to the distribution stage, reason being that the learned Judge in his Ruling referred to the 2nd respondent as the deceased's 'son' while in fact, that issue had not been canvassed before him. The applicants have strongly protested against that endowment of the title of '**Son**' on the 2nd respondent by the High Court.

It is their submission that that issue should be heard by way of adducing evidence and a determination made on the same after hearing the parties. Their intended appeal revolves around that issue.

The question we need to address in this application is whether the same passes the threshold required for applications of this nature. This is a well-trodden path and there are legion authorities in this area.

In order for an application of this nature to succeed, an applicant needs to satisfy the following:-

Was the delay complained of inordinate; has the same been explained to the satisfaction of the court; will the respondent suffer prejudice if the application is allowed? Does the intended appeal pass the test of arguability or is it frivolous and only meant to delay the matter;

The list is by no means exhaustive. See **Fakir Mohamed v Joseph Mugambi & 2 Others (Civil Application No. Nai 332 of 2004)**. I have applied this test to this application and arrived at the following findings.

The last criterion is particularly important when it comes to appeals against interlocutory orders when the substantive suit is still pending hearing and determination. This is so because this Court should as much as possible eschew giving orders that fetter or shackle the trial Court from proceeding with a matter that is properly before it before its conclusion, unless of course there is flagrant abuse of the Court process which this Court must address before the conclusion of the substantive suit, or where there is imminent danger of subversion of justice if the hearing is not stopped.

I have considered the motion before me, the contents of the rival affidavits, the entire record and the submissions of counsel.

On the issue as to whether the delay was inordinate, my finding is that it was not, particularly given the fact that notice of delivery of the ruling was not given to the parties. I accept the reasons given for the delay as plausible although, the applicants could have moved the Court sooner than they did. Will the applicants suffer any prejudice if this application is not allowed? I don't think so. I say so because the application for confirmation is still pending before the High Court. The Grant cannot be confirmed before the parties are heard on the issue of who the heirs are and their respective shares. I was told there was a pending application for dependancy by the 2nd respondent. In my view, that will be the best forum for the issue as to the relationship between the 2nd respondent and the deceased to be canvassed.

As far as the issue of substitution is concerned, my view is that the learned Judge had discretion to allow or not to allow the substitution after considering all the material presented before him. All the other issues raised in the draft memorandum of appeal should be canvassed before the High Court before they find their way here by way of a substantive appeal if need be.

In other words, I am not convinced that the applicants have an arguable appeal. The economy of judicial time and other resources and also that of the parties herein demand that the substantive matter be heard to conclusion and whoever is dissatisfied with the outcome can then come to this court on appeal against the final decision of the High Court.

I find this application devoid of merit and dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 25th day of July, 2014.

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

