



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 26 OF 2014 (UR. 19/2014)

BETWEEN

JIMMY MUSYOKI KILONZO.....APPLICANT

AND

MAJOR (RTD) JOHN KYALO KILONZO

JOSEPH MUNYAO KILONZO

FRANCIS MWAKA KILONZO.....RESPONDENTS

(An application for extension of time to file and serve notice of appeal and record of appeal out of time in an intended appeal from the ruling and order of the

High Court of Kenya at Machakos (Makhandia, J.)

dated 4th September, 2012

in

H. SUCC. CAUSE NO. 335 OF 2003)

R U L I N G

1. The matter before me is a motion dated 18th February, 2014 and filed on 20th February, 2014, by *Jimmy Musyoki Kilonzo* (Jimmy). He is represented before me by learned counsel Mr. Ndeto. The respondents to the motion are his brothers, hereinafter referred to as *John, Joseph* and *Francis* respectively. They are represented before me by learned counsel, Mr. Mulekyo.

2. The motion seeks the following orders:-

“2. The Honourable Court be pleased to grant injunctive orders restraining the respondents, their agents, servants, and or representatives from subdividing, alienating, transferring and or cutting down the trees standing in L.R. Number Kangundo/Isinga 304 until the final determination of the appeal.

3. *The court be pleased to grant the Petitioner Applicant extension of (sic) to file and serve notice of appeal out of time against the ruling made by the Hon. Justice Makhandia on 06.07.2012.*

4. *Applicant be granted leave to file and serve the record of appeal within such extended time.*

5. *The said leave do operate as stay of execution.*

6. *The costs of this application be provided for.”*

3. For obvious reasons, prayers 2 and 5 do not lie for consideration before me and Mr. Ndeto was right to abandon them. They are struck out accordingly. The motion thus remains one seeking extension of time to file and serve a notice of appeal and a record of appeal out of time under *Rule 4* of this Court's Rules.

4. A short background to the application is pertinent:-

Jimmy and the three respondents are sons of the late *Samson Kilonzo Nthei* of Kangundo, who died on 12th June, 1999. The deceased had two wives and four other sons as well as daughters. Upon his death, three of the sons and the surviving widow were granted joint letters of administration of the estate by the High Court in Machakos on 7th March, 2008. The widow was *Ruth Ndulu Kilonzo* who had no children of her own, and Jimmy, John, and Francis. Subsequently, the family could not agree on the mode of distribution of the estate and they took the matter before the court for adjudication and confirmation of the grant. The court heard several witnesses from different sides of the family dispute and decided on the mode of distribution of the estate and confirmed the grant. The Ruling to that effect was delivered by Makhandia J. (as he then was) on 6th July, 2012. That would have been the end of the matter and the deceased would have rested in peace in his grave.

5. However, Jimmy was not satisfied with the decision. Instead of challenging it on appeal, he went back to the same court to seek a review, variation or setting aside of the Ruling. The motion to that effect was filed on 17th September, 2012. Makhandia J. was no longer in that station having been transferred and so, procedurally, the matter fell before B. Thurairaja J. for hearing and determination. Jaden J. heard the parties who were represented by learned counsel and on 4th September, 2013, she delivered her Ruling rectifying a non-contentious error but otherwise dismissing the application. Nothing further happened for the next five and a half months until 20th February, 2014 when Jimmy filed the application now before me.

6. As stated earlier, the motion seeks extension of time to challenge the decision of Makhandia J. made more than one and a half years earlier and not the latter decision of Jaden J. The intended appeal seeks to put before the appellate court the same questions that were put before Jaden J. and she found they had been adjudicated upon by Makhandia J. and so refused to review them. On that premise I think this application is a non-starter, although I will still deal with it on merits.

7. The reason for so stating stems from the provisions of *Section 80* of the Civil Procedure Act, Cap 21 which provides as follows:-

“ Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

That provision is mirrored in *Order 45 (1)* of the Civil Procedure Rules (“the Rules”) which specifies the

grounds upon which an application for review may be made and states thus:-

“(1) Any person considering himself aggrieved—

(
a by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
or
)

(by a decree or order from which no appeal is hereby allowed, and who from the discovery of the
b
)

new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

8. My understanding of those provisions of the Act and the Rules is that a party, like the applicant before me, who is aggrieved by an order such as the one made by Makhandia J. in this matter, had two options: either to appeal against that order if an appeal was allowed under the provisions of the law invoked or apply for a review of the order. He had a third choice of accepting the Ruling of the court and not challenging it at all. But in this case Jimmy was aggrieved but not to the extent of appealing. He took the option of seeking review and on that score, exhausted the choice of appeal. In my view, it would make no sense of the law to allow both options to be exercised either simultaneously or one after the other. Of course, if the party chooses review and is still aggrieved after the review is determined, he can prefer an appeal against the review decision. It would be absurd, however, for the law to allow a party to exhaust the review option and then revert to appeal when the option hits the rocks, or vice versa.

9. I am not alone in so thinking. This Court in a recent decision (13th May 2014) in a similar matter, Anthony Gachara Ayub v. Francis Mahinda Thinwa [2014] eKLR, stated as follows:-

“Under the provisions of *Order 45* of the *Civil Procedure Act* (*sic*), a party who chooses to proceed by way of review loses the right of appeal. In the instant case, the appellant choose (*sic*) the route of review of the judgment dated 14th May, 2002, and lost his right of appeal when review was declined.”

I would have struck out this application for incompetence but I shall proceed to examine the merits of it for completeness.

10. The power I have for extension of time is discretionary. It cannot be exercised on whim or caprice but on sound reasons. The onus is therefore on the applicant, Jimmy, to satisfy me that I ought to exercise that discretion in his favour. Some factors that he has to lay before me for consideration have been stated by this court times without number and I take it from Fakir Mohamed v Joseph Mugambi & 2 others Civil Appl. No. 332/04 (ur):

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so 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 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: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003]

11. I am aware that the discretion of the court was boosted by the enactment of *Sections 3A and 3B* of the Appellate jurisdiction Act, but as this

Court stated in the case of City Chemist (NBI) & 2 Others v. Oriental Commercial Bank Ltd Civil Appl. NAI. 302 of 2008(ur):

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

12. Learned counsel for the applicant, Mr. Ndeto relied on the affidavit in support of the application but the affidavit in all its 19 paragraphs is long on emphasizing the same grievances placed before Makhandia and Jaden JJ. It also covers the activities of John who allegedly cut down some eucalyptus trees on the portion of the land claimed by Jimmy to be part of the deceased’s estate. Those facts were obviously in support of the prayers for injunction and stay of execution which I have dealt with above.

13. Only three paragraphs of the affidavit are relevant in explaining the delay in filing the notice of appeal and record of appeal, thus:

“14. THAT having been advised to appeal the earlier ruling of Justice Makhandia, on the 20.09.2013 I applied to the Deputy Registrar, Family Division – Machakos High Court to be supplied with typewritten, certified copies the proceedings and ruling. Annexed hereto and marked “JMK 7 & 8” are true copies of the said request application served and received at the registry on

20.09.2013, and receipt issued thereon of the deposit made on 14.10.2013.

15. THAT owing to the size of the file and the generated backlog of other files at the typing pool in the registry, it was not until 27.11.2013 that the when (sic) I the typewritten certified copies of the proceedings and ruling as requested were supplied to me.

16. THAT my counsel informs me and which information I verily believe to be correct that the time for appeal ran out long ago thereby rendering this application necessary.”

14. Mr. Ndeto submits on the basis of those averments that the delay was explained and that there were special circumstances to do with denial of justice if the applicant is locked out of pursuing a portion of his inheritance from his late father.

15. In response to the application, the three respondents filed a 28-page affidavit. It was partly in response to the two prayers which were spent and in support of the decisions of the two Judges below, but also contended that there was no reason for the lengthy delay occasioned in filing the application. Learned counsel for them, Mr. Mulekyo, submitted that the unexplained delay of almost two years was inordinate and there must be an end to litigation. He pointed out that the only matter remaining to wind up the administration of this estate was a survey report pending before the High Court in Machakos for confirmation of acreage and it would be prejudicial to stop that process when no appeal has been preferred for such a lengthy period. He pointed out that there was no draft memorandum to show the nature of the intended appeal.

16. I have carefully considered the application and I am not satisfied that I ought to exercise my discretion in favour of granting it. The applicant appears to blame his erstwhile Advocate for advising him to seek review rather than appeal, but that is a matter between them. Justice cuts both ways, and the respondents were entitled to assume that there was no intended appeal on the decision of Makhandia J. and proceed to enjoy the fruits of that decision, subject only to the outcome of the limited review issues placed before Jaden J. As it is, more than one year and a half is gone without any indication that the original decision would be challenged. Not even a formal notice of appeal which requires no legal knowledge to file was placed on record and served. In this application there is no draft to indicate the seriousness of the issues, if any, that are intended to go on appeal. Furthermore, even if I was to accept the explanation for the period of delay as blamable on the erstwhile Advocate, that period would end on 20th September, 2013 when copies of the proceedings were applied for. I find no proper explanation for the delay thereafter up to 20th February, 2014 when this motion was filed. It was possible to obtain a certificate of delay from the Registrar but none is exhibited. Only a statement that the copies were obtained on 27th November, 2013. Even if that were so, why wait further until 20th February 2014 to seek the discretion of the court? The conduct of the applicant does not endear itself to favourable treatment. Delay, of course, defeats equities and no discretion lies where there is no explanation.

17. I find and hold, in all the circumstances, that there was inordinate delay and that the guiding principles stated above for the exercise of my discretion have not been satisfied. The application is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR