



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: OTIENO-ODEK, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NYR. 27 OF 2014**

**BETWEEN**

**DAVID GACHOGU KARURI ..... APPLICANT**

**AND**

**TERESA KABUI KARURI ..... RESPONDENT**

*(An application for leave to serve Notice of Appeal and to file the Memorandum of Appeal and Record of Appeal out of time from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 11<sup>th</sup> January, 2011*

*in*

***H.C. Succession No. 147 of 1994)***

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**RULING OF THE COURT**

1. Before me is an application filed in this Court on 8<sup>th</sup> October, 2014 pursuant to **Rule 4** of the **Court of Appeal Rules** (the Rules). The applicant seeks leave of this Court to serve the Notice of Appeal and file the intended appeal out of time.
2. The grounds in support of the application are that the High Court Judgment subject of the intended appeal was delivered on 11<sup>th</sup> February, 2011; the applicant lodged a Notice of Appeal against the said judgment on 23<sup>rd</sup> February, 2011; the applicant also requested for proceedings therein on even date. Since the applicant was acting in person, he was not aware that the aforementioned documents were to be served upon the respondent. Subsequently, the applicant appointed an advocate on 24<sup>th</sup> February, 2011 and filed an application for revocation of grant on 9<sup>th</sup> February, 2012. According to the applicant, due to the pendency of the aforementioned application for revocation of grant, lodging the intended appeal escaped his mind; the proceedings were supplied to his current advocate upon his application on 18<sup>th</sup> July, 2014.
3. At this juncture, it is imperative to set out the background of this current application. The respondent herein was granted letters of administration over the Estate of Karuri Gachogu (deceased) on 21<sup>st</sup> July, 2004; the said grant was confirmed on 23<sup>rd</sup> May, 2007. The respondent

and the applicant are the deceased's widow and son respectively. The applicant herein filed an application for revocation of grant dated 22<sup>nd</sup> June, 2009 seeking *inter alia*:-

· ***That the confirmed grant of letters of administration issued to the petitioner Teresa Karuri on 23<sup>rd</sup> May, 2007 be revoked.***

· ***That David Gachogu Karuri, being the eldest son of one of the wives of the late Karuri Gachogu, be included as one of the administrators of the deceased's estate.***

4. After considering the application on merit, Seron, J. vide a judgment dated 11<sup>th</sup> February, 2011 dismissed the applicant's application. It is against that decision that the applicant lodged the Notice of Appeal on 23<sup>rd</sup> February, 2011.

5. In opposing the current application, the respondent contends that after the judgment dated 11<sup>th</sup> February, 2011 was delivered the applicant filed the Notice of Appeal within time. The applicant appointed his then advocate on 24<sup>th</sup> February, 2011 which was still within the period that the Notice of Appeal could be served upon the respondent. Instead, the applicant filed another application for revocation of grant dated 9<sup>th</sup> February, 2012 which was a clear indication that he had abandoned his intention to appeal against the judgment dated 11<sup>th</sup> February, 2011. The application dated 9<sup>th</sup> February, 2012 was dismissed vide a ruling dated 20<sup>th</sup> June, 2014. It is after the said dismissal that the applicant chose to revive the intended appeal. The applicant has not explained the delay of almost four years in serving the Notice of Appeal. Further, the applicant had not attached the Certificate of Delay from the High Court to demonstrate when the proceedings were ready for collection. The current application is an afterthought and ought to be dismissed.

6. In response, the applicant filed a further affidavit wherein he deposed that it was never his intention to abandon the intended appeal; it was his former advocate who misled him into filing the said application for revocation which led to the delay in filing the intended appeal. According to the applicant he was entitled to pursue both review and appeal against the judgment dated 11<sup>th</sup> February, 2011. If the leave sought is granted, it would not prejudice the respondent in any way.

7. Mr. D. Warutere, learned counsel for the applicant, submitted that the applicant was invoking the inherent jurisdiction of this Court to extend the time within which he could serve the Notice of Appeal and file the intended appeal. Mr. Warutere reiterated the grounds in support of the application. He argued that the delay in filing the intended appeal was due to the application for revocation of grant dated 9<sup>th</sup> February, 2012 which was dismissed on 20<sup>th</sup> July, 2014; the said application was misplaced and as a result of the mistake of the applicant's former advocate. According to Mr. Warutere, the intended appeal has high chances of success. He contended that the respondent had not sought for the Notice of Appeal to be struck out on account of the delay in filing the intended appeal; hence the respondent ought not to raise the issue of delay in opposing the current application. He urged me to allow the application.

8. Mr. Kebuka Wachira, learned counsel for the respondent, in opposing the application, submitted that the delay in filing the current application was inordinate; the applicant had not explained the delay in serving the Notice of Appeal and filing the intended appeal. According to Mr. Kebuka, the current application was instigated when the applicant's application for revocation of grant dated 9<sup>th</sup> February, 2012 was dismissed on 20<sup>th</sup> June, 2014. He argued that the applicant's intended appeal had no chance of success since he had filed three applications in respect of the grant in question which had been dismissed. Mr. Kebuka urged me to dismiss the application.

9. I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. There is no doubt that the discretion that I am being called upon to exercise in this application is under **Rule 4** of the Rules which 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 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.”***

10. The discretion under **Rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In **Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004**, this Court held:

***“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-***

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

11. In this case, the judgment , subject of the intended appeal was delivered on 11<sup>th</sup> February, 2011 and the applicant filed a Notice of Appeal on 23<sup>rd</sup> February, 2011. The applicant under **Rule 82** of the Rules was required to lodge the appeal with 60 days of filing the Notice of Appeal. In computation of time within which to lodge an appeal, the proviso in **Rule 82** provides that any period certified by the Registrar as having been required to prepare proceedings should be excluded. **Rule 82(2)** further provides that an appellant can only rely on the aforementioned proviso if the letter requesting proceedings is served upon the respondent. See **Mariam Abubakar Ireri & another -vs- National Cereals & Produce Board – Civil Application No. 9 of 2008**.

12. The applicant contends that despite requesting for proceedings on 23<sup>rd</sup> February, 2011 they were availed to his current advocate following his request on 18<sup>th</sup> July, 2014. I cannot help but note that the applicant never attached the Certificate of Delay to support that contention. I also note that the letter requesting proceedings was never served upon the respondent. I therefore find that the applicant cannot rely on the proviso of **Rule 82**. Time within which the intended appeal ought to have been filed begun running on 23<sup>rd</sup> February, 2011 when the Notice of Appeal was lodged. The intended appeal ought to have been filed on or before 18<sup>th</sup> April, 2011. The current application was filed on 8<sup>th</sup> October, 2014 and brought about 3 years 5 months after the lapse of the time within which the intended appeal could be lodged. In my view whether this delay was unreasonable ought to be determined with the explanation given for the delay.

13. It was the applicant’s contention that the delay was due to the pendency of the application for revocation of grant dated 9<sup>th</sup> February, 2012; the said application was filed on the

advice of the applicant's former counsel. Was this explanation given by the applicant for the delay in lodging the appeal reasonable and excusable? I find that the explanation given was not reasonable. Why do I say so? Firstly, I cannot help but note that the applicant in one of his affidavits in support of the application deposed that after appointing his then former advocate, he instructed him to file the application for revocation dated 9<sup>th</sup> February, 2012; consequently, the need to file the intended appeal escaped his mind. The applicant began to lay blame on his former advocate in his further affidavit. He contended that it was his former advocate who misadvised him into filing the application for revocation dated 9<sup>th</sup> February, 2012. From the affidavits sworn by the applicant, he contends that he has always been keen in filing and prosecuting the intended appeal. Even if I was to assume that the applicant's former advocate advised him into filing the application for revocation, the questions that arise in my mind are, did the advocate advise him not to serve the Notice of Appeal and file the intended appeal?; Did the advocate fail to institute the intended appeal despite the applicant's instructions to do so?

14. There is nothing on record that suggests that the applicant's former advocate negligently or otherwise prevented the applicant from serving the Notice of Appeal or filing the intended appeal in time. I note that the applicant in his own affidavit deposed that after filing the application for revocation dated 9<sup>th</sup> February, 2012, the need to lodge the intended appeal escaped his mind. Can this be a reasonable explanation? I do not believe so because the applicant ought to have been vigilant. Secondly, no explanation has been tendered for the delay in serving the Notice of Appeal which was lodged on 23<sup>rd</sup> February, 2011 and filing the intended appeal prior to the filing of the application for revocation of grant dated 9<sup>th</sup> February, 2012. I find that the delay by the applicant was inordinate.

15. I have perused the record and note that the applicant has not attached a draft Memorandum of Appeal setting out the intended grounds of appeal. Therefore, I am unable to determine whether the intended appeal is arguable.

16. Having expressed myself as above I find that the current application has no merit and it is accordingly dismissed with costs to the respondent.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of December, 2014.***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**