



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Application 161 of 2012

GRACE WACHUKA.....APPLICANT

VERSUS

JACKSON NJUGUNA GATHUNGU.....1ST RESPONDENT

JANE WAIRIMU GATHUNGU.....2ND RESPONDENT

(Being an application for leave to file appeal and notice of appeal out of time against the judgment of the High Court of Kenya at Nyeri

(Sergon, J.) dated 25th February, 2011

in
H.C. SUCC. C. NO. 929 OF 2009)

R U L I N G

1. The Motion before me is brought under Rule 4 of the Rules of this Court and it seeks for extension of time to lodge a Notice of Appeal against the decision of J. K. Sergon, J. made on 25th February, 2009, in **Nyeri High Court Succession Cause Number 929 of 2009**. The genesis of this application can be traced to a Succession Cause that was filed before the Magistrate's Court in Othaya. The applicant, Grace Wachuka, applied for the revocation of the grant that was issued before the Othaya magistrates' court. The summons fell for determination before **Sergon, J.** who considered the depositions by the applicant and the respondent for and against the orders sought for the revocation of the grant and concluded that the applicant had appended her signature to the proposed schedule of distribution, thus dismissed the summons for revocation as lacking in merit.

2. However, when the Judge delivered the judgment in open court on 25th February 2011, both parties and their counsel were absent although they were notified. The applicant now contends that she was never informed of the judgment by her previous counsel. The applicant states that after she unsuccessfully made attempts to see her former counsel, she approached the firm of Mr. Ndirangu, learned counsel, on 26th June, 2011. They wrote a letter to the court bespeaking the proceedings and judgment. Those proceedings were not supplied until 30th May, 2012. Thereafter Mr. Ndiragu filed the present application on 12th June, 2012, which was within a reasonable time. According to him, the appeal has good chances of success. The applicant did not give her consent to the distribution, and the distribution was not done according to the Law of Succession.

3. Mr. Kimunya, learned counsel for the 1st respondent, opposed this application on the grounds that the applicant was indolent and therefore not deserving the exercise of this court's discretion. The applicant

did not give reasons why she or her counsel failed to attend court at the delivery of judgment despite the fact that they had due notice. This application was filed after a period of over one year and even if the applicant was looking for her advocate, she had more than 3 months that she wasted. Counsel also pointed out that a party ordinarily does not require the copies of proceedings and judgment before filing a notice of appeal. The grant of letters of administration at Othaya Court was obtained by consent. The applicant had given her consent but later changed her mind and the 2nd respondent has now joined the applicant in rejecting the confirmed distribution of the estate thus, the 1st respondent had no way of distributing the estate without the co administrator and he had to file an application before the High Court seeking orders that the Executive Officer of the court do execute the necessary transfer forms.

4. On the part of Jane Wairimu Gathungu, the 2nd respondent, and co-administrator of the estate in question, she supported this application on the grounds that other beneficiaries of the estate did not consent to the distribution of the deceased's estate. More importantly, the distribution was not done according to the wishes of their late mother and that is why she has refused to sign the transfer forms for the distribution of the estate.

5. This is an application under rule 4 and the discretion exercisable thereunder is unfettered, but it has to be exercised Judiciously not on whim, sympathy or caprice. The guidelines for the exercise of this discretion are now clearly stated in cases of; - **MUTISO V MWANGI, Civil Application No. Nai. 255 of 1997 (ur)** and **Mwangi v Kenya Airways Ltd. [2003] KLR 486:**

“The exercise of this court's discretion under Rule 4 has followed a well-beaten path since the structure 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 as 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 the delay or 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”

6. Is the reason for delay in this case legitimate? The Judgment was delivered on 25th February, 2011 and this application was filed on 12th June, 2012, a delay of about 15 months. The applicant contends that she was not aware of the judgment and her attempt to consult the advocate who represented her in the High Court during the months of February, March, April and May were unsuccessful. She then consulted Mr. Ndirangu, who applied for copies of proceedings and judgment and received them on 30th May, 2012.

7. The judgment by the learned Judge clearly indicated the judgment was read in the absence of parties although the Judge noted the parties had notice, it is not indicated on record how that notice was effected. In my considered view, although the applicant's counsel may have had notice, the applicant contends that her counsel did not communicate to her and even her efforts to contact him after the judgment were not successful. Mr. Ndirangu, who took over legal representation of the applicant, applied for proceedings and judgment on 26th May, 2011. Mr. Kimunya, argued that a notice of appeal could have been filed even before the proceedings were obtained which is a logical argument. However in this case, Mr. Ndirangu, was not the one representing the applicant in the High Court and he probably wanted to read and understand the proceedings and judgment and then act and advice his client from an informed position.

8. For that reason I am of the view the reasons advanced for the delay are plausible and the delay is adequately explained. On the arguability of the appeal, all I need to say is that there appears to be issues that are arguable. In the result, I grant the application. I extend time to the applicant to file and serve the notice of appeal and record of appeal by 30 days.

Costs of this application shall be in the appeal.

Dated and delivered at Nyeri this 29th day of May, 2013.

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR