



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ONYANGO OTIENO J.A. IN (CHAMBERS))

CIVIL APPLICATION NO. 125 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL KEBERU NJUGUNA

BETWEEN

TABITHA NJAMBI NJUGUNA APPLICANT

AND

JANE NUNGARI RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kitale (Karanja, J.) dated 26th February, 2013

in

SUCCESSION CAUSE NO. 175 OF 2005)

RULING

The applicant in this Notice of Motion dated 20th May, 2013 and filed on 28th May, 2013 **Tabitha Njambi Njuguna** was the Objector in the *Succession Cause No. 175 of 2005* which was filed in the matter of the estate of **Samuel Keberu Njuguna** who died on 16th November, 2003 intestate. The respondent in this application **Jane Nungari Ngige** together with another **John Ngige Ngunjiri** had earlier petitioned the court in *Succession Cause No. 201 of 2005*, but it appears that in the end the two matters were heard together. The record shows that the applicant is the mother of the deceased while the respondent Jane maintained that she was the wife of the deceased despite some claims by the applicant and the Assistant Chief of their rural area that the deceased died unmarried.

The *Succession Cause* was heard by J.R. Karanja who in a judgment delivered on 26th February, 2013 rejected the applicant's objection and ordered that Letters of Administration be granted to both the applicant and the respondent. The learned Judge made a further order that the two would be the sole beneficiaries of the estate. The learned Judge made other orders as relates to the sharing of the estate but I think that is not before me and I will not waste any more Court's time on it. That judgment was

delivered in the presence of Mr. Nyakundi who held brief for Ms. Arunga, who was the learned counsel for the applicant and Mr. Wanyama who was the learned counsel for the respondent.

The applicant did not file any Notice of Appeal within the required fourteen days of the date of that ruling ie 26th February, 2013 pursuant to the provisions of Rule 75 of this Court's Rules. Come 28th May, 2013, she filed this Notice of Motion seeking orders:-

“1. That this court be pleased to extend time within which the applicant can lodge and serve a notice of appeal against the judgment and order of the Hon. J.R. Karanja in Kitale HCCC 175 of 2005.

2. That having extended the time for filing and serving the notice of appeal, this court be pleased to extend time within which the applicant can file and serve a record of appeal.”

The main ground advanced in the application for seeking such orders is that the judgment though delivered on 26th February, 2013 in the presence of the then advocate for the applicant but in the absence of the applicant, was not conveyed to the applicant in time by her advocate despite the applicant's visit to the advocate's chambers several times to know the outcome of the matter till 25th April, 2013 when the applicant visited the court and was informed that the subject judgment had been delivered on 26th February, 2013. The other ground is that the applicant feels she has an arguable appeal as in her view, the respondent who had been given part of the net estate of the deceased on the basis that she was married to the deceased by reputation or by a come we stay arrangement, did not deserve that decision as she was never married to the deceased. She thus blames her advocate for her failure to take action on the matter earlier.

In response, the respondent, in a replying affidavit sworn on 7th June, 2013 maintains that the deceased Samuel Keberu Njuguna was her husband and she buried him at their matrimonial home which is comprised of the subject four acres of land now essentially in dispute, **KIMININI/KAPKOI/WAMUINI “B”/147** which was on the main the only asset left by the deceased. According to her, the issue of lack of communication between the applicant and her former advocate is an afterthought as throughout the case, the applicant had never complained of the same against her former advocate. She further states in that affidavit that the application is part of a scheme to frustrate her and is intended to obstruct her from acquiring the property by transmission as there is no cogent reason to explain the delay. She thus says she stands to suffer prejudice if the application is allowed.

Mr. Githui, the learned counsel for the applicant and Mr. Karani, the learned counsel for the respondent addressed me at length on the application, but I note that on the whole, they mainly highlighted the contents of the applicant's and respondent's affidavits respectively.

I have considered the application, the affidavit in support of it and the replying affidavit. I have also considered the submissions by the two learned counsel, the record and the law. The principle that guides the courts when considering an application such as this brought under Rule 4 of this Court's rules is now well settled and several pronouncements have been made by this Court on the same. In considering such an application, the court exercises unfettered discretionary jurisdiction. Such jurisdiction, though unfettered, must be exercised judiciously and not upon any whims of the court nor capriciously. To do so, the court proceeds upon certain well established guidelines which have through many decisions of this Court been established and are now well known within the legal corridors, though as the powers of the court in the matter is discretionary, the same considerations cannot be exhaustive. As I have stated, such guidelines are in several pronouncements of the court but on the main they are first that the applicant must establish the length of the delay period; second he must explain the reasons for that delay; third, he must show that the intended appeal or the appeal where one has already been filed is arguable, but without going into the merits, and fourth he has to show that the respondent will suffer no prejudice if the application is allowed. As I have stated, the reasons cannot be exhausted as the court is empowered to look at all matters that would ensure justice for that is what is meant by exercise of unfettered discretionary powers. A summary of all these is readily available in the decision of this Court in the case of **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI** – *Civil Application No. NAI 255*

of 1977 where it was held as follows:-

“It is now well settled that the decision whether or not to extend 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.”

Again in the case of **Muchungi vs James Muchungi Karanja & Another** – *Civil App. No. NAI. 356 of 1996*, this Court had the following to say as regards the court's discretion under Rule 4:

“Lastly we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known unfettered and is only subject to it being granted on terms as the court may think just. Within this context this court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

In the matter before me the delay period is the period between 26th February, 2013 when Karanja, J. delivered judgment and 28th May, 2013 when this application was filed. That is a delay period of three months or to be precise ninety (90) days. What is the explanation for that delay? The only explanation is that the judgment was delivered on 26th February, 2013 in the absence of the applicant but in the presence of an advocate who held brief for Ms. Arunga who was the applicant's counsel but the same former counsel did not inform the applicant that judgment had been delivered and so the applicant remained unaware of the existence of such a judgment despite her enquiries at her former counsel's chambers.

This looks a doubtful explanation particularly as there is no good reason given as to why all of a sudden that former counsel turned against the applicant just after the judgment. It also looks doubtful in the face of no supporting affidavit from the same former counsel. However, doubtful as it is, I am prepared to accept it as an explanation for the delay but only so in respect of the period between the date of judgment upto 25th April, 2013 when at long last, the applicant went to the court and she admits that she was told that judgment was delivered on 26th February, 2013. From that day, she knew that judgment had been delivered and time began to run against her. What explanation does she give for the delay between 25th April, 2013 and 28th May, 2013? - about thirty two (32) days delay? None. Mr. Githui, on being prompted by the court, says that was time taken to get another advocate and to peruse the judgment. That exercise, in my considered mind could not have taken more than ten days if the applicant was serious and in any case it has not been set out in the replying affidavit, and so is not for consideration - it is not evidence.

I am far from being satisfied that the entire delay period has been explained by the applicant.

However, that is not the end of the matter. I have read the judgment of the learned Judge and the record before me which is scanty, and I do feel that the issue raised in the matter that was before the learned Judge, namely what rights accrue to a woman who is not formally married to a man but who has lived with him for a long period as man and wife when such a man dies is a matter that requires ventilation by this Court for the benefit not only of the parties in this matter but also of the public in general.

The respondent has raised the issue of prejudice and rightly too, but I note that with the present dispensation, the hearing of such an appeal will not take a long time. Further, I also note that she has been out of the suit land from the year 2005, and apparently has other avenues, now that the current High Court judgment entitles her to half the estate, which she can pursue to ensure that she minimises her suffering.

In conclusion, though not satisfied with the explanation given for delay, yet because I feel an important legal matter is at stake and needs to be revisited by this Court, I do allow the application. The applicant has **TEN (10)** days to file and serve Notice of Appeal and thereafter she has **Thirty (30)** days to file and serve record of Appeal. As a result of what I have stated above the applicant will pay costs of the application to the respondent. Orders accordingly.

Dated and Delivered at ELDORET this 23rd day of May, 2013

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR