



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPLICATION NO. NAI 73 OF 2012 (NYR 4/2012)**

**BETWEEN**

**LEONARD GICHOVI RUKERE .....APPLICANT**

**AND**

**GEORGE MUCHANGI NJERU .....RESPONDENT**

*(An application for extension of time to lodge Notice of Appeal and extension of time to file record of appeal out of time against the judgment of the High Court of Kenya at Embu (W. Karanja. J) dated 30th September 2010*

**in**

**HCSucc.Cause No. 189 of 2002)**

**RULING**

1. Leonard Gichovi Rukere filed a Notice of Motion dated 2<sup>nd</sup> February 2012 seeking two orders under Rule 74 of the Court of Appeal Rules 2010 that:-
  1. **the court does extend time for filing and service of the Notice of Appeal and Record of Appeal within such extended time.**
  2. **the costs of this application be in the cause.**
2. The ground in support of the application is that there has been inevitable delay in typing the proceedings; the applicant's previous advocates failed to disclose to the applicant the correct position of the cause; the delay was caused by the previous advocates which was beyond the control of the applicant and the appeal is arguable.
3. The judgment intended to be appealed against was delivered on 30<sup>th</sup> September 2010. The applicant deposes that his present advocates requested for certified copies of the proceedings on 9<sup>th</sup> November 2010; that on 18<sup>th</sup> February 2011 the certified copies were issued and immediately a certificate of delay was applied for; the certificate of delay was issued on 17<sup>th</sup> October 2011 and this application was filed on 3<sup>rd</sup> February 2012.
4. The background facts are that applicant in a Succession Cause No. 189 of 2002 relating to the Estate of Mukere Kobuthi argued that the respondent was not a dependant and child of the deceased and was not entitled to a share of the estate. The learned judge of the High Court (W. Karanja. J) by judgment dated 30<sup>th</sup> September 2010 held that the respondent was not a stranger to

- the deceased's estate and was entitled to a share of the estate. No notice of appeal was filed against the judgment. This is the subject of the present application seeking leave to file the appeal out of time.
5. At the hearing of this application, learned counsel **Mr. A.P. Kariithi** appeared for the applicant while the respondent was in person.
  6. In support of the application, the applicant deposed that there has been delay in typing the proceedings; the delay was caused by the previous advocates and the appeal is arguable.
  7. The respondent did not file a replying affidavit; but at the hearing, he opposed the application. He stated that the Succession Cause was finalized by the High Court; the estate of the deceased had been distributed and land sub-divided; he had acquired a title deed for his portion of land; he should be left to enjoy the fruits of his judgment as pronounced by the High Court. Since land had been sub-divided and title issued, there was no chance of the appeal succeeding.
  8. I have anxiously considered the application, the affidavit in support and submissions by the counsel for the applicant and statement by the respondent. The discretion I have to exercise under rule 74 is unfettered. Nevertheless, it ought to be guided by consideration of the factors stated in many 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 if the application is granted, and whether the matter raises issues of public importance, amongst others – See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai 332 of 2004** (unreported).
  9. There is also a duty now imposed on the Court under **Sections 3A** and **3B** of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.
  10. The applicant blames his previous advocates for delay in filing the notice of appeal. No evidence has been given in support of this statement. In **Mutiso – Mwangi 1997 KLR 630**, this court stated that:

**“It is now 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 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 application is granted.**

11. The applicant has attached a draft intended memorandum of appeal to the application. I do not think it is advisable to comment on the merits of the appeal as this is the duty of the appellate court.
12. The certificate of delay was issued on 17<sup>th</sup> October 2011. The certificate states that the time taken to prepare and supply the copies of the proceedings and ruling was from 10<sup>th</sup> November 2010 to 18<sup>th</sup> February 2011, being a period of 99 days. The ruling and proceedings were collected by the applicant on 18<sup>th</sup> February 2011. This application was filed on 3<sup>rd</sup> February 2012 almost **One year** after collection of the typed proceedings. This period of delay has not been explained. I have further noted that the Certificate of delay was issued on 18<sup>th</sup> October 2011 and this application was filed on 3<sup>rd</sup> February 2012, this is a further **3 ½ months** of delay. This period of delay has also not been explained. The applicant puts blame on his previous advocate. No evidence to support this allegation was submitted. The applicant was represented by Counsel before the High Court. As was stated by Tunoi JA. (as he then was) in **Njoka Muriu & another – v- Evan Githinji Muriu & another Civil App. No. NAI 356 of 2003**), a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client's interest. In **Njagi – v- Munyiri (1975) EA 179**, this Court observed that a notice of appeal attracts a small fee and does not need to await instruction.
13. I have considered the certificate of delay and taken into account the statement by the respondent. Given that the period of delay in this matter has not been satisfactorily explained, I decline to exercise my discretion to grant leave to file the Notice of Appeal and Record of appeal out of time. The upshot is that the Notice of Motion dated 2<sup>nd</sup> February 2012 is hereby dismissed with costs.

*Dated and delivered at Nyeri this 6<sup>th</sup> day of June, 2013*

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**