



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. NYR. 9 OF 2013

BETWEEN

CHARLES MWANGI KARINGITHIAPPLICANT

AND

EUNICE WANJUGU KARINGITHIRESPONDENT

(An application for extension of time to file and serve record of appeal from the judgment of the High Court of Kenya at Nyeri (Sergon J.) delivered on 18th November 2011

in

HC Succession Cause No. 159 of 2001)

RULING

1. This is an application under Rule 4 of this Court's Rules. It seeks two orders namely that this Court do extend time within which to file and serve the record of appeal and that the costs of this application abide by the outcome of appeal. The practice of this court concerning applications under Rule 4 is for the court to consider the following factors:

- (a) length of delay***
- (b) reasons for the delay***
- (c) the chances of the appeal succeeding if the application is granted and***
- (d) the degree of prejudice to the respondent if the application is granted.***

2. The substance of an application for leave to extend time is to place sufficient material before the single judge and to explain the reasons for delay in filling the notice or record of appeal within time. In the case of ***Paul M. Waweru & 2 others {2003} KLR 361***, it was stated:

This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under Rule 4 of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned Judge explaining the reasons for what was clearly an inordinate delay.

3. The background to the present application is that on 18th November 2011, the learned Judge of the High Court (Sergon J.) delivered a Judgment in which the Summons for Revocation or Annulment of Grant was dismissed with no orders as to costs. Aggrieved by the decision, the applicant filed both the notice of appeal and a request for typed proceedings on 1st December 2011. It is stated that the proceedings were ready for collection on 8th May 2012 when the time for lodging the record of appeal had lapsed.

4. The applicant deposes that he is physically challenged and had been admitted to hospital and this prevented him from lodging the record of appeal within time. In support of this submission, he annexed a medical letter from the Karatina District Hospital dated 29th May 2013 and which letter reads in the relevant part as follows:

“The above named person has been sick since the year 2011. He was further admitted in our hospital on 17th August 2012 and has been on treatment until May 2013”.

5. The applicant has attached a proposed memorandum of appeal in support of the application.

6. The respondent in her replying affidavit opposes the application for extension of time. The essence of the reply is that there is unexplained, unacceptable and inordinate delay in filing the record of appeal. The respondent deposes to an alleged bad faith on the part of the applicant in deliberately and conveniently failing to include in his application sufficient material to enable the court to exercise its discretion.

7. During the hearing of the appeal, the applicant was represented by learned counsel **M. Kiminda** while the respondent was represented by learned counsel **Wahome Gikonyo**.

8. Counsel for the applicant elaborated the grounds in support of the application; he emphasized that the typed proceedings were ready on 8th May 2012 and the 60 day period to file the record of appeal started to run from this date. Based on this counting, it was submitted that the final date for lodging the record of appeal should be construed to be 8th July 2012. It was submitted that despite the record of appeal having been ready from 8th May 2012, the applicant fell ill and was not able to communicate with his lawyer and to lodge the record of appeal. During his sickness, his would be co-appellants withdrew from the appeal. It was submitted that the intended appeal is arguable; the key issue being that the respondent totally concealed the existence of the applicant in the application for grant of letters of administration for the estate of the deceased. Counsel submitted that having perused the replying affidavit filed in opposition to the application, it was not true that insufficient material had been attached to support of the application. Counsel emphasized that the applicant had submitted sufficient material evidenced such as the certified copy of the judgment to be appealed against, the notice of appeal, the intended memorandum of appeal and a medical letter in support of the deposition that the applicant was unwell.

9. Counsel for the respondent submitted that the instant application is seeking the exercise of discretion by a single judge yet insufficient material had been placed before the Court. Counsel cited the case of **Dr. W.G. Machage t/a Pastor Machage Memorial Hospital -v - Charles Mageto t/a D'Akianga Stationers Civil Application No. 28 of 2001** in support of this submission. Other than the judgment, it was submitted that the applicant had not attached the pleadings that were before the High Court, that the replying affidavit filed in response to the application for revocation of the grant of letters of administration had not been attached and it was thus difficult for this court to exercise its discretion to extend time when one cannot tell the nature of application that was before the High Court. Counsel further submitted that if the applicant was admitted in hospital, a hospital discharge report should have been attached to show the date of admission and discharge from hospital. It was further submitted that the applicant had not explained the inordinate delay in filling the present application. There was no certificate of delay to confirm that the typed proceedings were not received on time. In addition, the medical letter from Karatina District Hospital indicated that the applicant was an outpatient as it bears an outpatient reference number being OP No. 91705; that even if one were to use the medical letter from Karatina Hospital, the said letter

indicates that the applicant was admitted on 17th August 2012 and it does not state when he was discharged; that even after discharge from hospital, no explanation has been given for delay in filing the record of appeal. Finally, the respondent submitted that the applicant stated he could not communicate with his lawyer for purposes of filing the record of appeal. If this were true, then a letter seeking instruction or showing inquiry from the lawyer to the applicant or vice versa ought to have been attached. Counsel urged this court to note that the applicant had not obtained leave from the High Court to file an appeal against the ruling dismissing the application for revocation of grant.

10. I have anxiously considered the application, the affidavit in support and submissions made by learned counsels for the applicant and respondent. The judgment of the High Court was delivered on 18th November 2011. The present application was filed on 6th June 2013. The period of delay from the date of judgment to the date of filing this application is over 18 months. No satisfactory explanation has been given for this delay. The medical letter does not state for how long the applicant was admitted in hospital, it only states the applicant was admitted on 17th August 2012; what about the period prior to this admission, why was the record of appeal not lodged prior to admission to hospital? Why did the applicant not collect and file the record of appeal which had been ready by 8th May 2012? No explanation has been given for these questions. The applicant has attached a medical letter and no medical evidence of the alleged illness has been exhibited or reasons given why at this time and age, the advocate for the applicant could not obtain instructions on the matter. (***See John Bundi Magiri – v- Cooperative Bank of Kenya Limited & Another {2010} eKLR***). The applicant deposes that his co-appellants withdrew from the appeal without informing him. No notice of withdrawal by co-appellants has been attached to enable this court to see the date of the alleged withdrawal and upon whom the notice of withdrawal was served.

11. In this application, no certificate of delay has been attached. The applicant is silent as to whether he has paid for and collected the typed proceedings and whether he has prepared the record of appeal. As to the issue of prejudice to the respondent, I was not addressed on it and so I cannot address it informatively. The applicant has attached a draft intended memorandum of appeal. I do not think it is advisable to comment on the merits of the appeal as this is the duty of the appellate court. The applicant has not attached the pleadings before the High Court that led to the judgment sought to be appealed against. In the case of **Joseph Kirweya Kahwai & 5 others -v - Charles Kirweya & 5 others**, it was stated that where there is no pleadings and/or proceedings and only a copy of a draft or intended memorandum of appeal, the court can make no head or tail of what are in issue in the entire suit.

12. I am aware that the discretion I have to exercise under the Rules of this Court 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). 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.

13. I find that no proper reason has been given for failure to file the record of appeal within the prescribed time. I also find that the medical letter submitted in support of the application is not detailed as to enable this court make an informed decision on what was ailing the applicant and if so, whether he was indisposed to the extent that he could not lodge the record of appeal on time. Given that the period of delay in this matter has not been satisfactorily explained and insufficient material placed before me, I decline to exercise my discretion to grant leave to file and serve the record of appeal out of time. The upshot is that the Notice of Motion dated 6th June 2013 is hereby dismissed with costs.

Dated and delivered at Nyeri this 11th day of July, 2013.

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR