



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, J.A.) (IN CHAMBERS)

CIVIL APPLICATION NO. NYR. 10 OF 2013

JACOB KINYUA KIGANO.....APPLICANT

VERSUS

TABITHA NJOKI KIGANO.....1ST RESPONDENT

SOLOMON MACHERE MUNGE.....2ND RESPONDENT

(An application for leave to appeal out of time from the Judgment of the High Court at Embu (Ong'undi, J.) dated 1st March, 2012

in

H.C.C.A. No. 83 of 2009)

R U L I N G

The Notice of Motion dated 5th day of June, 2013, by Jacob Kinyua Kigano (applicant), seeks for extension of time within which to file an appeal against the entire judgment of Ong'udi, J., in **Embu High Court Civil Appeal No. 83 of 2009**, which was delivered on 1st March, 2003. The application is brought under the provisions of **Rule 4** and **42** of the **Court of Appeal Rules**.

The background to this application as narrated in the supporting affidavit sworn by the applicant on 5th June, 2013, is that according to the applicant, he was aggrieved by the judgment of Ong'udi, J., delivered on 1st March, 2012, and he immediately instructed his Advocates by the name of Kamuga Mburu to appeal against the entire decision. However, the said advocates filed a Notice of Appeal dated 13th March, 2012, but failed to file an appeal. The said Advocates nonetheless applied for stay of execution before the High Court and an interim order of stay of execution was granted on 16th March, 2012. It is not clear from the records before me whether that application for stay of execution was heard inter partes or whether the order of stay is still persisting.

Be that as it may, the applicant went on to explain that after instructing the advocates to file the appeal, he kept on calling at the Advocates' offices and was informed they were working on the appeal. Eventually, on 10th May, 2013, when he called the Advocates he was informed the appeal had not been filed. That is when he instructed his present Advocates who moved quickly and filed this application. Mr. Wa Gathoni,

learned counsel for the applicant emphasized the fact that the appeal was not filed due to a mistake of the applicant's counsel which should not be visited on his innocent client. He urged that the delay was not deliberate and although the proceedings were ready from 8th March, 2012, the applicant obtained a copy thereto in March, 2013. Secondly, the appeal is arguable; the issues raised in the proposed appeal are in regard to the distribution of land belonging to the applicant's father out of which the applicant alleges he was given less land than the other beneficiaries. Finally, counsel submitted that the respondent will not suffer any prejudice as the judgment has not yet been executed.

This application was opposed by both respondents; Tabitha Njoki Kigano the 1st respondent and Solomon Machere Munge, 2nd respondent respectively. Mr. King'ori, learned counsel for the 1st respondent contended that there was no explanation for the inordinate delay which was not explained; the applicant had counsel on record but he chose to apply for the proceedings in person; applicant has not produced any evidence to support his contention that he had instructed M/s Kamuga Mburu & Company Advocates to file an appeal on his behalf; on the merit of the appeal, counsel submitted that the deceased died in 1977 and the applicable law in the determination of the estate in the **Law of Succession**. Mr. Mugambi, learned counsel for the 2nd respondent reiterated the submissions made on behalf of the 1st respondent and added that under **Section 50(1)** of the **Law of Succession Act**, no appeal has lies to the Court of Appeal for a decision from the subordinate court. He urged us to find the application incompetent and claims it with costs.

The prayers sought in this application for the exercise of the court's discretion which is generally unfettered. However, where the court has to exercise its discretion, there must be some reasonable basis based on facts or law to warrant the orders of extension of time. In other words, judicial discretion cannot be exercised whimsically or capriciously. The parameters that guide the court are well set out in a long line of authorities. See the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)**:

“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 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.”

The above list is of course not exhaustive as held in the case of **Mongira & Another v Mukaria & Another, 2005 2 KLR 103 at page 106-107**, where the Court again cited **Leo Sila Mutiso** (supra), and went on to state:

“Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general” Rule 4 gives the Judge unfettered discretion is exercised Judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. So factor is relevant to the issue being considered. To limit such issues only to the far set out in paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

With the above principles in mind, I now approach the application before me. The applicant is late in filing the appeal by a year or so. He has explained that the delay was caused by his counsel who kept telling him he was working on the appeal until May this year when he learnt an appeal had not been filed. If this was the only factor, I would have ruled that the applicant choose his own lawyers and, therefore, he should bear the consequences of his advocates' mistakes and should not visit it upon the respondents.

However, I have to look also at the merits of the appeal and that is not to say an arguable appeal will of necessity be successful. These are the grounds raised in the proposed memorandum of appeal:

- “1. The learned Judge erred in law in that she misdirected herself on points of facts in holding that the First House of the deceased had only one child, the appellant herein contrary to the evidence on record.**
- 2. That the learned Judge misdirected herself on points of fact in finding that the 2nd House of the deceased comprised of the widow, one son and 4 daughters contrary to the evidence on record.**
- 3. That the learned Judge erred in law in considering extraneous and irrelevant matters in arriving at her judgment and in the end occasions miscarriage of justice.**
- 4. That the learned Judge erred in law in that she arrived at a judgment that was not supported by the evidence on record.**
- 5. That the learned Judge erred in law in that she ordered that the appellant is entitled to ? of the deceased's estate.**
- 6. That the learned Judge erred in law in that while appreciating the fact that the subordinate court was erroneous in awarding the 2nd respondent land, went ahead to make a finding that the land given to the 2nd respondent was to remain intact.”**

From the submissions of counsel for the respondent, they seem to state that the deceased died in 1977 and therefore, his estate was distributed according to customary law. It is not my province as a single Judge to comment on the merit of the appeal that is for the Three Judge Bench to decide which law was applicable. What I can say at this point is that the grounds of appeal are arguable. There has been an order of stay of execution, therefore, execution has not taken place thus apart from the inconvenience caused by the delay and the costs of this application, I do not see any other prejudice that will be suffered by the respondents.

In view of the foregoing, I am satisfied that this is a proper case in which to grant leave to appeal. The applicant should file the appeal within the next 30 days.

Costs of this application to the respondents in any event.

Dated and delivered at Nyeri this 18th day of September, 2013.

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR