



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 24 OF 2013(UR 8/2013)

BETWEEN

MERIOTH NYAWIRA KARIUKI APPLICANT

AND

FREDRICK GITONGA KARIUKI..... 1ST RESPONDENT

SAMUEL NJUGI KARIUKI..... 2ND RESPONDENT

NAPOLEON MAINA KARIUKI..... 3RD RESPONDENT

(An application for leave to file an appeal out of time from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 11th February, 2011

in

H.C Succession Cause No. 571 of 2009)

RULING

1. Before me is a Notice of Motion application brought under **Rule 4** of the **Court of Appeal Rules** (the Rules) wherein the following orders are sought:-
 - ***The applicant be granted leave to appeal out of time against the whole judgment of the High Court dated 11th February, 2011 in Succession Cause No. 571 of 2009.***
 - ***The firm of Areba & Company Advocates be granted leave to come on record for the applicant.***
 - ***The Memorandum of Appeal annexed thereto be deemed as duly filed.***
 - ***Costs for the application.***
2. The grounds upon which the applicant relies on in support of the application are that firstly, he filed a Notice of Appeal against the said judgment on 17th February, 2011 and applied for certified copies of proceedings from the Registrar of the High Court vide a letter dated 16th February, 2011.

- Upon being issued with the Certificate of Delay by the Registrar of the High Court on 25th February, 2013 he suffered from an acute chronic disease and his mobility was heavily curtailed. Consequently, he was unable to file the intended appeal in time. Secondly, that he instructed his advocate to pursue the appeal immediately his medical condition improved. Thirdly, that the intended appeal has a high probability of success.
3. The genesis of this application is that the applicant and the 2nd respondent were issued with letters of administration over the Estate of Kariuki Kibira as joint administrators in Succession Cause No. 571 of 2009. Subsequently, the 2nd respondent filed an application dated 22nd May, 2010 for confirmation of the said grant. The applicant herein in opposition to the said application filed an affidavit of protest. He objected to the confirmation of the grant on the grounds that the 2nd respondent had failed to disclose all the beneficiaries of the deceased's Estate; and that the mode of distribution that was proposed by the 2nd respondent was inequitable.
 4. The High Court (Serگون, J.) in his judgment dated 11th February, 2011 dismissed the applicant's protest and confirmed the grant as was proposed by the 2nd respondent. Aggrieved with the said decision, the applicant filed a Notice of Appeal on 17th February, 2011 and requested for certified proceedings vide a letter dated 16th February, 2011. Since then the applicant has not lodged the Record of Appeal hence the current application.
 5. Mr. Gichuki, learned counsel for the applicant, submitted that the applicant was dissatisfied with the mode of distribution of the deceased's Estate and was desirous of lodging an appeal to this Court against the same. He stated that the delay in filing the appeal of about nine months was not inordinate and was occasioned by the applicant's illness. He argued that the intended appeal had a high probability of success and that the respondents would not suffer any prejudice if the orders sought were granted. He urged me to allow the application.
 6. Mr. Ng'ang'a, learned counsel for the respondents, in opposition to the application submitted that the applicant had not explained and/or give reasonable grounds for the delay in lodging the appeal. He argued that there was no explanation given for the delay between 29th November, 2012 when the proceedings were ready for collection and 25th February, 2013 when the Certificate of delay was issued. Mr. Ng'ang'a submitted that from the treatment notes attached by the applicant, it appeared like he only attended hospital in the year 2013; and that there is no evidence that he attended hospital in the year 2012. He stated that there was no explanation as to the nature of the chronic illness the applicant claimed to have suffered from. He argued that the intended appeal had no merit and urged us to dismiss the application.
 7. In response to the submission made by Mr. Ng'ang'a. Mr. Gichuki submitted that on the issue of whether the intended appeal was arguable that this Court has expressed itself in several decisions that an arguable appeal is not one that must necessarily succeed, but is one which ought to be argued fully before the Court. In support of the said submission he referred to the decision of K. M'noti, J.A in ***Joseph Wanjohi Njau -vs- Benson Maina Kabau- Civil Application No. 97 of 2012.***
 8. I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. There is no doubt that the discretion that I am being called upon to exercise in this application is under **Rule 4** of the Rules which provides:-

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9. The discretion under **Rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in 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 and interested parties if the application is granted, and whether the matter raises issues of public importance. In ***Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004***, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

“ It is now well 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.”

10. The applicant herein under **Rule 82** of the Rules was required to lodge the appeal with 60 days of filing the Notice of Appeal. It is not in dispute that the applicant herein filed the Notice of Appeal on 17th February, 2011. Therefore, when did the time frame within which the applicant could file the intended appeal lapse? In computation of time within which to lodge an appeal **Rule 82** provides that any period certified by the Registrar as having been required to prepare proceedings should be excluded. In **Mariam Abubakar Ileri & another -vs- National Cereals & Produce Board – Civil Application No. 9 of 2008** this Court held,

“In view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of time resumed on or about 3rd September when copies of proceedings were delivered to the respondent.”

In this instant case, the applicant requested for proceedings vide a letter dated 16th February, 2011. The Deputy Registrar of the High Court vide the Certificate of Delay issued on 25th February, 2013 certified that the period which was required to prepare and supply the proceedings was between 17th February, 2011 to 29th November, 2012. It was also indicated in the Certificate that the proceedings were collected on 29th November, 2012. It is then clear that time within which the applicant was required to file the intended appeal commence running on 29th November, 2012 when the proceedings were collected and lapsed on or about 28th January, 2013. The current application has been brought about 7 months after the lapse of the time within which the intended appeal could be lodged. In my view whether this delay was unreasonable ought to be determined with the explanation given for the delay.

11. The next issue that falls for my consideration is whether the explanation given by the applicant for the delay in lodging the appeal is reasonable and excusable. The applicant in her affidavit deponed that she filed the Notice of Appeal on 17th February, 2011, requested for proceedings vide a letter dated 16th February, 2011 and followed up on the proceedings by a letter dated 13th April, 2012. She deponed that by the time she received the Certificate of delay that was issued on 25th February, 2013 she was suffering from a chronic illness which had begun mid February, 2013. She also deponed that immediately she recovered she instructed his advocates to lodge the appeal. I find that the reason advanced by the applicant as being the reason for the delay in filing the appeal is not excusable. This is because the Certificate of delay clearly shows that the proceedings were collected on 29th November, 2012 while the applicant deponed that she was unable to lodge the appeal in time because she began ailing in mid February, 2013. I note that no explanation was given by the applicant for the delay of filing the appeal between 29th November, 2012 and mid February, 2013 when she alleges to have begun ailing. Further, the applicant did not

disclose when she recovered and gave instruction to her advocate to pursue the intended appeal. The nature of the chronic illness is not indicated. Further, whether the illness incapacitated the applicant was not stated.

12. Having expressed myself as above I find that the current application has no merit and it is accordingly dismissed with costs to the respondents.

Dated and delivered at Nyeri this 3rd day of September, 2013

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR