



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NAI. 50 OF 2010 (NYR. 4/2010)

BETWEEN

PAUL WANJOHI MATHENGE APPLICANT

AND

DUNCAN GICHANE MATHENGE RESPONDENT

(An application to file a Notice of Appeal out of time from the judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 21st April, 2008

in

H.C Succession Cause No. 139 of 1999)

RULING

1. Before me is an application dated 24th February, 2010 brought pursuant to order **Rule 4** of the **Court of Appeal Rules** (the Rules) wherein the following orders were sought:-
 - ***That this Honourable court be pleased to grant the applicant extension of time to lodge the Notice of Appeal out of time in High Court Succession Cause No. 139 of 1999.***
 - ***That the cost of the application be provided for.***
2. The grounds upon which the applicant relies on in support of his application are that firstly, the judgment of the High Court which is the subject of the intended appeal was delivered on 21st April, 2008; and that at that time the applicant was ill and could not lodge the Notice of Appeal in time. Secondly, that the intended appeal has high chances of success because the High Court erroneously ordered parcel no. Gatarakwa/Gatarakwa/Block 111/785 to be transferred to him while in actual fact the said parcel belongs to a third party who was not subject of the succession proceedings; and further the High Court did not grant him anything from his late father's estate thereby disinheriting him. Thirdly, that the respondent would not suffer any prejudice if the orders sought are granted.
3. The genesis of this application is that the parties herein being step brothers were jointly issued with letters of administration over the Estate of their late father, Gichane Mathenge (deceased),

- who died on 8th August, 1992. It was the applicant's case that during the Second World War he was picked to serve in the British army and upon his return in 1945 he purchased parcel no. Thegenge/Karia/645 (suit property) from two brothers namely Kinui Mbai and Wachira Mbai. He maintained that the deceased came to live with him on the suit property. During the land demarcation and consolidation period the applicant's father was registered as the proprietor of the suit land because the applicant at that time had been arrested and detained by the then colonial government. The applicant averred that before the deceased's death, the deceased had gone to the Land Control Board and obtained consent for the subdivision of the suit property into two portions namely, Thegenge/Karia/1693 and Thegenge/Karia/1694. He maintained that the deceased had signed transfer documents in his favour in respect of Thegenge/Karia/1693; and that he had given the other portion of the suit land Thegenge/Karia/1694 to the deceased as a gift.
4. In the said succession cause the suit property formed part of the deceased's Estate. The High Court (Kasango, J.) in her judgment dated 21st April, 2008 confirmed the grant and ordered that the suit property to be transferred to the respondent and Gatarakwa/Gatarakwa/ Block III/ 785 in turn be transferred to the applicant. It is that decision which is the subject of the intended appeal.
 5. Unfortunately, while this current application was still pending before this Court the applicant herein died on 2nd October, 2010; and he was substituted by Georgina Wangari Gichane being the legal representative of the Estate.
 6. Mr. Ombongi, learned counsel for the applicant, submitted that the applicant fell sick when the judgment was delivered on 21st April, 2008 and was undergoing treatment until he died on 2nd October, 2010. He urged me to make an inference that the death of the applicant was due to the illness that incapacitated him. Mr. Ombongi argued that the respondent would not suffer any prejudice if the orders sought were granted. He maintained that the applicant's intended appeal was arguable because his Estate stood to be disinherited of the two parcels of land which belonged to his late father. Mr. Ombongi stated that the failure to attach the draft Notice of Appeal and Memorandum of Appeal should be attributed to the fact that the applicant at that time was acting in person and did not have the benefit of legal representation. He urged this Court to allow the application.
 7. Mr. Kiminda, learned counsel for the respondent in opposition to the said application relied on the replying affidavit sworn by the respondent and filed in this Court on 9th March, 2010. He submitted that in an application such as the one before me that the length and reason for delay in filing the Notice of Appeal ought to be given by the party seeking extension of time. He stated that the judgment subject of the intended appeal was delivered on 21st April, 2008 and this current application for extension of time within which to file the Notice of Appeal was filed on 25th February, 2010; the applicant had not given any reasonable explanation for the delay of almost 1 year 10 months; and that the reason the applicant had attempted to advance for the delay was false.
 8. Mr. Kiminda argued that the judgment was delivered in the presence of the applicant; that the respondent had filed an application dated 28th May, 2008 seeking execution of the said judgment and the applicant in opposition had filed a replying affidavit on 20th June, 2008; and that the applicant had made several appearances in court after delivery of the said judgment. Therefore, Mr. Kiminda submitted that the applicant's conduct clearly indicated that he was not ill as he alleged.
 9. On the issue of whether the intended appeal was arguable, Mr. Kiminda argued that this Court did not have the benefit to consider the same since there was no draft Memorandum of Appeal attached to the application. He finally submitted that the respondent stands to suffer irreparable harm if the leave sought is granted because the suit property has already been transferred in his favour.
 10. In response to the submissions by Mr. Kiminda, Mr. Ombongi referred me to the replying affidavit which had been filed by the applicant in the High Court on 20th June, 2008 and submitted that the applicant had deposed that he had applied for certified copies of proceedings on 25th April, 2008 which had not yet been availed to him. He also argued that court attendance by the applicant did not in any way give proof that he was in good health.
 11. 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.”

12. 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.”

13. The applicant herein under **Rule 75** of the Rules was required to lodge the Notice of Appeal within fourteen days of the date of the judgment delivered on 21st April, 2008. Therefore, the applicant herein was required to file the Notice of Appeal by the 6th May, 2008. The application for extension to file the Notice of Appeal was filed on 24th February, 2010 almost 1 year and 9 months after lapse of the requisite time frame. In my view whether this delay was unreasonable and inordinate ought to be determined with the explanation given for the delay by the applicant.
14. At this juncture I am of the considered view that it is imperative for me to consider whether the explanation advanced by the applicant for the delay in lodging the Notice of Appeal was reasonable and excusable. It was the applicant's contention that the delay in filing the Notice of Appeal was occasioned to his ill health. On the other hand, the respondent contended that the applicant was not ill and that he in fact made several subsequent appearances in court after delivery of the said judgment. With great reluctance I accept that the applicant was ill after the delivery of the said judgment because he died thereafter. I also find that the explanation of the delay in filing the Notice of Appeal tendered by the applicant is reasonable and excusable.
15. On the issue of whether the intended appeal is arguable it is not in dispute that the applicant did not attach the draft Memorandum of Appeal indicating the grounds of appeal in his intended appeal. Therefore, is this omission fatal to the applicant's application? The purpose of attaching the draft Memorandum of Appeal in an applications such as this is to enable the court determine from the grounds advanced whether the intended appeal is arguable. The applicant's counsel, Mr. Ombongi stated that the failure to attach the draft Memorandum of Appeal was due to the fact that at the time the application was filed, the applicant was acting in person and did not have the benefit of legal representation. I am persuaded that the applicant being a lay person may not have been aware of the rules of procedure of this Court. I adopt and apply the following dictum of Lord Atkin in **Evans -vs- Bartam (1973) AC 437, 479:-**

“For my part I am not prepared to accept the view that there is in law any

presumption that anyone, even a Judge, knows all the rules and orders of the Supreme Court.”

I am not convinced that the fact that the applicant failed to attach the draft Memorandum of Appeal necessarily makes this current application incompetent. This is because the applicant through his application and submissions by his advocate on record advanced the intended grounds of appeal which include whether the High Court was correct in granting him Gatarakwa/Gatarakwa/ Block III/ 785 which belongs to a third party and whether the High Court's decision was tantamount to disinheriting the applicant. It is my considered view that the said grounds of appeal are arguable and ought to be heard and determined on merit by this Court. Even if the Memorandum of Appeal were attached this Court would not at this juncture determine the merits of the grounds of appeal. In ***Joseph Wanjohi Njau -vs- Benson Maina Kabau- Civil Application No. 97 of 2012 K. M'noti, J.A*** held,

“The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”

16. I find that the demands of justice will be better met by allowing the application so as to allow the parties to ventilate their respective positions on merit. In ***Richard Nchapi Leiyagu -vs- IEBC & 2 others Civil Appeal No. 18 of 2013***, this Court expressed itself as follows:-

“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

I am of the considered view that the respondent will not suffer any prejudice which cannot be compensated by costs if this current application is allowed.

17. Having expressed myself as above I find that the application herein has merit and I allow the same. Accordingly, the applicant is granted leave to file the Notice of Appeal within seven days from the date of this ruling.

Dated and delivered at Nyeri this 17th day of October 2013.

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR