



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 18 OF 2003

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

JOHN MATIRI MUGAMBI.....1ST APPLICANT

STEPHEN KINYA MBOGORI.....2ND APPLICANT

VERSUS

FRANCIS KATHURIMA.....1ST RESPONDENT

SILAS MURERWA MUGAMBI.....2ND RESPONDENT

JUDITH KARIMI.....3RD RESPONDENT

MARGARET MBUYA MUGAMBI.....4TH RESPONDENT

ROSEMARY GAKII.....5TH RESPONDENT

FAITH KENDI.....6TH RESPONDENT

(An application for leave to file a Notice of Appeal out of time against the order of the High Court of Kenya at Meru (Kasango, J.)

dated 10th August, 2011

in

H.C. Succ. Cause No. 192 of 2006)

RULING

This is an application under **Rule 4** of the **Court of Appeal Rules**, seeking for orders that the applicants be given an extension of time within which to file a Notice of Appeal against the judgment of

the High Court, Kasango, J. of 10th August, 2011. The application is supported by the affidavit of Stephen Kinyua Mbogori, the 2nd applicant which has attempted to give reasons that contributed to the delay in filing the appeal as follows:

3. ***“That we sought leave of the court to lodge an Appeal and due to pressure of work, the same was not granted.***

4. ***That we were unable to lodge the Record of Appeal in time because we were not supplied with proceedings in time despite the fact that we applied and paid for them in time (Annexed is a letter for request marked SK '2' payment receipt marked SK '3').”***

The applicants were represented by Mr. Kiara, learned counsel, who argued the Notice of Motion and underscored the grounds stated in the affidavit. He emphasized that the dispute involves the distribution of land which is an emotive issue and parties should be allowed to ventilate their dissatisfaction through an appeal. This application was not opposed, the respondents though served did not appear at the hearing nor did they file a reply thereto.

This Court's exercise of discretion under **Rule 4** although unfettered must be exercised judiciously not on whims, sympathy or caprice. In ***Leo Sila Mutiso & Another v Rose Hellen Wangari Mwangi, Civil Application No. Nai. 251 of 1997 (UR)***, this Court said:

“It is now well settled that the decision whether or not to extend 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 delay, thirdly (possibility), the manner of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the applicant if the application is granted.”

The discretion of the court is exercised in furtherance of justice and in considering an application under **Rule 4, Court of Appeal Rules** the court has to take into account the wider interests of justice in its various forms, one of which is that whenever possible a case should be determined on its merits. For instance, in ***Gichuhi Kimita v. Samuel Ngunu Kimotho and Another, Civil Application No. Nai. 243 of 95, (UR)***, Omolo, J.A., said:

“I am aware that litigation ought to come to an end and that it is unfair that one case should hang over the heads of parties indefinitely, but that consideration must be weighed against the wider interest of justice namely that where possible cases should be brought to a close after a hearing on the merit.”

Applying the above principles in this matter, the applicants contend that the court proceedings were not availed and secondly, they applied for leave from the High Court but ***“due to pressure of work, the same was not granted”***. The dilemma I face in this matter is the applicants and their counsel have not explained what ***“pressure of work”*** they were facing that impeded their ability to apply for leave in the High Court as they state. Also, it is not clear whether the said leave to file the appeal was granted. ***(I am assuming it is leave pursuant to the provisions of section 50 of the Law of Succession Act)***. I am also not sure that ***“pressure of work”*** so described by the applicants constitutes a reasonable and justifiable ground for the delay that can warrant the exercise of a Judge's discretion in favour of the extension of time.

Secondly, the judgment sought to be appealed against was delivered on 10th August, 2011, there is an unexplained delay of almost two years. The applicants are also silent on whether a certificate of delay was issued which could have assisted me compute time. Although it is stated in the supporting affidavit that they have annexed a copy of the Court's payment receipt, none was attached. As matters stand before me, there is no evidence to demonstrate that the applicants have obtained the proceedings or they are in a position to file the appeal assuming they had been able to explain the delay. In my view they have failed to explain the delay of almost two years, and they have not also demonstrated their readiness to file the appeal.

Regarding the merit of the appeal, this is clearly a province of the three Judges, but on the face of

the matter, the 2nd applicant claims an interest on the deceased's estate as a purchaser of a portion of the deceased's property. From the evidence on record, he purchased a portion from the 1st applicant; nothing stops him from recovering his money from the 1st applicant. Alternatively if he claims to have paid the purchase price to the deceased, there are Court appointed administrators of the estate of the deceased, whom he can pursue for any liabilities accruing from the deceased.

For the aforesaid reasons this Notice of Motion lacks merit, I dismiss it with no orders as to costs.

Dated and delivered at Nyeri this 10th day of October, 2013.

M.K. KOOME

.....

<p justify;"=""> ***JUDGE OF APPEAL***

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

DEPUTY REGISTRAR