



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 16 OF 2013

JOSEPHINE WAIRIMU GITHINJI.....APPLICANT

VERSUS

LUCY WANJIRU MURIMI.....RESPONDENT

(An application for leave to appeal out of time against the ruling/order of the High Court of Kenya at Nyeri

(Khamoni, J.) dated 30th July, 2004

in

H.C.C.A. No. 25 of 2004)

RULING

The Notice of Motion before me although erroneously indicating as having been brought under **Rules 41**, by its nature it falls under the provisions of **Rule 4** of the **Court of Appeal Rules**. The applicant, Josephine Wairimu Githinji, is seeking for extension of time to file and serve the record of appeal out of time in regard to **High Court Civil Appeal No. 25 of 2004** at Nyeri, a ruling delivered by Khamoni, J. on 30th July, 2004.

In that ruling, the Judge dismissed the applicant's Chamber Summons dated 6th April, 2004, with costs. In that application, the applicant was seeking for two principal orders:

- v. Stay of execution of the orders by the Principal Magistrate pending the hearing and final determination of the appeal.*
- v. Maintenance of the status quo as at 30th September, 2003, pending the hearing and determination of this appeal.*

The learned Judge dismissed that application with costs. As the orders sought clearly demonstrate, the application before Khamoni J. was an interlocutory application pending the hearing and determination of an appeal. There is, nonetheless, no mention of what became of the appeal before the High Court if at all anything turned on it.

Be that as it may, the applicant is now before me with an application seeking for extension of time to file an appeal against the ruling of 30th July, 2004. The fact that she is desirous of pursuing an appeal against a ruling is an indicator that the appeal before the High Court was never filed or if filed was never prosecuted. The applicant has given a plethora of reasons in her supporting affidavit why she was late to file the appeal that was due to be filed sometimes in or about October of 2004. She contends that she instructed an advocate by the name **Gacheche wa Miano** and paid him Ksh. 15,000/= towards the filing of the appeal before the Court of Appeal on 9th August, 2004. A notice of appeal was filed on 11th August, 2004, but the record of appeal was never filed.

The advocate misled the applicant that he filed an appeal and it was only recently she came to learn that the appeal was never filed; she tried to trace the said advocate without success. The applicant who is acting in person now seeks to extend the time to file the record of appeal out of time and argues that the mistakes of his advocates should not be visited upon her.

Mr. Magee Wa Magee, learned counsel for the respondent opposed this application. He based his arguments on the matters deposed to by the respondent, Lucy Wanjiru Murimi in her replying affidavit that was sworn on 18th September, 2013. He submitted that the delay of a period of over 9 years is inordinate and it has not been explained by the applicant. Moreover, there is no arguable appeal as the Succession Cause in respect of the estate of Cyrus Githinji Karuri was finalized with the applicant being given the letters of administration. Counsel also raised the following reasons that he contended militates against the granting of the orders as stated in a pertinent part of the replying affidavit:-

- a) That the notice of appeal lodged indicates that Gacheche wa Miano Advocates appears for the applicant and as such the application is incompetent for having been drawn and filed by the applicant in person.***
- b) That there is no right of appeal to this Court under provision of Section 50 of the Law of Succession Act, Cap 160 of the Laws of Kenya.***
- c. That the applicant did not seek leave to appeal at the Superior Court before filing a notice of appeal.***
- d) That the estate of the deceased herein has been duly confirmed by the Subordinate Court and, therefore, no pending matters in the Succession Cause.***

Before a single Judge can exercise the unfettered discretion in favour of the applicant, under Rule 4 of this Court's Rules, the applicant has a duty to demonstrate the following:-

- a) There is merit in the intended appeal.***
- b) Extending the time to file the record of appeal will not cause undue prejudice to the respondent.***
- c) The delay is not inordinate.***

(See Wasike v Swala 1984 KLR 591).

The applicant intends to appeal against the ruling of Khamoni, J. dated 16th July, 2004; that is after a period of slightly over 9 years. The applicant contends that she paid an Advocate the Court filing fees in August, 2004, to file an appeal but the Advocate disappeared. This is not a satisfactory explanation for such an inordinate delay even if the advocate disappeared from his offices; the applicant being the party interested in the matter, had a duty or responsibility to visit the court registry to enquire whether an appeal was filed. The applicant was indolent, and not deserving of this court's exercise of its discretion. Although the discretion under **Rule 4** is unfettered, it should be exercised judiciously not on whim, sympathy or caprice.

The guidelines for the exercise of this discretion are now clearly stated in cases of:- MUTISO v MWANGI, Civil Application No. Nai. 255 of 1997 (UR) and Mwangi v Kenya Airways Ltd. [2003] KLR 486:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of 'sufficient reason' was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider as long as they are relevant. The period of delay, the reason for the delay, (possibly), the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay or public administration, the importance of compliance with time limits, the resources of the parties whether the matter raises issues of public importance are all relevant but not exhaustive factors.”

On the second limb whether the intended appeal is not frivolous, I have pointed out this was an interlocutory application seeking for stay of execution of the orders of Principal Magistrate pending the hearing and final determination of the appeal. The fate of that appeal is not known, secondly, the matter before the Principal Magistrate was finalized. The applicant was given the letters of administration to administer the estate of her late husband. If some properties that she alleges belonged to the deceased were taken out of the schedule of his assets, as the administrator of the estate, she still retains all the powers to file a suit for the recovery of what she alleges was taken out of the schedule.

For these reasons, granting leave in the circumstances of this matter serves no purposes at all. The applicant failed to offer an explanation for the inordinate delay of over 9 years; she also failed to satisfy the court that the intended appeal is not frivolous.

In the circumstances I find no merit in this application and I have no hesitation to order it dismissed with costs to the respondent.

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

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR