



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 14 OF 2013

BETWEEN

JULIUS KAMAU KITHAKA APPLICANT

AND

WARUGURU KITHAKA NYAGA 1ST RESPONDENT (DECEASED)

ROSEMARY NJOKI NGARI 2ND RESPONDENT

ROSEMARY NJOKI NGARI 1ST INTERESTED PARTY

GRACE MUNENE 2ND INTERESTED PARTY

(An application for extension of time to file and serve Notice of Appeal and Memorandum of Appeal out of time from the judgment of the High Court of Kenya at Embu (Ong'udi, J.) dated 16th May, 2013

in

H.C MISC. APPLICATION NO. 82 OF 2007)

RULING

1. Before me is a Notice of Motion application dated 8th July, 2013 brought pursuant to **Rule 4** of the **Court of Appeal Rules** (the Rules). The applicant seeks the following orders:-

1. ***That this Court do grant an extension of time to the applicant to file and serve the Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time.***

2. ***Costs for the application.***

2. The grounds upon which he relies on in support of his application are that firstly, he was not present when the ruling dated 16th May, 2013 was delivered and that his then advocate on record informed him of the same much later after the period within which to lodge an appeal to this Court had lapsed. Secondly, that the intended appeal has a high chance of success; and thirdly, that he

- has filed this current application without unreasonable delay.
3. The genesis of this application is that letters of administration over the Estate of Kithaka Nyaga (deceased) were issued to the 1st respondent in the Senior Resident Magistrate's Court at Kerugoya in Succession Cause No. 282 of 1994. The letters of administration were confirmed on 12th January, 1996 and subsequently, the Estate was distributed.
 4. Thereafter, on 16th May, 1996 the applicant herein filed an application in the High Court seeking *inter alia* revocation of the grant which was issued in the Senior Resident Magistrate's Court. Vide an interlocutory application, the High Court on 18th March, 1997 issued prohibitory orders over L.R. No. Kabare/Nyagati/2969 and L.R No. Kabare/Nyagati/2970 (suit properties) which formed part of the Estate. The 1st respondent, the sole administratrix of the deceased's Estate, died on 11th July, 2006.
 5. Subsequently, the interested parties filed an application dated 15th October, 2009 seeking *inter alia* dismissal of the applicant's application for revocation of the grant and discharge of the prohibitory orders issued and registered against the suit properties. The interested parties claimed that they had bought the suit properties on 13th August, 1996 from Gilbert Muchira Kithaka and Paul Ndambiri Kithaka who were beneficiaries to the deceased's Estate. They claimed that by the time they had purchased the suit properties the deceased's Estate had been distributed and the said beneficiaries had clean titles over the same; and therefore, the interested parties title over the suit properties was protected under **Section 93** of the **Law of Succession Act**, Chapter 160, Laws of Kenya. The interested parties also argued that the 1st respondent who had since died had already distributed the deceased's Estate by the time the applicant herein had filed the application for revocation; and therefore, the applicant's application was not meritorious.
 6. The High Court (Ong'udi, J.) in a ruling dated 16th May, 2013 allowed the interested parties' application. In dismissing the applicant's application for revocation of grant and lifting the prohibitory orders, the learned Judge held *inter alia* that since the application for grant had been filed it had been over 17 years and the same had still not been prosecuted by the applicant; and that by the time the applicant had filed the application for revocation, the deceased's Estate had been distributed and that there was no evidence that there was any part of the Estate that had not been administered. Therefore, even if the grant was to be revoked there would be nothing in the deceased's Estate to distribute. She also held that the interested parties purchased the suit properties from the beneficiaries after distribution of the Estate and are therefore protected by **Section 93** of the **Law of Succession Act**; and that the applicant had slept on his rights by bringing the application for revocation late in the day. It is that decision that the applicant intends to appeal against.
 7. Mr. Maguta Kimemia, learned counsel for the applicant, submitted that when the ruling dated 16th May, 2013 was read the applicant's former advocate did not inform him of the same until July, 2013. He reiterated the grounds set out in the application and supporting affidavit. He argued that intended appeal had a high probability of success. He urged us to allow the appeal.
 8. Mr. Maina appeared for the interested parties and also held brief for the 1st respondent. He submitted that the 1st respondent who is deceased had not been substituted and therefore, the applicant's application was incompetent for including the deceased as one of the parties. He argued that under **Section 50** of the **Law of Succession Act**, the applicant had no automatic right to appeal against the decision of the High Court to the Court of Appeal without leave of the High Court. Mr. Maina submitted that under **Rule 39(b)** of the Rules the applicant was required to seek leave to appeal within 14 days of the delivery of the ruling on 16th May, 2013. He submitted that the applicant had not sought leave to appeal from the High Court; and therefore if this Court granted him leave to appeal it would be acting in vain.
 9. Mr. Maina submitted that the applicant was not being candid because he did not disclose when he was informed of delivery of the said ruling; and according to him the only inference that can be drawn from the applicant's conduct is that he knew about the ruling and had no reasonable ground to convince this Court to extend time. He argued that this Court's discretion should not be exercised in favour of the applicant who had failed to give reasons for the delay in filing the Notice of Appeal.
 10. Mr. Kiragu who held brief for Mr. Magee, learned counsel for the 2nd respondent in opposing the

appeal argued that the applicant had not sought leave to change his advocate after pronouncement of the ruling the High Court. Therefore, the applicant's advocate was not properly on record and the application ought to be dismissed.

11. In response to the submissions made by counsel for the interested parties and the 2nd respondent, Mr. Kimemia submitted that the applicant should not be shut out on technicalities in case of any deficiencies in the application. He argued that the first prayer in the application incorporated the prayer for leave to appeal. He also submitted that the applicant had discretion to appoint a new advocate for purposes of the appeal.
12. I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. I am of the view that it is crucial to consider at this juncture whether the applicant was required to have obtained leave to appeal from the High Court under **Section 50** of the **Law of Succession Act**; and if so what is the consequence of the failure to obtain such leave. **Section 50** of the **Law of Succession Act** provides:-

“50 (1) An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of the deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

The intended appeal herein is in respect of the decision of the High Court dismissing the applicant's application for revocation of grant. In my view what was before the High Court was not an appeal from the decision of the magistrate's court but an application for revocation of grant which clearly does not fall within the provisions of **Section 50** of the **Law of Succession Act**. There is no provision in the **Law of Succession Act** which required the applicant herein to obtain leave to appeal against the decision of the High Court dismissing the application for revocation. It is trite law that where any proceedings are governed by a special Act of Parliament, like in this case, the **Law of Succession Act**, the provisions of such an Act must be strictly construed and applied. See ***Josephine Wambui Wanyoike -vs- Margaret Wanjira Kamau & another – Civil Appeal No. 279 of 2003*** & ***H. Adongo & Others -vs- Savings and Loan Society (Kenya) Ltd.- Civil Appeal No, 22 of 1987***. Therefore, what is in the **Law of Succession Act** is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the legislator. I find that the applicant in this case was not required to seek leave to appeal from the High Court.

13. 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.”

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.”

14. It is not in dispute that the ruling subject of the intended appeal was delivered on 16th May, 2013. The current application seeking extension of time was filed before this Court on 8th July, 2013, 1 ½ months after delivery of the judgment. In my view whether this delay was unreasonable ought to be determined with the explanation given for the delay.
15. The next issue that falls for my consideration is whether the reason given by the applicant for the delay in filing the Notice of Appeal is reasonable and excusable. The applicant contended that the failure to file the Notice of Appeal in time was due to the fact that his then advocate on record only informed him of the delivery after the prescribed period for filing an appeal had lapsed. On one hand, the Mr. Maina contended that the applicant was not candid because he did not indicate the date when he was informed of the said ruling in his affidavit. On the other hand, Mr. Kimemia submitted that the applicant's former advocate informed him of the said ruling in July, 2013. Based on the time frame within which the applicant filed the current application I am inclined to believe that the delay was occasioned by the applicant's former advocate. I am of the considered view that the delay in filing the Notice of appeal was occasioned by the indolence and mistake of the applicant's former counsel; and that the said mistake should not be visited upon the applicant. See Lee .G. Muthoga -vs- Habib Zurich Finance (K) Ltd. & Another- Civil Application No. Nai. 236 of 2009. Consequently, I find that the reason given by the applicant for the delay in filing the Notice of Appeal excusable. Therefore, the delay of 1 ½ months in my view was not inordinate based on the explanation given.
16. I have also perused the draft Notice of Appeal and Memorandum of Appeal that had been attached to this application and I am of the considered view that the same raises an arguable appeal. I also find that the respondents and the interested parties will not suffer any prejudice if the application herein is allowed.
17. Mr. Kiragu submitted that the applicant's counsel, Mr. Kimemia, was not properly before the Court because he had not been granted leave to come on record as required after delivery of judgment on the succession cause. I have perused the **Law of Succession Act** and I find no provision requiring leave to be granted to an advocate who wishes to come on record after delivery of judgment. This requirement is provided under Order 9 rule 9 of the **Civil Procedure Act**, Chapter 21, Laws of Kenya. I am of the considered view that the **Law of Succession Act** does not require an advocate to seek leave to come on record after judgment is delivered; and that the provisions of the **Civil Procedure Act** are not applicable in this case unless where the **Law of Succession** expressly states. See Josephine Wambui Wanyoike -vs- Margaret Wanjira Kamau & another & H. Adongo & Others -vs- Savings and Loan Society (Kenya) Ltd. (supra). I find that the applicant's counsel is properly before me.
18. Lastly, Mr. Maina submitted that the application was incompetent for including the 1st respondent who was deceased and had not been substituted. I find that the 1st Respondent's Estate would not suffer any prejudice if the orders sought are granted; and further more the 1st respondent can still be substituted in the substantive appeal.
19. 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 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