



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**CIVIL APPLICATION 291 OF 2009**

**BETWEEN**

**MUGO MUMENYA NJOGU .....APPLICANT**

**AND**

**ELIZABETH WAMUYU KABURU )  
ESTHER WAMAITHA MUTHUIRU )  
MARY WANJIRU GITHHINJI ).....RESPONDENTS  
PETER MAINA KINYUA )**

***(An appeal from a judgment of the High Court of Kenya at Nyeri  
(Makhandia, J.) dated 7<sup>th</sup> April, 2008***

**in**

**H.C.C.SUCC. NO. 113 OF 1994)**

**\*\*\*\*\***

**RULING**

This is an application dated 14<sup>th</sup> July, 2009, brought under **rule 4** of this Court's Rules. It seeks extension of time within which to file and serve a Notice of Appeal. The grounds relied upon by the applicant are set out in the body of the application and the affidavit of the applicant sworn on 14<sup>th</sup> July, 2009 and filed in support of the application.

The background facts are that a summons for confirmation of grant in which the applicant had an interest came up for hearing in the superior court on 18<sup>th</sup> February, 2008 but the applicants advocate did not attend court because he had left the country for the U.S in respect of an undisclosed mission and had overlooked to ask a qualified advocate to hold his brief. The applicants advocate had sent his court clerk apparently with instructions to seek an adjournment. As expected the superior court's reaction was furious and fast. The adjournment was refused and the court immediately dismissed the application for revocation of the grant and simultaneously proceeded to hear the affidavit of protest and what followed was a judgment dated 7<sup>th</sup> April, 2009 which confirmed the grant as per the affidavit of protest.

After this, the applicant claims that he was advised by the advocate on record to make an application for the review of the judgment on the ground that the judgment had an error. The application for review was dismissed on 9<sup>th</sup> October, 2009. The applicant's reaction to this development was to file an appeal against the dismissal of the application for review but when the respondent applied to execute the earlier judgment of the court dated 7<sup>th</sup> April, 2008 the applicant abandoned the idea of appealing against the ruling of 9<sup>th</sup> October, 2008. To enable the applicant to appeal he applied for a copy of the judgment of 7<sup>th</sup> April, 2008 but was unable to do so because yet a further application to annul the grant had in the meantime been filed by another applicant and this made it difficult for the court file to be accessed for the purposes of the court availing the judgment and the proceedings to the applicant.

At the hearing of the application the applicant was represented by Ms. Menya advocate and the respondent was represented by Ms. Mwai.

In her submissions learned counsel Ms. Menya conceded that the judgment intended to be challenged in the appeal was given slightly over two years ago but added that the period of delay should be viewed from the point of view that what is at stake is the applicant being disinherited in the distribution of his father's estate.

Ms. Mwai learned counsel for the respondents opposed the application by relying on the third respondent's affidavit sworn on 5<sup>th</sup> October, 2009. She urged the court to find that the delay was unexplained and also inordinate. In this regard she emphasized that from the date of the decision being challenged that is 7<sup>th</sup> April, 2008 to the date when the application seeking extension of time that is 16<sup>th</sup> April, 2009 there was a gap of 17 months and this delay was not explained at all by the applicant both in the affidavit in support and in the submissions of the applicants counsel. Again from the date of the dismissal of the application for review on 9<sup>th</sup> October, 2008 to the date of the filing of the application to extend time on 16<sup>th</sup> July, 2009 there is a period of 11 months which the applicant has been unable to explain. She further submitted that a party who elects to pursue a number of remedies open to him would not be justified in pursuing all of them consecutively and as a result prevent successful parties from enjoying the fruits of that judgment. She concluded her submissions by observing that the applicant had not touched on the reasons why he thought he had chances of success in the intended appeal and that the court should take into account that the mission of the applicant who is a brother to the successful respondents was an endeavour to have her sister respondents disinherited.

The factors which a successful applicant must satisfy before this Court's discretion is exercised constitute an old hat and for this reason it is not necessary for me to explain each one of them. Instead a brief outline of the considerations would suffice. As stated in the case of **Wasike v. Swala [1984] KLR 591**, the considerations are delay, length of the delay, reasons for the delay, chances of the appeal and the likely prejudice to the respondent. However it is now acknowledged that the list of the considerations is not exhaustive. In addition, those considerations, in my view, must now be seen in the context of the overriding objective and not an end in themselves. They should be seen as pokes in the wheel of the overriding objective. Thus, I have to pause and ask how do the factors assist me in furthering the overriding objective and its principal aims or whether the application hinders the realization of the objective.

Taking a broad view of the situation with the above considerations in view, I fully agree with the submissions of counsel for the respondents that the two sets of delays extending to separate periods of 17 months and 11 months respectively have not been explained or satisfactorily explained. For example no single letter has been produced to demonstrate that the superior court file was unavailable or missing and therefore precipitating the inaction on the part of the applicant and his counsel. Furthermore the applicant has not shown that he has a chance of success. The application is completely silent on this. The allegation that his first advocate misadvised him does not in my view entitle him to indefinitely delay the respondent from enjoying the fruits of a final judgment on inheritance. With the overriding objective in place, it is no longer acceptable in my view for the court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the Court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective.

In my view the analysis of the factors which the Court has been using to manage the applications under **rule 4** have in my view uniquely tallied or matched with the overriding objective under **section 3A (1) and (2)** of the Appellate Jurisdiction Act. Thus the unexplained delay in this particular case does not in my view assist in the just, expeditious, proportionate and affordable resolution of this appeal. These are considerations which constitute a mandatory statutory duty on the part of the Court. Indeed delay and cost in my view constitute critical factors in succession and inheritance disputes such as the one forming the subject matter of this application. I find the delay herein inordinate and contrary to the O<sub>2</sub> principle. In the result the application is dismissed with costs to the respondents.

It is so ordered.

***Dated and delivered at Nyeri this 24<sup>th</sup> June, 2010.***

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**