



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 311 of 2007 (UR 211/2007)

**NJAU NYANJUI THITU JOEL MUNGAI
NYANJUI.....APPLICANTS**

AND

LAWRENCE KIMANI NYANJUI

STEPHEN NENE NYANJUI

BENSON MUNGAI NYANJUI

NOAH KIARIE NYANJUI

PHILISCA WAMBUI NYANJUI

MARGARET THITU NYANJUI

WILLIAM WAIHOBO NYANJUI

EDITH WANJIKU MUKONO.....RESPONDENTS

(Application for extension of time to file the Notice of Appeal, Record of Appeal and Memorandum of Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Koome, J.) dated 30th July 2004 in

H.C.Suc. C. No. 48 of 1993

RULING OF THE COURT

Nyanjui Thitu Kiarie passed on in 1990 aged 80 years. He was survived by 10 children. Upon his death, letters of administration intestate in respect to his estate were issued on 31st December 1993 to Irene Njeri Nyanjui who described herself as the deceased's widow. She too passed on on 9th July 1998 and the applicants herein applied by summons to be and were subsequently substituted in place of the deceased Irene Njeri Nyanjui. They were then issued with the grant of letters of administration on 18th June 2003. This grant appears to have been revoked by consent and substituted by another grant issued on 15th October 2003 to four administrators namely Joel Mungai, Njau Nyanjui, Lawrence Kimani Nyanjui and Margaret Thitu

Nyanjui. Two of the four administrators, the 1st and 6th respondents herein, then filed an application by summons seeking the confirmation of that grant. Out of the ten beneficiaries indicated on the grant eight filed a consent supporting the application for confirmation and the proposed mode of distribution of the estate. But the applicant's herein filed a protest to it. They were protesting against their exclusion from the distribution of the deceased's Sigona property as they wanted to have an equal share in it together with other eight beneficiaries. This is the subject of the superior court's judgment in **Nairobi Succession Cause No. 48 of 1993** delivered on 30th July 2004 by the superior court (Martha Koome, J) in which she dismissed the protest and confirmed the grant as filed, save that she directed that the applicants be given a sum of Kshs.40,000/= each from the net estate in addition to the properties allocated to them.

The applicants were not satisfied with this decision and they lodged **Civil Appeal No. 291 of 2004** to this court which was struck out on 26th April 2006, because the appellants/applicants who were acting in person did not include the certified decree in the record of appeal. They decided to start the appeal process afresh and applied for extension of time to file it in **Civil Application No. Nai 132 of 2006**. The application was placed before a single Judge of this Court (O'Kubasu, JA) who heard submissions thereon and in his ruling delivered on 2nd day of February 2007 granted the applicants 21 days within which to file the intended appeal. As a result of that ruling, the appellants/applicants filed Civil Appeal Number 21 of 2007 to this Court which was likewise struck out on 13th December 2007 for the same reason which caused the striking out of the earlier appeal. The applicants were still eager to pursue their appeal and filed an application **No. Nai. 311 of 2007** for extension of time for filing the intended appeal. The file was placed before another single Judge of this Court (Bosire, J.A.) who heard submissions thereon and delivered his ruling on 24th January 2008 in which he stated:-

“It cannot be gainsaid that an applicant whose appeal has been struck out may move the court under rule 4 of the Court of Appeal Rules for an order extending the time within which to restart the appeal process to this Court. The court in considering such an application is guided by the principles set out in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Appliaiton Number Nai. 251 of 1997*. The Court exercises judicial discretion and must, among other things, look at the conduct of the parties, particularly the applicant before and after the application.

It is common ground that the applicants' first appeal against the decision of the superior court, aforesaid, was struck out because of their failure to include in the record of appeal a certified copy of the decree. In the next appeal they committed the same mistake. Clearly there was gross carelessness which does not entitle the applicants to further indulgence. Unlike their first attempt when they were not represented, they had an advocate, who knew very well the reason why the earlier appeal had been struck out. I agree with Mr. Macharia for the respondents, that where as here it is shown that the applicants' lack seriousness in pursuing their appeal the court should deny them indulgence and bring litigation to an end.

In the circumstances, I decline to exercise my discretion in favour of the applicants and dismiss the motion dated 12th December 2007 with costs to the respondents to be paid by the applicants.”

This is the ruling which is the subject of the present reference before us. The application was by notice of motion dated 14th December 2007. It was based on the ground that the applicants' **Civil Appeal No. 21 of 2007** was struck out on 13th December 2007 by this court

“for failure to include the certified copy of the decree in the record of appeal.....”

The application was also supported by an affidavit deposed to by Njau Nyanjui Thitu, the first applicant, in which he stated, amongst others that the failure to include the certified copy of

the decree,

“was a mistake, inadvertent and oversight which was not deliberate,”

because copies of the record in the possession of the applicants and served upon the respondents' advocates included the certified decree save for the copies filed in court; and that the applicants were surprised at the hearing of the appeal, when the court confirmed to the applicants' advocate that the court copies did not contain certified copies of the decree. That the appeal arises from a dispute over the mode of the distribution of the estate of the deceased by the learned Judge and her failure to distribute all assets of the estate fairly and equally. The supporting affidavit further stated that the application was made without undue delay and no prejudice would be caused to the respondents who had thrown the applicants out of the Sigona plot where they used to stay with their families.

In a replying affidavit deposed to by the 1st respondent, he stated that the applicants' application had been filed in bad faith and was an abuse of the court process. That the applicants gave no reason why they failed to include a copy of the decree in the record of appeal and that they had never lived on the Sigona plot and hence they could not have been evicted therefrom nor had they demonstrated that they have an arguable appeal. The application was heard before this court on 25th May 2009 wherein Mr. Nyende learned counsel for the applicants complained that the single Judge misdirected himself by making a decision on matters he should not have done and failed to take into account all relevant points and/or failed to consider the principles on which the extension of time is based. According to the counsel the respondents had consented that the applicants could file the appeal if they agreed to pay costs. He stated that the appeal is arguable and not frivolous as evidenced by the grounds set out in the memorandum of appeal. According to him, he had committed only one mistake and that such mistake should not have been visited on the applicants.

Mr. Macharia, learned counsel for the respondents opposed the reference and said the learned Judge was alive to the principles upon which the extension of time is based and that failure to consider that the application for extension of time was filed timeously did not fault the Judge's ruling. That the applicant's were not candid when they falsely alleged that they had been thrown out of one of the deceased's plots when in fact they had never lived there. According to him the respondents did not consent to the applicant filing the appeal and what they said was that if the court exercised its discretion in their favour then they should be ordered to pay costs to them. That the single Judge exercised his discretion properly because his ruling was based on the material before him.

Rule 4 of the Court Rules under which the application before the single Judge was made is framed in the following terms:-

“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 the doing of any act authorized or required by these Rules, whether before or after the 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 rule gives the court wide and/or unfettered discretion to or not to extend time since the stricture of “sufficient reasons” was removed by amendment in 1985. As it is the discretion, is wide and unfettered and there is no limit also to the number of factors the Court should consider before either granting or not granting extension of time. In **Sila Leo Mutiso vs. R. H. Wangari Mwangi, Civil Application No. Nai 255 of 1997 (UR)** the Court recognized four factors, namely the period of delay, the reason for it, (possibly) the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. This is not an exhaustive list of factors to be considered in such an application. Other factors can still be cited, including the importance of compliance with time limits, the conduct

and resources of the parties particularly the applicants or whether the matter raises issues of public importance. These are all important but not exhaustive and so long as the court is exercising its discretion judicially; it would be perfectly entitled to consider any other factors outside those listed in **Leo Sila Mutiso's** case (*supra*); so long as they are relevant to the issue being considered, **Mwangi v. Kenya Airways Limited [2003] KLR 485**. Any attempt to limit the possible grounds for or not granting extension of time to those few listed **Leo Sila Mutiso's case** (*supra*) would amount to fettering the discretion allowed under **Rule 4**.

The case out of which this appeal is intended relates to succession process. It started in 1993 and involves many beneficiaries who would have wished to benefit from the process. For the last 16 years they have been waiting and spending their resources to come to court. And whenever they have done so they have not had this matter conclusively determined because the intending appellants have failed to file proper documents in court. In the first appeal where the applicants' were unrepresented and where they failed to include in the record of appeal a certified copy of the decree the single Judge (O'Kubasu, JA) found it excusable and exercised his discretion to grant extension of time. However, in the second appeal where the appellant/applicants were represented by counsel who repeated the same mistake with the knowledge of why the first appeal had been struck out, the learned single Judge (Bosire, JA) was perfectly entitled to refuse to grant extension of time on the ground that the applicants were grossly careless and lacked seriousness in their pursuit of the intended appeal and that they were not entitled to any further indulgence. In our view, he cited valid grounds in the circumstances.

That the copies of records held by counsel for both parties contained the requisite documents was not relevant because **Rule 85(1)(h)** of the Courts Rules had not been complied with anyway. We also wish to add that the long period of time the matter has taken in court was certainly prejudicial to the final determination of the Succession Cause and a serious delay in the respondents' peaceful utilization of the property in dispute. In the circumstances, we are of the view that this reference has no merit and we order it to be dismissed with costs to the respondents.

Dated and delivered this 10th day of July, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR