

REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NYERI

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

Civil Application Nai 361 of 2004

BETWEEN

GACIHI WANG'OMBE.....APPLICANT

AND

ERASTUS WANG'OMBE.....RESPONDENT

**(Application for extension of time to appeal out of time from an order of
the High Court of Kenya at Nyeri (Khamoni, J) dated 26.7.2004**

in

H.C.SUCC.C. NO. 105 OF 1999)

R U L I N G

The notice of Motion dated 22.12.04 seeking four substantive orders under Rule 4 of this court's Rules, namely.

- “1. THAT the applicant be granted leave to file Notice of appeal out of time.***
- 2. THAT the applicant herein be granted leave to file appeal out of time.***
- 3. THAT the annexed petition of appeal be deemed to be duly filed.***
- 4. THAT there be a stay of any further proceedings including execution in H.C. Succession Cause NO. 105 of 1999 until the final hearing and determination of the Appeal.”***

Obviously, the 4th prayer cannot be granted under **Rule 4** and it was appropriate that the applicant did not argue for its grant. So is the 3rd prayer which was abandoned by counsel. The application therefore boils down to extension of time to file a notice of appeal and the record of appeal out of time. There was indeed a notice of appeal which was timeously filed on 30.7.04 but it was deemed to have been withdrawn by dint of **Rule 82(a)** of this Court's Rules. Thereafter the applicant applied for copies of proceedings but these were not supplied until 8.12.04. It is not the applicant's fault that the copies were delayed. The period of delay that calls for explanation is therefore between 8.12.04 to 24.12.04 when this application was filed which is just over two weeks. The explanation offered in the supporting affidavit is that counsel was away from his office on personal matters and he acted soon after he was able to. The subject matter of the intended appeal is Succession involving the parties who are related. Issues of illegality will also be raised and contested.

The two respondents did not think the applicant ought to be allowed to file the intended appeal. But the reasons given in their replying affidavit and in oral submission relate to the merits of the intended

appeal which they feel they cannot succeed, in view of what the superior court decided.

My discretion under **rule 4** is unfettered but it must be exercised on sound basis or as is normally put judicially. I do not consider the period of two weeks delay as inordinate nor do I have any reason to doubt the reasons given for the delay in seeking extension of time. More importantly, the subject matter of the dispute involves close family members over Succession issues. The respondents may well feel satisfied that the superior court was right in deciding in their favour, but the applicant is exercising an undoubted right of appeal too, and barring any culpable conduct on his part, he ought to be allowed to exhaust the legal channels available to him.

I grant the application and order that the notice of appeal filed on 30.7.704 be deemed to have been filed and served timeously. The record of appeal shall be filed and served within 30 days of this ruling. The costs of the application shall be borne by the applicant in any event and are assessed at Shs.5,000/-

DATED and DELIVERED at NYERI this 20th day of May, 2005.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR