



**IN THE COURT OF APPEAL
AT NAIROBI**

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

CIVIL APPLICATION NAI 253 OF 2004

BETWEEN

JOAN YATICH KILELE APPLICANT

AND

MAJOR

GENERAL

LAZARUS SUMBWEIYO & 11 OTHERS RESPONDENTS

*(An application for extension of time to file and serve record of appeal against the ruling and order of the High Court of Kenya at Nairobi (Mr. Justice Etyang) dated 20th June, 2003 in
in
H.C. SUCCESSION CAUSE NO. 2699 OF 1998)*

R U L I N G

This ruling arises from a Notice of Motion dated 13th October 2004 in which the applicant **Joan Yatich Kilele (the applicant)** seeks firstly an extension of time under rule 4 of the Court of Appeal Rules (the Rules) to file and serve a record of appeal from the Ruling and Order of Etyang J. dated **20th June 2003** in Nairobi Succession Cause No 2699 of 1998 in which **the applicant** was the respondent and Major General Lazarus Sumbweiyio (**the first respondent**) was the Executor/Petitioner and secondly that the Notice of Appeal filed in Court on 28th June, 2003 be deemed as duly filed and served. There are twelve other respondents to the application who were all, together with the applicant, objectors in the superior court.

In the case of **Leo Sila Mutiso v. Rose Helen Wangari Mwangi – Civil Application No NAI 251 of 1997** (unreported) delivered on 5th November 1999 in a Ruling of the Court (Gicheru, Lakha, and Bosire JJs) this Court reiterated that **“Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy. 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.”

The application for extension of time came before me on 18th July 2005 and at the hearing learned counsel Mr. Ngaah appeared for ***the applicant***, learned Counsel Ms Janmohamed appeared for the ***first respondent***, learned counsel Mrs. Ndungu appeared for the second respondent, learned counsel Mr.K.K. Katwa appeared for the ***third, fourth, fifth, and sixth respondents*** and learned counsel Mrs. Orina appeared for the ***seventh, eighth, ninth, tenth, eleventh and twelfth respondents***.

The Notice of Appeal was lodged five days after the ruling was delivered and the letter bespeaking the copies of the proceedings and ruling was timeously sent to the Registrar with a copy to the appellant's advocates on 25th June 2003.

On 10th August 2004 the Deputy Registrar informed the applicant of the readiness of the proceedings etc. and on the same day issued a Certificate of delay amounting to 413 days. I calculate from these events that the last day for filing the Record of Appeal was Monday 11th October 2004. The applicant failed to meet that dead line so that it became necessary for the applicant to seek an extension of time to file the record which application was lodged on 13th October 2004.

It is clear from the above that the applicants cannot be accused of inordinate delay in bringing the application. The length of the delay to be taken into account was a mere two days.

I am enjoined by the authorities to consider next the reason for that delay.

The applicant in her affidavit in support of the Motion set out the following facts by way of explanation: -

11. That soon after obtaining the Certificate of Delay the firm of Messrs Arusei & Company Advocates came on record for me after the previous firm of Messrs Arusei, Letangule & Company Advocates split into two. (annexed hereto and marked JYK-7 is a copy of the Notice of Change of Advocates).

12. That I am informed by the said firm of Messrs Arusei & Company Advocates which information I verily believe to be true, that on 9th September 2004, it sent to the rest of the advocates in this matter a draft order of the ruling delivered by the superior court on 20th June 2004 for their approval or amendment (if any). (annexed hereto and marked JYK-8 is a copy of the letter).

13. That my said advocates subsequently informed me which information I verily believed to be true that on 20th September 2004 they applied to the Deputy Registrar to approve the draft order. (annexed hereto and marked JYK -9 is a copy of the letter).

14. That subsequently my advocates aforesaid informed me which information I verily believe to be true that the order was issued on 22nd September 2004. (annexed hereto and marked JYK-10 is a copy of the order).

15. That since my advocates had all that was necessary to file the record of appeal, I honestly expected it to have been filed immediately but to my surprise when I visited my advocates chambers on 7th October 2004 I was informed that the appeal record had not been filed.

16. That when I sought explanation as to why the appeal record had not been filed Mr Arusei informed me that there was disagreement between him and his previous partner over which files were to be retained by Mr. Arusei and which ones should be taken by his partner Mr. Letangule and that my file was one of the files in dispute hence the delay.

17. That I was also informed that the work involved in the preparation of the bundles of appeal was quite demanding as each bundle was going beyond 2,200 pages.

18. That though Mr. Arusei's explanation sounded convincing I was worried that in view of the dispute between him and his former partner the record of appeal will delay further and therefore opted to instruct the firm of Messrs. Naikuni and Ngaah Advocates in place of Messrs. Arusei & Company Advocates.

19. That I am informed by my new advocates Naikuni, Ngaah & Company Advocates which information I verily believe to be true that they have already filed the Notice of Change of Advocates and have assured me that they are able to prepare and file the record of appeal within 21 days if allowed to do so. (Annexed hereto and marked JYK-11 is a copy of the Notice of Change of Advocates).

Ms. Janmohamed learned counsel for the first respondent raised the point that since the firm of Arusei & Company Advocates came on record on or about 16th August 2004 it was not logical for the applicant to be claiming that there was a dispute as to which of the two firms resulting from the split in the original firms should take over which files causing delay as late as the end of September or early October. I did not find this contention to be convincing. It is not unusual for such disputes to linger on after the initial decision to dissolve a partnership.

In my view the short delay has been adequately explained in the above paragraphs of the affidavit of the applicant. Although there could have been greater expedition earlier in obtaining the formal order this has not impacted significantly on the critical path towards being able to file the record, which could not be filed until the current application was heard and determined.

Ms. Janmohamed launched a technical procedural attack on the chances of success of the appeal. She submitted that the intended appeal was bound to fail on one or other of two procedural grounds without going into the underlying merits.

The first of these submissions was to the effect that the firm of Naikuni, Ngaah & Company are not properly on record because the Ruling intended to be appealed against resulted in a formal Order and not a Decree. Ms. Janmohamed submitted that an appeal from an order could only be brought if leave to appeal had been granted. No such leave was applied for or granted in this case.

The second of these submissions, and the horn of the dilemma facing the applicant, was that if the Etyang J. decision should have been embodied in a Decree then no leave to appeal was required but the High Court's leave for a change of advocates was mandatory under Order III Rule 9A of the Civil Procedure Code which reads as follows:-

"9A When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record." (emphasis added)."

I believe that these two submissions are really more relevant to an application to strike out the Notice of Appeal which is outside my jurisdiction as a single judge.

I have also come to the conclusion that for the purpose of considering the issue as to whether there is an arguable appeal, which is only possibly to be taken into account, these two issues are themselves arguable points which are for the decision of the three judge bench if and when the appeal comes before them. I consider that the two issues are themselves arguable matters and their existence do not render the intended appeal frivolous.

I have considered the Draft Memorandum of Appeal, which does raise a number of issues which do not appear to me to be wholly frivolous.

There remains to be considered the degree of prejudice to the respondent if the application is granted. In Ms. Janmohamed's submission (with which Mrs Ndungu associated herself) the first respondent would be

prejudiced by being unable to carry out his duties to get the estate distributed. While there is some substance in this it should also be noted that there were a number of matters enumerated in the Ruling of the superior court which required to be established before the whole matter could be finalised. There is nothing before me to indicate whether progress has been made in this direction.

Having taken all these matters into account I exercise my unfettered discretion in favour of granting an extension of time to the applicant to file the Memorandum and record of Appeal.

I order that the time for filing and serving the Memorandum and Record of Appeal is hereby extended to expire 21 days after the delivery of this Ruling and I order that the costs of this application be costs in the appeal.

There was no mention by any party to the application of the position of the notice of appeal consequent upon any extension of time to institute the appeal.

For the avoidance of doubt and in the interest of Justice and in the further exercise of my unfettered discretion under rule 3 (1) I make the following further order:-

Time having been hereby extended for the filing of the memorandum and record of appeal and no order for the striking out of the Notice of Appeal having been applied for or made, the Notice of Appeal dated 24th June, 2003 remains valid and shall not be deemed to be withdrawn pursuant to rule 82(a) unless the applicant fails to file the Memorandum and Record of appeal within the time limit as extended by this ruling this now being the “appointed time” for the purposes of rule 82(a).

Dated and delivered at Nairobi this 27th day of September,, 2005.

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true Copy of the original. **DEPUTY REGISTRAR**