REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appli 93 of 2005

MUKUNGA NJOKA……..……..….APPELLLANT

AND

WANJIKU NJOKA *(substituted by*

LUCIA KARIUKI MUCHIRA)

VIELINA MUTHONI IRERI)…….....…….……. RESPONDENT

(An application for extension of time to file and serve notice of appeal from the judgment

of the High Court of Kenya at Embu (Lenaola, J.) dated 23.11.2004

in

H.C.SUCC. NO. 86 OF 2002)

****

-

R U L I N G

This matter emanated from a Succession cause in the estate of ***Njoka Nyagah*** who died on 03.10.94. He left one wife, one son, two married daughters and one asset in form of a 3-acre piece of land in Embu registered under the ***Registered Land Act***. The wife died shortly after applying for grant of representation and was substituted by one of her daughters. The grant was issued in the joint names of the son and one daughter. The son however applied to inherit the entire parcel of land since his sisters were married and because the customs of his community so dictate. But his two sisters objected, asserting that their parents had always intended that they should share the land equally with their brother regardless of their marital status. The superior court, Lenaola, J. agreed with them and held that the three children of the deceased were entitled to an equal portion of the land, stating emphatically:

"In this age and time, to continue subjecting women to unclear and slavish laws would be a travesty of justice. That one is married and therefore ceases to have rights as a child of somebody upon death of that somebody is unjustifiable to my trained legal mind".

That was on 23.11.04. There was no immediate indication that any of the parties were dissatisfied with the ruling although they were both represented by learned counsel. Not until the 31.03.05 when the

son took out the notice of motion now before me seeking leave to file a notice of appeal and a record of appeal out of time. The application is made under ***rule 4*** of this Court's rules which confers unfettered discretion on this Court, represented by a single judge, to extend time. Though unfettered, it is a discretion that cannot be exercised on whim or caprice, but on reason. As I said in **Fakir Mohammed v Joseph Mugambi & 2 others** Civil Application Nai. 332/04 (Nyr. 32/04) (ur):

"**The exercise of this Court's discretion under *Rule 4* has followed a well-beaten path since the stricture of "*sufficient reason*" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutison vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38."**

The son referred to above was ***Mukungo Njoka***, the applicant. In an effort to explain the delay of four months or so, he swore that as soon as the ruling was delivered, he instructed the advocate present with him in court to appeal, and a letter bespeaking copies of proceedings was written on 25.11.04. But it was not copied to the respondents. He then related information given to him by ***Mr. Gacheche wa Miano,*** the proprietor of the firm of advocates on record for him, that he (Miano) had an assistant, one ***Baru*** whom he instructed to file a notice of appeal in the matter but, to his consternation, he found out that the notice had not been filed. Mr. Miano had acrimoniously parted ways with the said assistant and it was not possible therefore to obtain an affidavit from the assistant. The proceedings which had been applied for were received on 24.03.05. Mr. Miano then swore his own affidavit to confirm that he gave the information stated above, to the applicant. Before me in oral submissions, he personally owned up for any omissions or negligent acts pertaining to the matter and exonerated the applicant from blame. He further submitted that the intended appeal was meritorious because it will raise the legal issue whether the distribution of the deceased's land ought not to be in accordance with the customary laws of the parties.

The respondent and his counsel were not impressed by the tribulations of the applicant and his counsel. Learned counsel Mr. Mutahi submitted that the delay in obtaining proceedings could not be justifiable since in practice, Lenaola, J. always read out typed rulings and judgments and they are available to the parties soon after. As for the merits of the intended appeal, he saw none, since the distribution of the estate is under the ***Succession Act*** and not under any Land laws, customary or otherwise.

I have carefully considered the rival contentions in the light of the principles stated above. It is evident that there was a letter bespeaking copies of proceedings but since it was not copied to the respondents the applicant cannot take refuge under the proviso to ***Rule 81*** of this Court's rules. I am not persuaded that the fact that the ruling was available in typed form, obviated the need to apply for copies of the proceedings as contended by the respondent. As I understand the applicant however, he does not plead that the delay was not occasioned. It is rather that it was occasioned by the omission of counsel handling the matter who had received express instructions to prefer an appeal. I do not see in the affidavit in reply or in submissions of counsel for the respondent any averment that such an assistant was not in fact employed by the applicant's advocate and I am inclined to believe that there was such an assistant who for unexplained reasons failed to carry out the instructions given to him. The applicant's advocate however takes personal responsibility for such omissions and again I am not inclined to transfer the advocate's transgressions to the applicant. The merits of the intended appeal, though consideration thereof lies with the full court, is a factor that is relevant at this stage albeit on *prima facie* basis. The issue of law raised is not, in my view, frivolous and is indeed topical. At center stage, is on the one hand, Customary law and practice which has pride of place in our constitution; and, on the other hand, written laws on Land and Succession including progressive international principles and covenants on gender equality and equity. Ventilating such issues before the highest court in the land cannot but be beneficial to the nation at large, and to jurisprudential development.

For those reasons I am inclined to exercise my discretion in favour of granting the application. The notice of appeal shall be filed and served within seven (7) days of this ruling. The memorandum of appeal and the record of appeal shall be filed within fourteen days of service of the notice of appeal. As for costs, in view of the admission made by Mr. Gacheche wa Miano advocate that his firm was responsible for the delay occasioned in this matter, I order that Gacheche wa Miano shall personally bear the costs of the application assessed at Shs.15,000/= which shall be paid within 14 days of the date of this ruling. In default of payment, execution for the costs shall issue.

Dated and delivered at Nyeri this 18th day of November. 2005.

P.N. WAKI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR