



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERUGOYA**

**(CORAM: R. MWONGO, J)**

**SUCCESSION CAUSE NO. 35A OF 2013**

**PURITY MUTHONI IRIMU.....APPLICANT**

**VERSUS**

**EPHANTUS KARANI MAKANGA.....1<sup>ST</sup> RESPONDENT**

**PERIS WANJIRA KINYUA.....2<sup>ND</sup> RESPONDENT**

**EPHANTUS KARANI MAKANGA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Background**

1. The applicant's application dated 2<sup>nd</sup> September, 2019 seeks that the court do enlarge time for the applicant to file her appeal out of time. It is filed pursuant to Sections 7, 3A & 3B of the Appellate Jurisdiction Act Cap 8 Laws of Kenya as read with Rules 44 & 73 of the Probate & Rules- Cap 160
2. The application is based on the grounds: that Judgment in this matter was delivered by Gitari, J, on 7<sup>th</sup> February, 2019; that the Applicant intends to lodge an appeal against the whole judgment of the superior court and has not filed and served the Notice of Appeal; that the Court has the discretion to extend the time for giving notice of intention to appeal from a judgment; that the time for giving notice of intention to appeal has since lapsed; and that the intended appeal is against the entire Judgment challenging the findings of the learned trial Judge
3. The applicant asserts that the superior court's determination that the applicant was not a beneficiary or a dependant of the deceased and therefore not entitled to share in the estate of the deceased, is wrong, since it had in fact been proven that the Appellant was a granddaughter of the deceased and therefore entitled to a share of the estate of the deceased which her mother would have been entitled to had her mother not predeceased the deceased.
4. In addition to the grounds, the applicant deposed a supporting affidavit, repeating the assertions in the grounds and making the following other averments: that the applicant has requested for a certified copy of typed proceedings and all the filed pleadings to enable her progress with her intended appeal and prepare the Record of Appeal; that the intended appeal raises pertinent issues of fact and law that prop an arguable appeal as demonstrated by the Draft Memorandum of Appeal; that the delay in filing this Application was occasioned by the Pending ruling which was slated for delivery by the Hon Deputy Registrar on 29<sup>th</sup> July, 2019; and that the delay in filing this application is not inordinate and the same is excusable.
5. The 1<sup>st</sup> Respondent opposes the application. In his replying affidavit deposed on 3<sup>rd</sup> December, 2021 he asserts: That the applicant has not given sufficient reasons in law for the granting of the orders sought; That there has been unreasonable delay in bringing this application to challenge judgment for a period of 5 years now; That he is advised by his advocate that the intended Appeal has no chances of success at all and should not be granted; That the applicant allegation in her supporting affidavit that the delay was caused by the pending ruling before the Deputy Registrar is not correct as the said Ruling was delivered on 29th July 2019 and the applicant does not give reasons for the delay from the date of the ruling; and that the applicant is a granddaughter of the deceased and hence not a beneficiary of his estate.
6. The applicant and 1<sup>st</sup> respondent filed submissions, but the 2<sup>nd</sup> respondent did not file any submissions

**Applicant's submissions**

7. The applicant submitted on two main issues: Whether this court has jurisdiction to grant the orders sought; and Whether the applicant has

an arguable appeal.

8. The applicant submits that the Court has jurisdiction to grant the orders sought in the instant application in view of section 7 of the Appellate Jurisdiction Act which provides:

***“The High Court may extend the time for giving notice of intention to appeal from a judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.*”**

9. On this, the applicant cited **CAA & Anor v Timothy Ndui CA [2014] eKLR** where Githinji JA stated that:

***“The application....for extension of time to lodge appeal out of time, was properly made in the High Court as the High Court has power to extend time for giving notice of intention to appeal...”***

10. The applicant submits that this application has been brought without unreasonable delay. She urges that the judgment was delivered on 7th February, 2019 whereas a notice of Appeal was lodged on 13<sup>th</sup> August, 2019, and the instant application was filed on 3<sup>rd</sup> September, 2019. Whilst admitting there was a 7 months delay, the Applicant argues she is not guilty of laches, and in absence of any evidence to the contrary by the Respondents, the applicant prays that the court allows the application as prayed.

11. Further, the Applicant has stated in her supporting affidavit on record that the reason for the delay was due to the fact there was a pending ruling which was slated for delivery by the Hon. Deputy registrar on 29<sup>th</sup> July, 2019 and further that the Applicant was unrepresented at trial stage and was at all material time of the knowledge that she was within time to lodge the appeal.

12. Finally, the applicant submits that the appeal has a high chance of success due to the fact that it is not in dispute that the Applicant is a beneficiary under estate of the said Kiriungi Karani, the deceased.

### **1<sup>st</sup> Respondent’s Submissions**

13. The 1<sup>st</sup> respondent submitted that the application had not been brought within reasonable period. That it was brought after about a period of 3 years, and there is no good reason given as to why the same was never brought within the timeframe allowed by law.

14. He further submits that the intended appeal has no chances of success whatsoever since their main ground of appeal is that a granddaughter who was not even a dependant was not given a share out of the estate of the deceased. Therefore, it is argued, the application before the court is an abuse of the due process of the court.

### **Analysis and determination**

15. I have considered the application and prayers sought for leave to appeal out of the statutory stipulated period, and the parties’ representations. The only issue for this court to determine is whether the applicant can or should be granted leave to file the appeal out of time.

16. Section 7 of the **Appellate Jurisdiction Act** is clearly and unambiguously worded. It allows this court to “***extend the time for giving notice of intention to appeal from a judgement of the High Court or for making an application for leave to appeal***”. The Court of Appeal confirmed this point in the **CAA & Anor v Timothy Ndui case (supra)**. Accordingly, what this court may allow is are: extension to file notice of intention and extension to file an application for leave to appeal. The question whether the Court of Appeal will allow the appeal to be filed out of time is solely in the domain and discretion of the Court of Appeal under Rule 4 of its Rules.

17. The applicant’s request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time.

18. The Supreme Court of Kenya in the case of **County Executive of Kisumu v County Government of Kisumu & others [2017] eKLR** while relying to its decision in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR** reiterated the considerations to be made in a case for extension of time as follows:

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

19. The applicants contend intended appeal raises pertinent issues of fact and law that support an arguable appeal as demonstrated by the Draft Memorandum of Appeal. In particular, the applicant’s issue in the appeal arising is whether or not the Applicant is entitled to a share of the deceased’s estate, which the Court of Appeal has jurisdiction to determine.

20. Further, they contend that this application has been brought without unreasonable delay.

21. According to the record, the judgment was delivered on 7th February, 2019 whereas a notice of Appeal was lodged on 13<sup>th</sup> August, 2019, and the instant application was filed on 3<sup>rd</sup> September, 2019.

22. In my view the applicant has an arguable appeal and has explained the reasons for the delay in lodging the appeal. I am satisfied with the reasons, and I think the justice of the situation leans in favour of granting the applicant the extension of time sought.

23. I hereby grant extension of time in terms of section 7 Appellate Jurisdiction Act for making an application for leave to appeal.

24. Applicant serve the application within 30 days of today’s date.

25. Orders accordingly.

**DELIVERED AT KERUGOYA ON THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

.....

**R MWONGO**

**JUDGE**

Delivered in the presence of:

1. Asimwe holding brief for Magua for the Applicants
2. Kagio holding brief for Mogusu for the Respondents
3. Murage Court Assistant