



In re Estate of Richard Gatitu Wanjahi alias Gatitu Wanjahi (Deceased) (Miscellaneous Application 156 of 2019) [2022] KEHC 10418 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION 156 OF 2019
MM KASANGO, J
MAY 26, 2022**

**N THE MATTER OF THE ESTATE OF RICHARD GATITU
WANJAHİ ALIAS GATTU WANJAHİ (DECEASED)**

BETWEEN

CECILIA NDUTA WANJAHİ APPLICANT

AND

FRANCIS NJUKI GATTU 1ST RESPONDENT

JAMES MAINA 2ND RESPONDENT

RULING

1. Cecilia Nduta Wanjahi, the applicant moved this Court by Notice of Motion dated 25th March, 2019. By that application the applicant seeks leave to file an appeal out of time. The Ruling the subject of the intended appeal was delivered on 8th January, 2019 in Gatundu Senior Principal Magistrate's court Succession Cause No. 46 of 2012.
2. Although the applicant did not annex a copy of the Ruling, she proceeded to state in her affidavit in support of her application that details of her marital relationship to the deceased whom she alleged was the registered owner of the suit property. None of those depositions are verifiable since the applicant failed to annexed copy of the subject ruling.
3. The applicant further deponed that she was unable to obtain copies of the proceedings of the trial court as the reason for her failure to file her appeal out of time.
4. The application was opposed by the affidavit of the 1st respondent Francis Njuiki Gatitu. The 1st respondent termed the applicant's application as incompetent, bad in law and gross abuse of the court process. The 1st respondent also deponed that the applicant filed the application two months after



the Ruling which in his opinion was filed to “serve the sole purpose of delaying and denying the beneficiaries their rightful share of the deceased (sic) estate.”

- Parties filed their written submissions and authorities which I have had an opportunity to consider.

Analysis

- The applicant ought to have filed her appeal within 30 days from the date of the trial court’s Ruling, that is, 8th January, 2019. That is, what is provided under Section 79G of the Civil Procedure Act which provides:-

“79G. Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

- The proviso under that Section requires a party who has failed to file an appeal out of time would need to satisfy the court that she/he has a good and sufficient cause for not filing the appeal in time. The applicant stated without providing any proof at all, that she was not able to file an appeal within the requisite period because she was unable to obtain the trial court’s proceedings. In so stating, she did not show proof of any request made by her for those proceedings. She also did not state in her affidavit in support of the application, whether she had been supplied with those proceedings. If indeed she had not, then she needed to explain how she was able to prepare a draft memorandum of appeal which she annexed to her application.
- Further, the prevailing jurisprudence of the proviso of Section 79G of the Civil Procedure Act is plainly discussed in the case Chania Travellers Sacco Ltd & Another vs. Mercylina Bosibori Akoya & Another (2021) eKLR as follows:-

“3. That Section does afford the court discretion to admit an appeal filed out of time. In other words, the section does not provide that leave would be granted to a non-existent appeal as in this case. This is the jurisprudence of that Section which was articulated in the case *General M’limbine vs. Joseph Kangangi* (2008) eKLR:-

‘My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under Section 79B which says:-

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order



appealed against he may notwithstanding section 79C, reject the appeal summarily”.

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”

9. From the above jurisprudence, it is plain that the applicant should have filed her appeal albeit out of time and on having filed it should have sought admission out of time. The Court of Appeal in the same vein in the case *Jonathan Karanja t/a Jonatech Enterprises vs. Aqs Worldwide Movers & 2 others* (Civil Application E261 of 2020) (2022) KECA 154 (LR) (Commercial And Tax) 18 February) 2022 thus:-

“In my considered judgment, the fate of the application before me depends on proof that the Applicant has signified his intention to appeal by filing and serving his notice of appeal on the Respondent as required under the Rules. Only then could he be said to have laid the basis for approaching the Court for orders to cure any delay in lodging his Notice of Appeal. No such notice has been filed, which dispossesses me of the otherwise unfettered discretion in determination of the application before me.

4. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR, this Court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others* [2018] eKLR:-

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

5. Accordingly, the application is fatally defective and cannot stand.”
10. The applicant did not explain with proof for her failure to file her appeal out of time. Therefore, applying the guidelines set out in the case above by the Supreme Court, I find no merit in the application before me.

Disposition

11. Accordingly, the notice of motion dated 25th March, 2019 is dismissed with costs.
12. This file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 26TH DAY OF MAY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Cecilia Nduta (Applicant) : - Miss Wanjiru Njihia H/B Mr. Kamonjo

For Francis Njuki and James Maina (Respondent):- Ms. Maina H/B Mr. Ndegwa



RULING delivered virtually.

MARY KASANGO

JUDGE

