



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**MISC. CIVIL APPEAL NO. 47 OF 2019**

**BOKEYE WANDA SAMSON.....APPELLANT**

**versus**

**ELIAS CHACHA MUKAMI.....RESPONDENT**

**RULING**

By the Notice of Motion dated 11/8/2020, the applicant, **Bokeye Wanda Samson** seeks an order that this court be pleased to extend the time within which the applicant can comply with the court's orders dated 28/5/2020 and that costs be in the cause.

The application is premised on the affidavit sworn on 11/8/2020 by Kerario Marwa Advocate. He deposed that the Ruling in the application dated 6/11/2020 was reserved for 13/3/2020 but it was not delivered on the said date; that the applicant's counsel was not served with notice to attend the Ruling on 28/5/2020 and that he was not aware of the ruling and therefore neither the Advocate nor the applicant can be blamed for not complying with the court's orders of that day; that it is in the interest of justice that the time for filing the appeal be extended. The applicant also filed written submissions on 14/3/2021 in which he reiterated the above position. He added that on making an enquiry about the ruling in August 2020, he learnt that the same had been sent by the court on 28/5/2018 to an email

address that did not belong to him. Counsel relied on the decision of **Alibhai Musajee =vs= Sharif Mohamed Al-bet – Civil Appeal No. 283 of 1998** where the court held that time can be extended for good cause and **Itute Ngui & Another =vs= Isumail Mwakavi Mwendwa NRB Civil Appeal No. 166 of 1997** where it was held that the bonafide error of an advocate is a good reason for the court to extend time within which to file appeal.

The application was opposed through a replying affidavit sworn by **Elias Chacha Mukami**, the respondent, on 13/11/2020. It was deposed that an application for stay of distribution of the estate had been denied by the lower court but no appeal was preferred against the said ruling. Instead the applicant filed the application dated 6/11/2019 and a ruling therein was delivered on 28/5/2020 and copies were sent to counsel on record via their official email; that service through email [Kerarioam@gmail.com](mailto:Kerarioam@gmail.com) has not been denied; that the ruling was delivered electronically due to the Corona Virus Pandemic and that a notice was issued to the litigants by the court whereby parties were asked to provide their email addresses for service. He deposed that the applicant is guilty of laches and is not keen on prosecuting his case and is abusing the court process through dubious applications; that the applicant has not demonstrated that he attempted to get the court proceedings from the registry; that the applicant has been indolent because the applicant was informed on 27/7/2020 that the ruling had been delivered on 28/5/2020 but the appellant did nothing till he filed this application on 13/8/2020.

The Respondent's Counsel **Abisai Advocate**, filed their submissions on 17/3/2021 where counsel reiterated the contents of the Respondent's affidavit. Counsel urged that it was the duty of the applicant's counsel to make a follow up on this matter and not sit back because he had a temporary order on the distribution of the deceased's estate; that the applicant has not demonstrated when he followed up the matter at the registry and the applicant is guilty of inordinate delay and that the decision of **Itute Ngui (supra)** does not apply to this case.

I have considered the application and the rival submissions. What seems to be undisputed is the fact that the ruling in the application dated 6/1/2019 was reserved for delivery on 13/3/2020 but it was not delivered. It is common knowledge that at the time, courts had scaled down operations due to the corona virus pandemic that had ravaged the world.

No doubt the said ruling was delivered electronically on 28/5/2020. The question is whether the applicant's counsel was served with the said ruling or notice of its delivery. I have seen that in the ruling the email addresses for the counsel of both parties are indicated at the end of the ruling. The applicant counsel's email address is indicated as [kerariom@gmail.com](mailto:kerariom@gmail.com). It is the address which the applicants' counsel disputes; that his email address is [kerariomarwadvocates@gmail.com](mailto:kerariomarwadvocates@gmail.com). Counsel made reference to prior correspondence on the file, dated 3/6/2019 which bears his email address.

I have seen the notice of delivery of judgment dated 28/5/2020 at 11:00 a.m It bears the email address for Abisai Advocate, counsel for the

Respondent i.e. [roabisai@yahoo.com](mailto:roabisai@yahoo.com). I do not see Kerario Marwa's email address on the said notice. It seems Kerario Marwa Advocate is not in the habit of indicating their email address on every document they file as is required of them. Counsel has only one document on the whole file which bears their email address, i.e. the letter dated 3/6/2019. The address is indeed [Kerariomarwaadvocate@gmail.com](mailto:Kerariomarwaadvocate@gmail.com) which is not similar to the addresses which is contained in the ruling that was read. It seems that the court had the wrong email address and therefore the applicant's ruling was sent to the wrong address nor was he notified of the date for delivery of the ruling. It follows that the applicant's counsel did not receive the ruling and could not have been aware of the ruling. The applicant and counsel cannot be blamed for what was beyond their control.

I do agree with the Respondent's submission that it is the duty of the applicant to make a follow up with the court on when the ruling would be delivered. Indeed the applicant has not shown to this court any evidence, for example, by way of a letter to the Deputy Registrar asking to know whether or when the ruling would be delivered. In the same vein, there is no evidence by the applicant that he has made any attempt to obtain the proceedings from the Registry.

To some extent the applicant was indolent.

However, the applicant cannot be wholly to blame for the mistake of the court. In this case, the special circumstances prevailing at the time and the fact that the court may have sent the ruling to a wrong address, it is in the interest of justice that this court do exercise its discretion to extent time for the applicant to comply with the orders of 28/5/2020.

The court will therefore make the following orders:-

- a) Leave is granted to the applicant to file appeal out of time.**
- b) The Executive Officer, Migori Law Courts do avail certified copies of the proceedings and the Ruling in Migori Succession Cause No. 33 of 1995 within ten (10) days of this order upon payment of the necessary fees.**
- c) Upon receipt of the proceedings and the Ruling, the applicant shall file and serve the appeal and Record of Appeal within fourteen (14) days thereof;**
- d) Costs will abide the appeal.**

**DATED AND SIGNED AT MIGORI THIS 29<sup>TH</sup> DAY OF JUNE, 2021**

**R. WENDOH**

**JUDGE**

Ruling delivered in the absence of parties who were duly served through email.

Ms. Nyauke court assistant