



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO. E008 OF 2020

IN THE MATTER OF THE ESTATE OF M'KIRIINYA M'IREA (DECEASED)

STEPHEN KIREMA M'IREA.....APPLICANT

VERSUS

SILAS MUGAMBI.....1ST RESPONDENT

JACINTA MUKOBUURI M'IKIRIINYA....2ND RESPONDENT

RULING

1. The court is called upon to determine an application under certificate of urgency dated 31/08/2020 and brought pursuant to sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules and Article 50 of the Constitution. In it, the applicant seeks leave to file an appeal out of time against the ruling of the trial court delivered 26/02/2020. The grounds upon which the application is premised are set out in the body of the application and the supporting affidavit of Stephen Kirema M'Irea, the applicant herein sworn on 31/08/2020 in which it is averred that he was only furnished with a copy of the typed ruling on 19/08/2020 hence the delay in filing his intended appeal. He contends that he has exhibited the letter requesting for the typed ruling as well as the memorandum of appeal. The object for which the citation was pursued was to enable the applicant identify a party for substitution in place of the defendant (now deceased) in CM ELC Case No.21/2018 (formally High Court Case No. 88/2014). The applicant then added that unless the orders sought are granted, the pending ELC Suit will be rendered nugatory and he will suffer irreparable loss and damage. He urges the court to render substantive justice in line with sections 1A and 1B of the Civil Procedure Act as read with article 159(2) of the Constitution. His further contention is that his appeal is arguable and has been brought without inordinate delay hence no prejudice will be occasioned to the respondents if the orders sought herein are granted.

2. The application was opposed by the replying affidavit dated 13/11/2020, by Jacinta Mukobuuri M'ikiriinya, the 2nd respondent. She contends that the application has been filed with inordinate delay of over 6 months from the date of the impugned ruling, which delay has not been explained. She states that the applicant has not met the pre-conditions for grant of the orders sought and then hastens to add that the right to appeal must be balanced with that of a successful litigant.

3. The court on 21/01/2021 gave timelines within which to file and exchange the respective parties' submissions pursuant to which directions the applicant submitted that he has demonstrated that he has an arguable appeal to warrant the grant of the orders sought. The decisions of **Utalii Transport Company Limited & 3 others v Nic Bank Limited & anor (2014) eKLR**, **Allen v Alfred & Sons(1968) 1 ALL ER 543**, **Stephen Kiatu Nganga v Stanley Kindiga & anor (2015) eKLR** among others were cited in support of his submissions that the leave sought was merited.

4. For the respondents, submissions were made to the effect that the deceased died on 02/03/2018 therefore the suit against him has since abated. They maintain that leave should not be granted as the applicant has failed to explain the inordinate delay in filing his application. The decision of **Leonard Mutua Mutevu v Benson Katela Ole Kantai(2014)eKLR** was relied on in support of their position that the ELC suit ought to first be revived since it had abated.

5. I have anxiously considered the application, the affidavits and the submissions made by the parties herein. For a litigant to show a sufficient cause for extension of time to do an act that should be done within a prescribed time, they must show that there is a good reason for delay and more importantly that there is substance in what they want to pursue. Order 50 Rule 6 of the Civil Procedure Rules provides that;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

6. In Karny Zaharya & Anor v Shalom Levi (2018) eKLR the court stated that:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

7. According to the applicant, the delay in filing his appeal was occasioned by the late receipt of a typed copy of the ruling. It has been averred that the said ruling was received on 19/08/2020 and the application was filed on 01/10/2020. I have looked at the exhibited letter filed on 03/03/2020 requesting for a copy of the ruling and find that the reason and duration of the delay have been satisfactorily explained.

8. The second threshold to be considered by a court in the exercise of discretion to enlarge time is the strength of the cause to be pursued. In this case, one would ask what are the arguable points the intended appeal seeks to advance. The intended appeal is premised on the allegation that the applicant was entitled to the grant of the deceased, in the event that the respondents renounced their right.

9. The undisputed facts are that the applicant is the brother of the deceased herein. He is also the plaintiff in CM ELC No.21/2018 whereas the deceased herein, was the defendant therein. The respondents herein are the respective son and wife to the deceased herein. The applicant cited them to take out letters of administration in order to defend the ELC case on behalf of the estate of the deceased, which they have not done. In the ruling sought to be challenged, the application was dismissed on the basis that the applicant did not demonstrate the citor had not demonstrated being entitled to be issued with the grant in the event that the citees renounced their rights.

10. The strongest objection to the application is that the suit sought to be pursued upon substitution has in fact abated and therefore it would be futile to allow the application then pursue the appeal on a cause that is otherwise non-existent having abated.

11. A reading of Order 24 Rule 4 of the Civil Procedure Rules reveals that a suit against a defendant abates if no application for substitution is made within one year from the date of death. In taking that stand point, the respondent contends that the deceased having died on the 2.3.2018 the suit abated by a decision rendered on the 28.05.2019. In Kenya Farmers’ Cooperative Union Ltd. v Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR it was held that, a court of law has no jurisdiction to order substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law. While none of the parties has given the evidence on the exact dates of death and the alleged decision declaring abatement, both agree that he died in the year 2018. That is clearly more than one year and by operation of the law, the suit stands abated. In addressing the benefit to be derived by enlargement of time, I doubt if any benefit would be achieved by extending time here.

12. In the end I do find that there would be no purpose and benefit in enlarging time when the suit sought to be pursued is abated and non-existent. I order that the application lacks merit and the same be dismissed. Considering the kinship between the parties, I order that each shall bear own costs.

DATED SIGNED AND DELIVERED AT MERU, BY MS TEAMS, THIS 29TH DAY OF JUNE 2021

PATRICK J O OTIENO

JUDGE

In presence of:-

No appearance for appellant

No appearance for respondent

PATRICK J O OTIENO

JUDGE