



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL CASE NO. 84 OF 2019

CATHERINE WAWIRA MURIUKI.....APPLICANT

VERSUS

ELIZABETH WANGECI MWAI

(sued as the administrator of the Estate of

PETER MWAI MBURATI)1ST RESPONDENT

SIMON MWANGI.....2ND RESPONDENT

NESTER WANGIGI IRERI.....3RD RESPONDENT

RULING

1. The applicant herein moved this court vide an application dated 29.11.2019 and wherein she basically seeks for leave to file an appeal out of time from the judgment in Embu Succession Cause No. 541 of 2017. She further prays for the costs of the application.
2. The application is premised on the grounds on the face of it and is further supported by the affidavit sworn by the applicant. In a nutshell, her case is that she was dissatisfied with the ruling of the lower court and she has prepared her memorandum of appeal. That however, she has realized that time for filing the memorandum of appeal was over. Further that she was late in filing the appeal as she was sick and further that the application has been filed without undue delay. That the appeal has high chances of success and that he is ready to meet any conditions that the court may impose in extending the time to file the memorandum out of time and that the respondents will not suffer any prejudice.
3. From the affidavit of service on record and which was sworn on 5.03.2020, the same is to the effect that the application was served upon all the respondents (the 3rd respondent having been served on 15.02.2020 and the 1st and 2nd respondent having been served on 22.02.2020). However, the 1st and 2nd respondents did not file any response to the instant application.
4. The 3rd respondent filed her replying affidavit in opposition to the application and wherein she deposed that the applicant is the granddaughter of the deceased and that the grant she seeks to revoke was issued to her father Peter Mwai Mburati and who is the son of the deceased. Further that the appeal has no chances of success but the same is aimed at antagonizing the respondents herein more so the 3rd respondent and the same ought to be dismissed with costs. Further that the application herein offends Rule 49 of the Probate and Administration Rules.
5. Directions were taken that the application be canvassed by way of written submissions. The applicant in support of her application relied on the case of **First American Bank of Kenya Ltd -vs- Gulap P Shah & 2 others Nairobi Milimani HCCC No. 2255 of 2000 (2002) EA 65** on the principles to be considered in exercising discretion on whether or not to enlarge time. She submitted that the delay in filing the appeal was explained as she was sick.
6. Further that the intended appeal is arguable and raises substantial grounds to wit that there were three different certificates of confirmation of grant on record and which is irregular, that the sale of land between the 3rd respondent and one Peter Mwai was null and void as the said Peter Mwai was not the registered owner of the suit land and further that the same was null and void for want of Land Control Board's consent, that the trial court failed to note that the 3rd respondent misrepresented to the court that she was a beneficiary and daughter of one Peter Mwai and which was untrue and a sufficient ground for revocation of the grant and that the 2nd respondent was not a direct beneficiary of her deceased grandfather's estate.
7. It was further submitted that the respondent can be compensated by way of costs for any prejudice that she may suffer if the application is

allowed and reliance made on the case of **Edward Kamau & Another –vs- Hannah Mukui Gichuki & Another (2015) eKLR**. The applicant further submitted that the delay in filing the appeal is excusable and not inordinate and that sufficient cause had been shown for the same.

8. The 3rd respondent on her part submitted that the application is bad in form as it was filed under the wrong provisions of the law and as such it offends the provisions of Rule 49 of the Probate and Administration Rules. Further that the appeal (intended) has no chances of success as the grant which the applicant sought to revoke was given to the applicant's father who was the sole beneficiary and since the applicant is not a dependant or a beneficiary of her grandfather's estate, she ought to claim through her father. Further that the applicant's application would lead to the cancellation of the title issued to the 3rd respondent in her land being LR No. Mbeti/ Gachoka/ 1622 which was excised from LR. Mbeti/ Gachoka/ 1053 and which title was issued on 2.07.1992 which is over twenty nine years ago. That the Limitation of Actions Act bars the applicant from cancelling such a title.

9. I have indeed considered the applications herein, the response by the 3rd respondent and the rival submissions filed herein. However, I note that the respondent raised an issue that the application is bad in form as it offends the provisions of Rule 49 of the Probate and Administration Rules. The said rule provides that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported, if necessary, by an affidavit. I have looked at the application and I note that it's titled "Notice of Motion" as opposed to "Summons". Further the application is indicated as to having been brought under the provisions of Order 50 Rule 5 of the Civil Procedure Rules 2010 and sections 1A, 3 and 3A of the Civil Procedure Act.

10. It is my view that defect in form does not make the application fatally defective. This court has powers under Section 47 of the Law of Succession Act to entertain any application and to determine any dispute under the Act. As such, despite the applicant having approached this court in the wrong provisions of the law, I will proceed to determine the instant application on the basis of the powers bestowed on this court by virtue of Section 47 of the Law of Succession Act. (See **In re Estate of Benson Maingi Mulwa (Deceased) [2021] eKLR**).

11. Having determined the above preliminary issue, I now go to the merits of the application. The applicant substantially seeks for leave to file an appeal out of time. Under Section 79G of the Civil Procedure Act appeals from the decisions of the lower court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

12. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court ought to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See **Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) and Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR**). The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.

13. As for the length of the delay, the judgment of the trial court was delivered on 31.10.2019. The instant application was filed on 2.12.2019. The 30 days period within which the applicant ought to have filed the appeal lapsed on 31.11.2019. The application was thus brought about two days after the said period. It is my considered view that the application was brought without unreasonable delay.

14. In justifying the said delay, the applicant deposed that she fell ill and when she resumed on 29.11.2019 she noticed that the time was lapsing on 1.12.2019 which was on a Sunday. She annexed to the application a sick-off form to substantiate the same and which clearly indicates that the applicant was given ten days sick off from 17.11.2019 to 29.11.2019. The said sick-off form was never disputed. It is my view that the reason for the delay (which is for only two days) was well explained.

15. As for the chances of the appeal succeeding, the applicant annexed to the application her draft memorandum of appeal and wherein she postulated eleven grounds of appeal. The respondent in opposition to the application deposed that the applicant was a granddaughter of the deceased and as such, not a direct beneficiary. At the stage of determining whether to grant leave to file an appeal out of time on the grounds that the appeal is arguable, it is trite that the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. The court is not supposed to determine as to the success of the appeal but as to whether the same is arguable. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. (See **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008**).

16. I have perused through the draft memorandum of appeal and it is my considered view that the same contains arguable points and which are worth consideration by this court on appeal. For instance, did Peter Mwai have authority to sell the land to the 3rd respondent? Is the applicant a beneficiary of the estate of the deceased? In my view, those issues amongst others are indeed weighty and needs consideration by this court. However, I am not pre-empting on the outcome of the appeal.

17. As for the prejudice which the parties might suffer, the respondents did not depose as to the prejudice that she might suffer if the application is allowed. Indeed the applicant deposed that the respondent will not suffer any prejudice. It can therefore be said that she stands to suffer no prejudice. Further the applicant deposed that any prejudice that the respondent might suffer can be compensated by way of costs.

18. As I have always held, extension of time to file appeal is a matter of exercise of judicial discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal as the delay has been explained.

19. For the above reasons, the applicant herein has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (prayer 1) as thus is merited and the same is allowed. The appeal to be filed within 14 days from the date of this ruling failure to which the

said leave shall automatically lapse.

20. This being a succession cause, each party to bear her own costs.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents