



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL APPLICATION NO. E025 OF 2021

BETWEEN

JAMES GICHURU GICHUKI.....APPLICANT

VS

CHARLES NGAII GICHUKI.....1ST DEFENDANT

SOLOMON KANGETHE GICHUKI.....2ND DEFENDANT

RULING

1. I wish to begin this ruling by setting out the provisions of **Section 79G** of the **Civil Procedure Act, Cap 21** as follows:-

“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.”

2. **JAMES GICHURU GICHUKI**, the applicant has by his notice of motion application dated 27th January, 2021 sought to invoke the proviso of the above section. He seeks by that application that he be granted leave to file his appeal against the Kiambu Chief Magistrate’s court decision out of time. The decision he seeks to appeal against was delivered on 18th February, 2020.

3. The applicant deponed by the affidavit, sworn by his advocate, dated 27th January, 2021 as follows:-

“THAT the applicant being dissatisfied with the ruling and order of the Honorable court at Nairobi delivered on 18th February, 2020 in Kiambu Succession Cause No. 330 of 1992 intends to appeal against the entire ruling and order. Annexed and marked CL1 is a copy of the notice of appeal and intended memorandum of appeal with high chances of success.

THAT the delay in filing this appeal within the mandatory period of thirty (30) days were (sic) occasioned as the proceedings and ruling was applied for on 19th February, 2020 but were only ready on 11th March, 2020 past 14 days but within the thirty (30) mandatory days.

THAT the applicant delay is reasonably understandable due to the Covid-19 pandemic which made court temporary (sic) closed.”

4. The above deposition is the entirety of the applicant’s grounds for seeking leave to appeal out of time.

5. The application was opposed through the affidavit of the two respondents, namely, **CHARLES NGAII GIUTHUKI AND SOLOMON KANGETHE GITHUKI**. The respondents deponed that the ruling of the Kiambu Chief Magistrate’s Court, which is the subject of the application was in respect to a succession cause, where the deceased passed away in 1992 and that the applicant in filing the application before court is intent on frustrating the other beneficiaries of the estate.

ANALYSIS

6. I have considered the deposition both in favour and in opposition to the application. I began this ruling by setting out the provisions of **Section 79G of Cap. 21**. That Section provides that an appeal from the subordinate court should be filed within 30 days of the decision being appealed.

7. The decision which aggrieved the applicant was delivered on 18th February, 2020. An appeal ought to have been filed by the applicant on 19th March, 2020, the thirtieth day after the decision. The applicant deponed through his advocate that subordinate court's proceedings were availed on 11th March, 2020. There is no reason given by the applicant why his appeal was not filed on the 11th March, 2020 which was within the thirty days allowed by **Section 79G of Cap 21**, to appeal against subordinate court's decision.

8. As it will be noted above, where I reproduced the depositions in the affidavit of the applicant's advocate the applicant deponed that the subordinate court's proceedings were availed after the fourteen days permitted to file an appeal. It is hard to understand how an advocate could state that the period permitted to file a civil appeal was fourteen days when the application under consideration cites **Section 79G Cap 21**. This is the Section which clearly states that the period of filing an appeal is thirty days from of the subordinate court's decision.

9. The applicant further stated that he could not file his appeal within time because the courts were closed due to the COVID-19 pandemic. The applicant ought to be reminded that the National Council on the Administration of Justice, through the Chief Justice issued a press statement on 15th March, 2020 announcing temporary closure of Courts due to Covid-19 pandemic. That closure was not permanent, for example, the Chief Justice by a press statement dated 15th April, 2020 announced the scaling up of judicial services which included the operations of court registry.

10. It is important to note that from April, 2020 the court registries have largely operated normally, only that parties are required to submit their documents for filing through either the e-filing platform or through the court's email.

11. The present application was filed on 2nd February, 2021. There is no explanation given why the applicant failed to file the application earlier. I am guided in my consideration of this application by the Court of Appeal decision which cited a Supreme Court holding. That case is VISHVA STONE SUPPLIERS COMPANY LIMITED V RSR STONE [2006] LIMITED [2020] eKLR where it was stated thus:-

“The above principles were restated by the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in NICHOLAS KIPTOO ARAP KORIR SALAT VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS (supra) 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 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 respondent of the extension is granted.

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

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

12. The jurisprudence set out in the above case shows that leave to file an appeal out of time is an exercise of the court's discretion and for the court to exercise that discretion the applicant bears the burden of satisfying the court that it is deserving of the exercise of that discretion in his favour; and the applicant shows that by explaining the reason for delay in filing the appeal, by showing that the respondent will not be prejudiced and must prove that the application was filed without undue delay.

13. The applicant hereof failed to explain the reason for delay. This is in view of the fact that when the proceedings were supplied on 11th March, 2020, the period for filing the appeal had not expired. The applicant also did not respond to the respondent's contention that the beneficiaries of the estate will be prejudiced. On the whole, no material was provided by the applicant which can lead to this Court exercising its discretion in his favour.

14. The applicant's notice of motion is without merit.

DISPOSITION

15. The notice of motion dated 27th January, 2021 is unmerited and is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 23RD DAY OF SEPTEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the Applicant: Mr. Wachakana

For the Respondent : N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE