



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS CIVIL CASE NO. 24 OF 2019

CHARITY WANGITHI GICHOBI.....APPLICANT

VERSUS

ROSE WANGECHI GICHOBI.....RESPONDENT

RULING:

The applicant has brought this summons general form under 49 and 73 of the Probate and Administration Rules, Order, 50 rule 5 of the Civil Procedure Rules, section 79g of the Civil Procedure Act Seeking an order that she be granted leave to file an appeal out of time in respect of the ruling delivered on 7th February, 2019 in Kerugoya Succession Case No. 327 of 2017.

It is based on the following grounds that judgment/ruling was delivered on 7th February, 2019 that the applicant was dissatisfied with the finding of the court, and that the typed ruling could not be availed as the same was awaiting ruling from the magistrate's laptop and which was done on 16th April, 2019 or thereabout. This application has been filed without any delay whatsoever.

The application is supported by the affidavit of Charity Wangithi Gichobi sworn on 23rd April, 2019. She contends that the Succession proceedings in Kerugoya Succession cause no. 327 of 2017 relates to the estate of her late husband Phillip Gichobi Miano who died on 6th January, 1997.

That the Petitioner claimed Rose Wangui Gichobi claimed that she was also a wife of the deceased a fact which she disputed and filed a protest. However, her protest was dismissed with no orders as to costs.

Annexure CWG 1 is a copy of the ruling delivered on the 7th of February, 2019. She reiterates that it was not possible to get a copy of the ruling as it was yet to be printed and she only managed to get the ruling sometime on 16th April, 2019. That the delay in filing the appeal was not deliberate or intentional.

That she further contends that she has a good defence worthy of consideration by this court, and has annexed a draft copy of the memorandum of appeal.

She urges the court to allow the application.

The respondent opposed the application and filed a replying affidavit sworn on 10th July, 2019 and that she contends that it is a blatant attempt by the applicant to mislead the court that the ruling was not available until 16th April, 2019, as the ruling was delivered on 7th February, 2019.

The ruling was delivered in the presence of both counsels for the parties.

She depones that the application is meant to delay this matter and she has failed to substantiate or explain the same, or explain when she applied for the copy of the ruling.

That the applicants' intended appeal as per the memorandum of appeal does not raise any substantial ground for consideration by this court is unmeritorious without any chances of success.

The application dated 23rd April, 2019 is an afterthought that the same was only brought when the applicant learned that the respondent was at an advanced stage of executing the trial court's ruling and the application is merely meant to impede her from enjoying the fruits of the said ruling

The parties agreed to proceed by way of written submissions.

For the applicant submissions were filed by Maina Kagio & Company advocates on 31st July, 2019, while those of the respondents were filed by C.S. Macharia Advocates on 16th October, 2019. I have considered the application and the submissions filed.

The applicant have filed memorandum of appeal which I have considered and I find that the appeal is not frivolous.

The applicant has brought this application under **order 50 rule 6 of the Civil Procedure rules which provides that.**

“ where limited time has been fixed for doing any act or taking any proceedings under this 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 :- provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”

The rules gives court discretion to extend time of filing appeal where the appeal has not been filed within the time stipulated within the **Section 79g of The Civil Procedure Act. The Section provides**

“Every appeal from a sub-ordinate court to the High court shall be filed within a period of 30 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 pre-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 law therefore allows the court to extend the time for filing the appeal this been a discretionary power it must be exercised judiciously and only after a party seeking the exercise of the courts discretion places before the court sufficient material to persuade the court to exercise discretion in its favor.

In exercising such the courts have developed a number of factors for consideration by the courts when exercising the discretion to exercise time. In the case of: **Mwangi - versus- Kenya Airways (2003) KLR**. Such factors are;

- ***Whether the appeal is arguable***
- ***Whether the respondent will suffer any prejudice***
- ***Whether the importance in complying with time limits to the particular litigation and the effect of any in the administration of justice in the public interest if any is involved***

In this case the applicant has given a good cause as to why the appeal was not filed in time.

That is the ruling she intends to appeal against was not supplied by the court within the time limited for the appeal.

She has also demonstrated with the memorandum of appeal that she has an arguable.

The appellant upon receiving a ruling from the lower court filed the appeal immediately. The delay in filing the appeal cannot be said to be inordinate.

The applicant was vigilant and filed this application as soon as she received the ruling.

The respondent is not likely to suffer any prejudice.

The applicant has an arguable appeal.

This is a succession matter involving land and obviously emotive and important issue which calls for the parties to be given an opportunity to ventilate an appeal to its logical conclusion.

This are matters which calls for amicable resolutions and where one partyis not satisfied with the decision of the court he/she should be given an opportunity to pursue his/her appeal.

In the case of; **Banco Arabe Espanol -vrs- Bank of Uganda (1999)2 EA 22** quoted with approval in the case of; **Lucy Wanjiku Mbugua & Others -vrs- Mary Wanjiru Ndichu (2017) eklr**. It was stated

“the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights and unless lack

of adherence to rules renders the appeal process difficult an inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of dispute should be fostered rather than hindered.”

I find that it is in the interest of justice that the applicant be given an opportunity to pursue her appeal. The respondent is not likely to be prejudiced.

I therefore exercise discretion and allow the application by the applicant to file for the extension of time to file the appeal.

In conclusion I allow the application and order that;

1. The application is allowed
2. Leave is granted to the applicant to file the appeal out of time
3. The said appeal be filed within 30 days.
4. I make no orders as to costs.

Dated, and signed at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE