



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

MISC. CIVIL APPLN. NO. 47 OF 2019

BOKEYE WANDA SAMSON.....APPLICANT

-VERSUS-

ELIAS CHACHA MUKAMI.....RESPONDENT

RULING

1. This is a consolidated ruling in respect of two applications. The applications were both taken out by the Applicant herein. The applications were the Notice of Motion dated 25/07/2019 and the Notice of Motion dated 06/11/2019.
2. The application dated 25/07/2019 sought for extension of time within which the Applicant would file an appeal. I will henceforth refer to it as '**the leave application**'. The other application sought for a stay of distribution of the Estate of *Arubeya Mukami* (Deceased) pending the hearing and determination of the leave application. I will refer to the second application as '**the stay application**'.
3. The applications were supported by the sworn affidavits of the Applicant herein.
4. The Respondent opposed both applications. He swore a Replying Affidavit in opposition to each application.
5. Directions on the hearing of the applications were given. The applications were both heard by way of written submissions. Both parties duly complied.
6. The Applicant submitted on the leave application. He stated that he was intent on appealing against the ruling rendered by the lower court on 28/05/2019. He further submitted that he had timeously applied for certified copies of the proceedings and the ruling but was yet to be provided with the same. He pointed out that he was once issued with uncertified copies which he returned to the court for certification. The Applicant contended that he was at the time of filing the leave application yet to be provided with the certified proceedings and the impugned ruling. He submitted that the delay was excusable as it was occasioned by the court in not availing the proceedings as requested.
7. It was also submitted that since **Section 79G** of the **Civil Procedure Act** provided that an appeal could only be lodged within 30 days then leave of this Court ought to be granted to prefer the appeal out of the said period.
8. The Applicant implored this Court to note that the matter involved land hence it was a very emotive issue. He submitted that as such there was need for parties to be accorded an opportunity to ventilate their rights further on appeal. The Applicant relied on **Kinyunjuri Muguta vs. Wotuku Muguta (2018) eKLR** in support of the submissions.
9. The Applicant also submitted on the stay application. He referred to the law and some decisions in demonstrating why the stay application ought to be allowed.
10. Citing **Gachero & Ano. vs. Pioneer Holdings (A) Ltd & Ano. (2008) KLR 315** the Respondent submitted that the leave application ought not to be allowed. He submitted that the Applicant had not offered any reasonable explanation on the delay. The Respondent submitted that even in the absence of the proceedings and the ruling still the Applicant could have filed a skeleton memorandum of appeal since the proceedings were only relevant in filing of the record of appeal.
11. The Respondent also pointed out that the intention to appeal by the Applicant was an afterthought and prayed that the leave application be dismissed with costs.
12. On an equal footing the Respondent opposed the stay application. He argued that the Applicant was not a beneficiary of the estate of the deceased and as such lacked any *locus standi* in the matter. The Respondent relied on **Re Estate of Gitau Njoroge 'B' Deceased (2019)**

13. I have carefully considered the applications alongside the submissions.

14. I have noted that the prayer for stay of distribution of the estate of the deceased in the stay application was limited to the hearing and determination of the leave application. In view of this ruling and the order of this Court made on 27/11/2019 the stay application is spent.

15. That leaves the leave application for consideration.

16. The jurisdiction of this Court to deal with an application for leave to lodge an appeal out of time is donated by **Section 79G of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya. The power is however discretionary and must be exercised judicially.

17. The Court of Appeal in considering an application for extension of time to file and serve a Record of Appeal under the Court of Appeal Rules (which principles equally apply in the current instance) in **Gachero & Ano -vs- Pioneer Holdings (A) Ltd & Ano. (2008) KLR 315** had the following to say:

The powers of the Court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, Rule 4) were discretionary and unfettered. However, in executing its discretion, this Court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable.....

18. The foregone principles were restated in **Benjamin G. Ndegwa vs C. N. Murungaru (2009) eKLR** and **Mwangi Kimenyi Mugwe vs A.H. Kamau, Court of Appeal Civil Appeal No. NAI. 357 of 2003 at Nakuru** (unreported).

19. Other factors for such consideration were stated by the Court of Appeal in **Civil Application No. Nai. 41 of 2014 Samiyan Kaur Devinder Singh vs Speedway Investment Ltd & CFC Stanbic Bank Limited (UR 31/2014)** to include: -

- (a) The effect of the delay in public administration of justice;**
- (b) The importance of compliance with time-lines in litigation;**
- (c) The resources of the parties;**
- (d) Whether the matter raises issued of public importance;**
- (e) If the Applicant has been diligent.**

20. The net effect of all the above considerations is to foster a quicker, fair and equitable disposal of disputes between parties, a calling which all persons and this Court is constitutionally-bound to uphold. However, in doing so this Court must endeavor to do justice to the parties.

21. It is a fact that since the delivery of ruling the Applicant has not been availed with certified copies of the proceedings and the ruling which he timeously sought. A letter dated 03/06/2019 was addressed by the Applicant to the lower court. Given that the proceedings sought are yet to be availed by the lower court the Applicant cannot be accused of failing to file a Memorandum of Appeal. I break ranks with the Counsel for the Respondent in his submission that the Applicant ought to have filed a skeleton memorandum of appeal and that the proceedings are only relevant in the preparation of the record of appeal.

22. To me the grounds of appeal must emanate from the proceedings and decision appealed against. As such, it will be without any justifiable cause to condemn the Applicant more so in the absence of evidence that the proceedings have been available for collection. Likewise, the Applicant cannot be accused of delay. Further, I must state that the consideration of whether the Applicant has an arguable appeal before this Court is not one of the considerations in appeals before the High Court. It is however a consideration before the Court of Appeal in stay applications.

23. I therefore find that the leave application is merited. It is allowed in the following terms: -

- (a) The Executive Officer of Migori Law Courts shall avail certified copies of the proceedings and the ruling in Migori Succession Cause No. 33 of 1995 within 14 days of this order;**
- (b) Upon receipt of the proceedings and the ruling the Applicant shall file and serve a Memorandum of Appeal within 10 days thereof;**
- (c) Costs of the applications shall be in the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020.

A. C. MRIMA

JUDGE

Ruling delivered electronically: -

1. **kerariom@gmail.com** for Messrs. Kerario Marwa & Company Advocates for the Applicant.
2. **roabisai@yahoo.com**, for Messrs. Abisai & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE