



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 4 OF 2020

IN THE MATTER OF ESTATE OF NJERU NGARIKO (DECEASED)

SACILIA MUTITU NJERU.....APPLICANT

VERSUS

DAVID MUNYI NJERU.....RESPONDENT

R U L I N G

A. Introduction

1. This is an application seeking for orders that this court do grant the applicant appeal against the decision of this court delivered on 26/07/2018 out of time and consequently the Notice of Appeal filed herewith be deemed to be duly filed in time.

2. The application was premised on the grounds on the face of the application and further by the supporting affidavit wherein she deposed that on 26/07/2018, Hon. L.K Mwendwa delivered a ruling in Succession Cause 103 of 2017 and which ruling she was aggrieved of and intended to appeal against. However, she was late in filing the appeal within the required time and thus the instant application. She further states that the delay was occasioned by procedural events which were beyond her control *to wit* that she had no knowledge as to the fact that the time for filing an appeal is always limited as she was a lay person aged 80 years and thus not conversant with the court procedures and that she was a sickly woman whose movements are restricted and thus it was not possible to file the appeal within time. She further deposed that her appeal was arguable with overwhelming chances of success and that it was in the interest of justice that the application be allowed. Further that the respondent would not be prejudiced if the application was allowed.

3. The application was opposed by the respondent herein vide his replying affidavit sworn on 14/02/2019 and wherein he deposed that it was incompetent, misconceived and bad in law without merit and an abuse of the court process as the same was brought after nineteen (19) months and which delay the applicant did not explain save for unexplained procedural technicalities. Further that the applicant conceded to her inexcusable ignorance of the law and she did she not tender any evidence to support her averments that she was of ill-health. It was the respondent's averments in reply that the applicant herein does not suffer ill-health and she carry her duties freely with no restrictions in movement.

4. The parties herein filed their respective written submissions in support of their respective positions and wherein the applicant reiterated the contents of her application herein. The respondent reiterated the content of his replying affidavit and further submitted that the applicant filed the instant application with no copy of the memorandum of appeal annexed thereto and neither was any served upon him. As such there was no appeal filed to be admitted out of time since she ought to have filed an appeal first and then seek leave for it to be admitted out of time. Reliance was made on Section 79G of the Civil procedure act and further the case of **Gerald M'jimbiwe -vs- Joseph Kangangi 2009] eKLR.**

5. It was his further submissions that the intended appeal has no chances of success as the reasons as to why the grant issued to the applicant was revoked were amongst the grounds for revocation of grant under Section 76 of the law of Succession Act and which ground were never rebutted by the applicant before the trial court. Reliance was made on the case of **First American Bank of Kenya Ltd -vs- Gulap P Shah & 2 others (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** that outlined on the factors which the court ought to consider in deciding whether or not to allow an application for extension of time.

6. The respondent further submitted that the applicant having failed to establish the grounds for grant of extension of time to file the intended appeal, and the orders sought being equitable in nature, she was disqualified from the exercise of the court's discretion in her favour she was indolent and therefore the application ought to be dismissed with costs.

B. Application of the law and determination

7. I have analyzed the application herein, the reply by the Respondent and the rival submissions. In my view, the only issue for determination

is whether the application is merited.

8. Before I proceed, I note that the applicant's application is titled "Notice of motion" and it's indicated to be premised on "section 1A, 1B, 3, 3A, 79G of the Civil Procedure Rules 2010 and all other enabling provisions of the law".

9. It is trite law that in proceedings under the Law of Succession Act, provisions of the Civil Procedure Act and Civil Procedure Rule do not apply. The Law of Succession Act is *sui generis* with its own unique and special procedures which regulate proceedings in probate courts. However, the only provisions of the Civil Procedure Rules which apply are provided under Rule 63 of the Probate and Administration Rules. Otherwise in other instances the rules provided under the Law of Succession Act apply. (See **Josephine Wambui Wanyoike -vs- Margaret Wanjiru Kamau & Another [2013] eKLR**).

10. The Orders in the Civil Procedure Rules applicable in succession matters are Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X. In the amended Civil Procedure Rules 2010 these Orders are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time. Further pursuant to Rule 59 of the Probate and Administration Rules, an applicant is required to move the court by way of summons and not notice of motion. As such it is clear that the instant application is brought under provisions of the law which are not applicable to succession matters and in the wrong form.

11. However, I note that the substratum of the instant application is to seek leave to file a notice of appeal out of time. Order 50 of the Civil Procedure Rules 2010 (previously Order XLIX) is one of the orders which are applicable in succession matters pursuant the Provisions of Rule 63 of the Probate and Administration Rules. Rule 5 specifically provides as thus: -

"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."

12. Despite the applicant having not indicated the right provisions of the law applicable and further the application being wanting in form, it is my opinion that the defects and omissions therein are curable under article 159(d) of the Constitution which obligates this court to dispense justice without undue regards to procedural technicalities. Further, this court is obligated under section 47 of the Law of Succession Act to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and makes such orders therein as may be expedient. Under Rule 73 of the Probate and Administration Rules this court is empowered to invoke its inherent power and to make such orders as may be necessary for the ends of justice. Since the prayers sought in the instant application are such which can be entertained in succession matters pursuant to Order 50 of the Civil Procedure Rules 2010. The above provisions therefore validate the competency of this application.

13. The powers to extend time for filing a notice of appeal or an appeal (as the case may be) is a discretionary power and in exercise of which the court must bear in mind that the main concern of is to do justice between the parties. The discretion has to be exercised judicially, that is on sound factual and legal basis and not on whims or caprice. In deciding whether to grant an extension of time, the court ought to take into consideration the following: -

i. the length of the delay

ii. the reason for the delay

iii. the chances of the appeal succeeding if the application is granted; and

iv. the degree of prejudice to the respondent if the application is granted.

(See **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**, **Annah Mwhaki Wairuru v Hannah Wanja Wairuru [2017] eKLR** and **Mwangi v Kenya Airways Ltd [2003] KLR**).

14. It is not in dispute that the ruling which the applicant intends to appeal against was delivered on 26/07/2018. The instant application was filed on 30/01/2020 and which date was more than 18 months from the date of the ruling.

15. The applicant averred that she failed to file notice of appeal within time since she had no knowledge as to the fact that the time for filing an appeal is always limited as she was a lay person aged 80 years and not conversant with the court procedure technicalities. She further averred that she was a sickly woman whose movements are restricted. She called these reasons "procedural events" which were beyond her control. The respondent in opposition to this submitted that the applicant did not explain the reasons for the delay and neither did she tender any evidence to support her averments that she was of ill-health. According to him, the applicant did not suffer ill-health.

16. It is trite law that ignorance of law is no defense. As assertion by the applicant that she was a layperson and not aware of the court's procedures and timelines therefore cannot hold water as ignorance of the law is not a defence. As to the ill-health and inability to move, it is my opinion that the same was not proved since no medical records were presented. As such the reasons for the delay were never explained to the satisfaction of the court as to warrant the exercise of its discretion in the applicant's favour.

17. The applicant deposed that her intended appeal was arguable with overwhelming chances of success. However, she never annexed her draft memorandum of appeal to this application and/ or file the same in court. As such it is impossible to gauge/ assess the chances of the intended appeal succeeding based on the issues of law and fact which would have been included therein. I have nonetheless perused the

ruling annexed to the application and in my opinion, it does not support the applicant's argument tht her appeal has high chances of success.

18. Considering all the above therefore, it is my opinion that the applicant herein did not make a case so as to persuade this court to invoke its discretionary powers to extend time and do the same in her favour. The instant application therefore ought to fail.

19. All the foregoing considered, it is my considered opinion that the application has no merit and ought to fail.

20. I note that the applicant is the mother to the respondent. Award of costs is always at the discretion of the court but generally, the same ought to follow events. However, this being a family matter, it is my opinion that each party should bear his/her own costs and I hereby so order.

21. The application stands dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF AUGUST 2020.

F. MUCHEMI

JUDGE

In the presence of the Applicant