



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS APPLICATION NO. 281 OF 2019

ANTON WANDUI MURAGE.....APPLICANT

VERSUS

WAMWEA GICHINA.....RESPONDENT

RULING

1. Before me is the motion filed on 2nd September 2019 seeking an order leave to file an appeal out of time. The application is based on among other grounds that the Applicant herein Anton Wandui Murage, is aggrieved with the judgment delivered on 2nd February 2019 which he learned about it in July 2019. He deposed in the supporting affidavit that he is the Administrator of the estate of **Gichina Kiarie** (deceased) and that he is dissatisfied with the manner of distribution of the estate by the lower court. It was his contention that the judgment was adjourned on several occasions before being delivered without notice; that he only became aware of the judgment in July 2019 by which time the time to file an appeal had already lapsed. He asserted that he has a good appeal as evidenced by the draft memorandum of appeal.

2. The motion was opposed through the replying affidavit of Wamwea **Gichina**, the Respondent, filed on 29th October, 2019. Therein, the Respondent deposed that he and other beneficiaries who are elderly, will be prejudiced as the matter has been in court for long; that contrary to assertions by the Applicant, the Applicant present in court when the judgment was delivered; that the draft memorandum of appeal was devoid of merit; and in the circumstances the court ought to dismiss the application as litigation must come to an end.

3. The application was canvassed through written submissions. The Applicant through his counsel submitted that he has satisfied requirements to warrant granting leave to file the appeal out of time, as postulated in the case of **Mwangi v Kenya Airways Ltd (2003) KLR**. Concerning the period of delay, the Applicant stated that it was not inordinate and that in any case the Respondent will not be prejudiced. The Applicant reiterated that he was not aware of the judgment until July 2019 as the judgment had been severally deferred. Counsel submitted that the Applicant's appeal is arguable, placing reliance on the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another (2018) eKLR** for the holding that an applicant need only demonstrate that his appeal is arguable.

4. On his part, the Respondent submitted that the judgment of the lower court indicates the presence of the Applicant at the delivery. Counsel submitted that the Applicant did not demonstrate any efforts made to follow up on the status of the judgment at the time he claims it was pending or furnish reasons for the delay in filing the appeal in respect of the judgment read in his presence. Moreover, it was the Respondent's contention that the intended appeal was devoid of merit. And that, the Respondent stands to be prejudiced if the Court allowed the motion.

5. The court has considered the material canvassed in respect of the application. Although no provision of the law is invoked on the face of the motion, the same is premised on Section 79G of the Civil Procedure Act which provides:

“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 [Rev. 2012] CAP. 21 Civil Procedure 35 [Issue 1] 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.”

6. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

7. The judgment against which the Applicant proposes to appeal was delivered on 2/2/2019 but it was not until 2nd September 2019 that this application was filed. The delay covers a period of 7 months. Although the period may not be inordinate in absolute terms, the explanations given for the delay are not supported by the Applicant's own annexures, namely, annexure "AWM3A" and "AWM3B" which are copies of the judgment and proceedings in the lower court, respectively.

8. First, the Applicant claims that the judgment of the court was adjourned on the first reserved date and that despite efforts to follow up, no information was forthcoming and eventually the judgment was delivered without notice. Nothing could be further from the truth. The proceedings of the court on 20.12.18 indicate that judgment had been set for 7/2/19 after submissions were filed. I presume the correct date is 2/2/2019 and that there is a mistyping of the date in the proceedings. The judgment itself is clearly dated 2nd February 2019. The coram indicates the presence of the Petitioner i.e. the Applicant at the reading of the judgment. Not a single copy of the Applicant's alleged letters of inquiry to the lower court concerning the judgment has been annexed to the Applicant's affidavit. Annexure "AWM1" is a receipt dated 25th July 2019 in respect of payment, presumably by the Applicant for copies of the judgment and proceedings.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any 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 a case to case basis;**
- 4. Whether there is a 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 if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

10. A party who seeks to have the court exercise its equitable jurisdiction in his favour is obligated to approach the court with clean hands. He must lay the facts he relies upon before the court with candour. The Applicant herein has placed before the court explanations that are inconsistent with his own annexures. Rather than admit his own tardiness in obtaining copies of the judgment and filing an appeal timeously, he has resorted to making evidently inaccurate accusations against the court below. The said court, on material available, delivered its judgment on the date scheduled on 20.12.18 and in the presence of the parties including the Applicant. At no time was the judgment postponed. The Applicant has offered no explanation why it took him close to seven months to decide to make the present application, which in all likelihood is an afterthought. If as he asserts, he believed he has a good appeal, that should have been caused him to move with alacrity once the judgment was delivered.

11. Finally, the degree of prejudice to be suffered by the Respondent and indeed all the beneficiaries of the estate cannot be glossed over. The succession cause has been in court since 2007 and some of the parties including the Respondent herein are in their twilight years. Litigation must come to an end. No matter how strong a party's case, he cannot be allowed to litigate at leisure and to extend litigation *ad infinitum*. The court finds no merit in the application filed on 2nd September 2019 and will dismiss it with costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 23RD DAY OF OCTOBER 2020.

C. MEOLI

JUDGE