



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**MISC CIVIL APPLICATION NO. 91 OF 2020**

**BETWEEN**

**SUSAN ANYANGO OMWA.....APPLICANT**

**VERSUS**

**JANE ATIENO OMWA.....RESPONDENT**

**RULING**

1. By a judgment dated 27.02.2019, the trial court revoked the grant of letters of administration issued to the Applicant and ruled that the Respondent and her children were dependents of BOAX OMWA AMADI for purposes of succession.

2. By notice of motion dated 26.05.2020 filed on 27.05.2020, brought under Sections 1A, 3A and 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 (6) of the Civil Procedure Rules, the Applicant prays for orders that:

**1) Time be enlarged for the Applicant within which to file an appeal from the judgment in KISUMU CM SUCC CAUSE NO. 432 OF 2016 delivered on 27.02.2019**

**2) That leave be granted to appeal the judgment in KISUMU CM SUCC CAUSE NO. 432 OF 2016 delivered on 27.02.2019**

**3) The Honourable Court be pleased to grant leave to the Applicants to appeal out of time**

**4) Court be pleased to give any order or direction as it deems fit**

**5) Costs be in the intended appeal**

3. The application is based on the grounds among others that the Applicant is aggrieved by the judgment delivered on 27.02.2019 and that the delay in filing the appeal was caused by the fact that she was grounded due to sickness.4. The application is supported by the affidavit sworn by the Applicant on 26.05.2020 in which she reiterates the grounds on the face of the application. Annexed to the affidavit are Applicant's three treatment notes and receipts dated 21.01.19; 28.03.19 and 24.02.2020.

5. The application is opposed by way of a replying affidavit sworn by the Respondent on 30.07.2020. She avers that Applicant is guilty of inordinate delay that has not been explained.

**Analysis and Determination**

6. I have considered the affidavits on and annexures thereto. The main issue for determination is whether the Applicant ought to be granted leave to appeal out of time.

7. The law on extension of time is to be found in Section 95 of the Act which states as follows:

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

8. Order 50 of the Civil Procedure Rules on the other hand states that:

**“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”.**

9. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya states that:

**“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 anytime 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”.**

10. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered. In the case of **Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR**, the Court of Appeal reiterated the parameters for exercise of court’s discretion as set out 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.”**

11. As much as the discretion of the court is unfettered, an Applicant is obligated to present material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court’s discretion in his favor.

12. I have considered explanation for the delay advanced by the Applicant and whilst the treatment notes and receipts demonstrate that she has been receiving treatment, only one dated 28.03.19 which shows her blood pressure readings relates to the period after judgment. The Applicants’ own documents demonstrate that her assertion that the delay in filing the appeal was occasioned by infirmity due to illness is not factual.

13. This court appreciates that it has the inherent discretion under Section 3A to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of the Constitution to do justice without any delay.

14. The Court of Appeal in the case of **Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR** cited **Esther Waimaitha Njihia & Others Vs. Safaricom Ltd (2014) eKLR** with approval and reiterated that:

**“The exercise of judicial discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice”.** (Emphasis added).

15. From the material presented before the court, it is clear that the Applicant was well aware of the judgment delivered on 27.02.2019 but only moved the court 15 months later.

16. The conduct of the Applicant demonstrates that she is seeking to deliberately obstruct the cause of justice and to deny the Respondent the fruits of her judgment.

17. From the foregoing, I am persuaded that the Applicant is guilty of inordinate delay that has not been sufficiently explained and I therefore decline to exercise my discretion in favour of granting leave to file the appeal out of time.

18. Consequently and for the reasons stated hereinabove, I have come to the conclusion that the notice of motion dated 26.05.2020 is devoid of merit and it is hereby dismissed with costs to the Respondent.

**DATED AT KISUMU ON THIS 22<sup>nd</sup> DAY OF October 2020**

**T.W. CHERERE**

**JUDGE**

**Court Assistant - Ms. Amondi**

**For Applicant - Mr. Onyango for Olel, Onyango, Ingutiah & Co. Advs For Respondent - Mr. Oloo for Ogejo, Omboto & Kijala LLP Advocates**