

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 877 OF 2007

IN THE MATTER OF THE ESTATE OF JANE WAMBUI GATONYE (DECEASED)

LUCY NYOKABI WAMBUIPETITIONER/APPLICANT

VERSUS

HELLEN WANGARE WAMBUIOBJECTOR/RESPONDENT

RULING

1. The ruling that is sought to be appealed from was delivered on 19th November 2018. It was scheduled to be delivered on 31st October 2018 but was not. Notice was sent to the counsel for 19th January 2018. The advocate of the applicant Lucy Nyokabi Wambui states that they were not served with the notice. The respondent Hellen Wangare Wambui similarly states that they did not receive the notice, but that cannot be true because on the day of the ruling there was counsel holding brief for her advocate. The present application for leave to extend time for the filing of the appeal against the ruling was filed on 19th December 2018. The applicant was late in filing the appeal by 16 days. She states that her advocate became aware of the ruling on 3rd December 2018, and on the same day wrote to the court for proceedings.

2. I consider that the right to appeal is a constitutional one. Where one seeks to appeal out of time he has to explain the delay to the satisfaction of the court (**Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others [2011]eKLR**). The explanation for the delay (the claim that counsel did not receive the ruling notice) was not materially challenged. I determine that the delay was for a short period, and has been satisfactorily explained. I exercise my discretion and allow the application. I allow the applicant 7 days to file and serve the Notice of Appeal.

3. On whether the proceedings should be stayed pending the hearing and determination of the appeal that is intended to be filed, I consider that such jurisdiction is exercised under **Order 42 rule 6(2)** of the **Civil Procedure Rules**. There has to be an appeal already filed before such jurisdiction can be invoked. Secondly, the merits of the appeal would not be a consideration for this court.

4. I further consider that the cause was filed in 2007. The deceased left an estate when she died on 28th December 2006. She left a Will whose executor was the applicant. The beneficiaries of the Will were the applicant and her late brother John Ngugi who was survived by his widow Jane Wanjiku Ngugi. The respondent and her sister Susan Ann Wanjiku received no provision. The ruling sought to be challenged reinstated the respondent's objection to the petition and challenge of the Will. It is clear to me that considering how long this matter has been in court, no serious prejudice will be occasioned by this court proceeding to hear the dispute, even as the applicant proceeds with the appeal process.

5. In conclusion, I refuse the request to stay the proceedings.

6. The applicant has been indulged. She will pay the costs of the application.

DATED and SIGNED at NAIROBI this 22ND day of MAY 2019

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 28TH day of MAY 2019

J.N. ONYIEGO

JUDGE