



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CIV. APPLN. NO. 23 OF 2019

SAMUEL KIRAMBURI M'MWAMBIA.....APPLICANT

VERSUS

JAMES NTONGAI MURUNGI.....RESPONDENT

R U L I N G

1. By a Chamber Summons dated 4th March 2019, the applicant sought an order for leave to appeal out of time against the judgment of Hon. A. G. Munene (SRM) The same was delivered on 28th December 2012 in the CMC Succession Cause No. 112 of 2012. He further prayed that the said leave do operate as a stay of proceedings.

2. The grounds upon which the application was made were set out on the face of the Summons and the supporting affidavit of Samuel Kiramburi M'Mwambia sworn on 4th March 2019. The applicant averred that the delay in appealing was due to an irrevocable family dispute in looking for an amicable out of court settlement which failed. That it was therefore in the interests of justice that the application be allowed as the respondent will not be prejudiced if leave is granted.

3. The application was opposed vide the replying affidavit of James Ntongai Murungi sworn on 29th March 2019. He denied the existence of any family dispute in attempting any out of court settlement as there was a judgment in force. That the application lacked merit and should be dismissed.

4. On leave, **section 79G of the Civil Procedure Act** provides that an appeal may only be admitted out of time if an applicant satisfies the court that he has a good and sufficient cause for not filing the appeal in time. In the case of **Annah Mwihaki Wairuru v Hannah Wanja Wairuru [2017] Eklr**, quoting with approval the holding in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (UR)** the court delivered itself 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

5. The principles enunciated in that case apply in this case, Although the said case was in the appellate court, the principles for leave to appeal out of time are applicable in this court.

6. In this case, judgment was delivered on 28th December, 2018. The applicant filed the subject application on 5th March, 2019. There was a delay of approximately 68 days. The delay was in excess of 38 days. The delay was inordinate as the 38 days were over and above the original 30 days allowed by law.

7. The reason advanced for the delay was that there was a family dispute as to settlement of the matter out of court which failed. The nature of the dispute was not disclosed. By the filing of the protest itself in the lower court, that was a dispute which the trial court determined through the judgment. This court was not told what other sort of family dispute the applicant was referring to. The effort made to settle the dispute or the date the negotiations failed was never disclosed.

8. In any event, the respondent denied there being any family dispute that would have led to delay in the of lodging the appeal. To this extent, the applicant has failed to give any sufficient reason why he did not prefer the appeal within time.

9. The next issue is the chances of success. The applicant did not file any draft memorandum appeal to set out what he will argue in the proposed appeal. In this regard, this court is not able to know what grounds the applicant intends to urge on appeal in challenge gale impugned decision. The respondent was of the view that the appeal is frivolous. I have on my part carefully perused the impugned Judgment. The distribution of the estate was in accordance with **section 40 of the Law of Succession Act, Cap 160** since the deceased was a polygamist.

10. In view of the foregoing and in the absence of a draft memorandum of appeal, I am not convinced that the intended appeal has any chances of succeeding. The distribution seems to have been in accordance with the law.

11. On prejudice, the respondent claimed that the intended appeal will delay the sharing of the estate to the beneficiaries. The matter in the trial court commenced in 2012. Surely, any further delay in sharing the estate will be prejudicial to the respondent and the other beneficiaries of the estate.

12. Accordingly, the prayer for leave to appeal out of time is declined.

13. On the issue of stay of proceedings, **Ringera J** (as he then was) held in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 (UR)**:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

14. Guided by the above authority, in the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR**, Githua J held:-

“To my mind the court’s discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and

c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

15. I have already found that the application was not made timeously. I have also found that the intended appeal is not arguable. Being of that disposition, I am of the view that the order for stay of proceedings is not deserved.

16. Accordingly, the application is unmeritorious and it is hereby dismissed. This being a family matter, I will make no order as to costs.

It is so ordered.

DATED and **DELIVERED** at Meru this 23rd day of May, 2019.

A. MABEYA

JUDGE