REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLENOUS APPLICATION NO. 156 OF 2017

IN THE MATTER OF AN APPLICATION TO APPEAL OUT OF TIME

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT THIKA,

SUCCESSION CAUSE NO. 126 OF 1982 ESTATE OF KARARI REBO

AND IN THE MATTER OF SECTION 79 OF THE CIVIL PROCEDURE ACT

BETWEEN

MBUGUA KARARI.....APPLICANT

VERSUS

DANIEL NJUGUNA KARARI.....1ST RESPONDENT

RAPHAEL WAHOGO KARARI.....2ND RESPONDENT

RULING

1. The Application before the Court is the one dated 01/09/2017. It seeks three prayers thus:

a) That the applicant be allowed to file his appeal out of time.

b) That the orders herein issued by the trial court be stayed pending hearing and determination of this appeal.

c) Costs of this application be provided for.

2. The Application is supported by an Affidavit of Samuel Karuga Wandai, who is the advocate who has the conduct of the matter on behalf of the Applicant.

3. The Application is opposed. The 1st Respondent filed a Replying Affidavit in opposition on his and the 2nd Respondent's behalf.

4. The parties agreed to canvass the Application by way of written submissions. Neither party deemed it necessary to orally highlight.

5. The Applicant's Supporting Affidavit is remarkably sparse. In it, Mr. Wandai deposes says that the orders were issued without his knowledge and that his client was only served after three months. He then deposes that he makes the affidavit in "support of my Application that the order be stayed pending the finalization of this appeal be restrained from disposing the said 48 shares."

6. I have quoted verbatim above because I have been unable to make sense of the nature of the orders which were issued by the Lower Court and from which the Appellant now seeks to appeal and obtain a stay. I will return to this shortly.

7. In opposition to the Application, The Respondents have raised five objections in their Replying Affidavit and submissions. I will address each objection next.

8. First, the Respondents resist the Application on the ground that the Applicant did not obtain the leave of the Lower Court before

approaching this Court. The argument would be that the Application is, therefore, futile since leave would be required from the Lower Court before any appeal is filed anyway. The Respondents rely on Order 43, Rule 1(3) for this argument.

9. This objection misapprehends the law. It is true that Order 43, Rule 1(3) provides that where leave is required before an appeal is preferred, that leave should first be obtained from the Court that made the order or judgment. However, no leave is required when preferring an appeal from the Magistrate's Court with respect to an order or decree in a succession matter. Section 80(1) of the Law of Succession Act is clear:

> *An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court shall be final.*

10. The second salvo unleashed by the Respondents is that the Application is incompetent since it is not accompanied by a decree which, in their words, is an "inextricable part of an appeal filed in the High Court against a decision from the subordinate Court…"

11. The provisions of Order 42, Rule 1 stipulate how an appeal is filed in the High Court. It provides that:

> *Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*

12. Respecting filing of decrees or orders, Order 42, Rule 2 is pertinent. It provides as follows:

> *Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.*

13. It is clear from these provisions that an appeal is considered competent when a Memorandum of Appeal is filed even before a certified copy of the decree is filed. In any event, the Applicant has approached the Court to be allowed to file an appeal out of time. There is no appeal in place as yet.

14. Next, the Respondents argue that the Applicant should have filed a Memorandum of Appeal first and then seek to have it admitted by the Court out of time. For this argument, the Respondents rely on the text of Section 79G and the interpretation it was given in ***Gerald M'Limbine v Joseph Kangangi [2009] eKLR***.

15. Section 79G of the Civil Procedure Act provides as follows:

> *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 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.*

16. Emukule J. interpreted this section in the following words in the ***Joseph Kangangi Case***:

> *My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision do not mean that an intending appellant first seeks the court's permission to admit a nonexistent appeal out of the statutory period. To do so would actually be an abuse of the court's process.*

17. I have, however, taken a different view of the provision. I do not take the phrase "*an appeal may be admitted out of time"* to mandatorily require that a party who is late to file an appeal must first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance. At worst, that reading of the statute is not in accord with our practice and may be out of place with the "mischief rule" of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age.

18. The next argument by the Respondents is that the Applicant has not shown any good reason for the delay in filing the appeal. They point out that the order was given on 20th July, 2016 and the Applicant did not bring the present Application until fourteen months later. Further, they point out that the Applicant was present in Court when the order was made. He has not explained why he was unable to appeal on time yet he knew about the orders.

19. The claim that the Applicant was in Court and heard the orders of the Court was made in the Replying Affidavit and remained uncontroverted throughout. It is therefore taken as established. In any event, I note from the Supporting Affidavit that the Applicant's lawyer admits that the order was served on his client three months after it was given. What, then, was the Applicant and his lawyers doing for the next eleven months when they were admittedly aware of the orders? Why did they not file the Application as soon as they, in their own concession, learnt about the orders but waited for another eleven months to do so? No explanation at all has been given for this lapse. In my view, the delay is inordinate and it is inexcusable. No good reason has been given to exercise the discretion of the Court in the Applicant's favour.

20. There is another reason to deny the present Application. The Applicant has not even attempted to demonstrate how or why his intended appeal is arguable. Indeed, the Applicant is not even clear which order he is appealing from! The order that the Applicant ostensibly had hoped to appeal from was given on 20/07/2016. It directs the Executive Officer of the Thika Law Courts to be allowed to execute all relevant documents necessary to effect the subdivision and transfer of land parcel No. Ngenda/Mangu/1624. The Supporting Affidavit talks of disposal of 48 shares. It is completely unclear what shares the Applicant is speaking of. In any event, it is not clear why the Applicant is dissatisfied with the decision of the Court and what points he plans to take up on appeal. This Court cannot assume that every intended appeal is definitionally arguable. There has to be a showing that it is. No efforts was expended even to make a passing claim that the appeal is arguable in this case. It is therefore impossible, under the circumstances, for the Court to conclude that there is sufficient reason to allow the Applicant to file the appeal out of time.

21. **For the reasons outlined above, therefore, the Notice of Motion dated 01/09/2017 is dismissed with costs.**

22. Orders accordingly.

Dated and delivered at Kiambu this 8th day of March, 2018.

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JOEL NGUGI

JUDGE