REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2270 of 2001

IN THE MATTER OF THE ESTATE OF NJOROGE GITAU (DECEASED)

PERIS WANJIRU NJOROGE.....PETITIONER/APPLICANT

VERSUS

RAPHAEL MAINA GITAU.....OBJECTOR/RESPONDENT

RULING

1. The Chamber Summons dated 11th May 2018 and filed the same day is brought under Article 159 (2) (a) and (d) of the Constitution of Kenya Section 47 of the Succession Act, Cap 160 of the Laws of Kenya, rules 49, 67 and 73 of the Probate and Administration Rules of the Law of Succession Act seeking orders enlarging time within which to file the intended appeal and also leave to file the intended appeal against this court's judgment delivered on 5th May 2017.

2. The application is premised upon grounds set out on the face of it and affidavit in support deponed by Peris Wanjiru Njoroge on 11 th July 2018.

3. It is the applicant's averment that judgment in this case was delivered on 5th May 2017 and a notice of appeal filed on 16th May 2017 (See annexure PNN1). That on 20th April 2018 the court granted stay pending lodgment of the appeal. She averred that, due to the mistake on her advocate's side, a memorandum of appeal was not filed within the prescribed time.

4. That being desirous of pursuing the intended appeal, the application to file the same out of time will serve the interest of justice and that an advocate's mistake should not be visited on his client.

5. In response, the respondent filed a replying affidavit sworn on 31st August 2018 opposing the application citing laxity on the part of the petitioner and that the application is an abuse of the court process. Further, he contended that the applicant was granted leave more than six months ago hence a delaying tactic.

6. On 9th October 2018, parties canvassed the application orally with Mr. Ngugi counsel for the applicant adopting the applicant's averments in his affidavit in support urging the court to allow the application. He admitted that the delay to lodge the appeal was purely an oversight on his part and hence his client should not suffer because of his mistakes.

7. On the other hand, Mr. Kiama for the respondent opposed the application relying on the averments contained in the replying affidavit.

8. Briefly, judgment in this case was delivered on 5th May 2017. The applicant swiftly filed the application dated 30th May 2017 seeking stay of execution orders of the said judgment pending hearing and determination of the appeal. In his ruling delivered on 20/4/2018, Justice Musyoka allowed the application.

9. Despite lodging a notice of intention to appeal on 17th May 2017, no memorandum of appeal was filed. The only explanation given by counsel for the applicant is that it escaped his mind that he had not filed a memorandum of appeal. It is over one year now since the notice of intended appeal was lodged.

10. The application herein is brought under Article 159 (2) (c) and (d) thus urging the court not to dismiss the application on undue technicalities. Secondly, it is brought under rule 67 of the Probate and Administration rules which allows a court to exercise discretion in enlarging time where the period fixed for doing something has lapsed and rule 73 regarding exercise of inherent powers of the court.

11. Although there is no specific provision governing the process of appeals to the court of appeal under the Succession Act, justice will demand that parties be given an opportunity to exhaust the available legal remedy in addressing their grievances. It therefore follows that under the inherent powers of this court under rule 73 of the Law of Succession, this court can issue the orders sought for the ends of justice to be met.

12. I am alive to the fact that the delay in lodging the appeal is inordinate in the circumstances. Does the client have a remedy against his advocate in the event the application is dismissed? I have considered the sensitivity of the matter which is an old file of 2001. This case has been pending in court for over 18 years now. Litigation must come to an end in the spirit of Section 1A and 1B of the Civil Procedure on expeditious disposal of cases.

13. Mr. Ngugi has miserably pleaded with this court admitting his mistake. The application for stay also took time to be heard until April this year when the ruling was delivered. The advocate is to blame for the mess the applicant is in. I will reluctantly grant the application so as not to punish the client who is innocent. In the case of **Lucy Bosire vs Kehancha Division Land Dispute Tribunal and 2 others (2013) eKLR Odunga** J held as follows:**"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemolo and Another vs Augustine Kubende (1986) KLR 492: (1982 – 88) IKAR 1036 at 1040; (1986 – 1989) EA74".**

14. Justice is an elusive and delicate balancing act. Courts must look at both sides of the law. Whereas the respondent is entitled to the fruits of his judgment, the applicant is also entitled to exhaust the full process to legal redress. It will be amount to a travesty of justice if the applicant is locked out of the legal process. Accordingly, I am persuaded that it is in the interest of substantive justice that the application be allowed with orders that:

(1) Leave to appeal out of time is hereby granted.

(2) The applicant to file the intended appeal within 30 days from today in default the stay orders issued on 20th April, 2018 shall lapse.

(3) That costs of this application be and are hereby awarded to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2018.

J.N. ONYIEGO

JUDGE