



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL NO. 54 OF 2018

HANNAH WAMBUI NYOIKE.....APPLICANT

VERSUS

LABANSON NJUGUNA.....1ST RESPONDENT

NJOROGE NJUGUNA.....2ND RESPONDENT

RULING

1. This is an application by way of Notice of Motion filed on 27th February, 2017 and brought under Section 50(1) of the Law of Succession Act and Section 79G of the Civil Procedure Act seeking for an order that the Applicant be granted leave to file an appeal out of time.

2. The application is based on ground that the delay in filing the appeal was caused by delayed court proceedings and the sickness of the Applicant's sister. The application is supported by the affidavit of **Hannah Wambui Nyoike**, the Applicant herein She deposed that, she applied for copies of proceedings and judgment and the same were not supplied until 11th September, 2017 when the period for filing the appeal had already expired. She further deposed that thereafter her sister fell sick and later died, leaving her impecunious due to medical bills. Thus, could not afford to file the intended appeal.

3. The Respondents opposed the application. They both swore a replying affidavit and filed it in court on 12th April, 2018. They deposed that the Applicant does not explain her reason for delaying to apply for proceedings and in any case, did not require certified copies of the proceedings to file a memorandum of appeal. It was contended that the claims by the Applicant that she lacked funds to file the intended appeal were false and they sought to demonstrate that she is a person of means. In conclusion, they deposed that the application was meant to frustrate the process of distribution of the estate in respect of a cause that has been in court for the last 19 years. That litigation must come to an end.

4. The court directed that the application be argued orally. The Applicant through her advocate submitted on the basis of the facts as deposed in her supporting affidavit, the certificate of delay and the draft memorandum of appeal. In regard to matters the court should consider in exercising its jurisdiction under Section 79G of the Civil Procedure Act, counsel relied on the case of **Mwangi v Kenya Airways [2003]eKLR**. Counsel stated that the reason for delay is well explained in the Applicant's affidavit and also the appeal has a high chance of success, and in any event, the Respondents will not suffer any prejudice. To support this proposition, counsel cited the case of **Factory Guards v Abel Vundi Kitanyi whose citation was not provided**.

5. In Reply the Respondents' counsel reiterated the contents in the replying affidavit. It was his submission that the delay was not satisfactorily explained as the request for proceedings was made after

lapse of time for filing appeal. Further, the claim that the applicant's relative fell ill was not supported by medical records and that in any event, the Respondents have demonstrated that the applicant is a person of means. In the Respondents' view, the Applicant's intention was to delay the distribution which is prejudicial to the beneficiaries. Finally, counsel stated that the application lacks merit.

6. The court has considered the material canvassed in respect of the instant motion. The application is expressed to be brought under Section 79G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The judgment that is sought to be appealed from was delivered on 24th March 2017.

7. Section 79G of the Civil Procedure Act provides 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 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.”

8. The successful applicant must demonstrate “good and sufficient cause for not filing the appeal in time.” In **Thuita Mwangi v Kenya Airways [2003]e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nairobi 255 of 1997** 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.”

9. While the discretion of the court is unfettered, an Applicant is obligated to adduce 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.

10. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7.”

11. The ruling of the lower court sought to be appealed from was delivered on 24th May 2017, in connection with an application filed in 2006. As pointed out by the Respondents, the first request for proceedings was made by the Applicant one day after the period for lodging appeal had lapsed. There is no requirement that an appellant must obtain copies of proceedings before filing a memorandum of appeal. Besides, the proceedings in this case were ready by 11th September 2017 but it was not until 27th February 2018 that the Applicant filed the present motion.

Allegations that the Applicant’s sister’s illness took up her time and resources have been effectively controverted by the Respondents affidavit.

12. At paragraph 6 the Respondents have deposed to the activities commenced by Applicant subsequent to the ruling, leading to fresh applications in the lower court suit in which the Applicant participated through different advocates. Indeed on 17th September, 2017 the Applicant filed a summons for revocation of the grant in the lower court suit. The application was made through a firm of advocates. It is disingenuous for the Applicant to feign lack of resources when she has been actively engaged in other litigation relating to the same subject matter, through a firm of advocates.

13. Annexures **LN 3A, LN4, LN6** and **LN7** to the Replying affidavit displace the alleged financial disability of the Applicant. She has failed, in my considered view to explain her inordinate delay in bringing the present application or filing appeal on time. The lower court suit related to a succession cause ongoing since 1999. It appears that the execution of the certificate of confirmed grant was at an advanced stage as at November, 2017 judging from the contents of annexure **LN9** to the Replying Affidavit. The Respondents and other beneficiaries in the cause will be prejudiced unduly by further delays, if this court grants the orders sought.

14. In the result, it is my considered view that the application filed on 27th February 2018 should be disallowed. The same is dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 23RD DAY OF NOVEMBER 2018

C. MEOLI

JUDGE

In the Presence of:

Miss Mulumba holding brief for Mr. Ngaruiya for Respondent