



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APP CIVIL APPEAL NO. 31 OF 2016

JACKSON KIMANI NGUGI (Suing as the Legal Representative of the estate of

Josephat Mburu Gitau).....APPLICANT

VERSUS

JACKTON AYIEKO ARUKO alias ORUKO JACKTON.....RESPONDENT

RULING

1. The Applicant Jackson Kimani Ngugi filed an application where sought orders thus:

- i. ***THAT*** the application be certified urgent and servicem be dispensed with at the first instance and that the same be heard *ex-parte*.
- ii. ***THAT*** the honorable court be pleased to grant leave the law firm of Owang & Associates Advocates to come on record for the applicant herein in place of the law firm of Kingori Kariuki & Company Advocates.
- iii. ***THAT*** the Honorable Court be pleased to extend time for the applicant to file an appeal out time against the whole of the judgment delivered by Hon. SRM Chesang on 10th June, 2015 in Nairobi CMCC No. 1901 of 2012.
- iv. ***THAT*** costs of the application be provided for.

2. The respondents opposed the application claiming that the reasons advanced for the delay in bringing the intended appeal are not cogent and no proof has been adduced by the applicant. They averred that the delay is inordinate since the filing of the memorandum of appeal was not pegged on availability of the typed proceedings and judgment. They urged the court to order security for costs in the event it grants the leave sought.

3. The applicant has sought leave Under Order 9 Rule 9 (a) for the law firm of Owang & Associates Advocates to come on record for the applicant herein in place of the law firm of Kingori Kariuki & Company Advocates. It is evident vide the letter dated 2nd November 2011, that the Firm of Kingori Kariuki & Company Advocates, impliedly suggested to the Applicant that they were not willing to continue representing him in the appeal since they strongly felt that the appeal had no chance of success. Consequently, I see no reason why the firm of Owang & Associates Advocates should be denied an

opportunity to represent him in this matter. In that case I grant the aforesaid firm of advocates leave to do so.

4. Section 79(G) of the Civil Procedure Act provides:-

"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."

On perusal of the application and the documents annexed to it, I note that the judgment was delivered on the 10th June 2015 and the application herein was filed on 25th January 2016 which is a delay of over 6 months. The applicant attributes the delay to his previous advocate, the firm of Kingori Kariuki & Company Advocates whom he had instructed to represent him in the matter at the Lower Court. He claims that they applied for certified copies of the proceedings and judgment and did not inform him until 2nd November 2015 when they also advised him against filing an appeal for the reason that there was no eye witness. He claims that after the said communication he went on a searching spree for another firm of advocates to represent him until he instructed his current advocates.

5. It is not clear when the certified copies of the proceedings and the judgment were obtained. None of the parties has shed light on this fact. However, given that the advocates representing the applicant are not the advocates who were previously on record and given that they are yet to be granted leave to represent the applicant after which they will be at liberty to obtain the file from the previous firm of advocates, I am inclined to accommodate the Applicant and grant him leave to file the appeal out of time. The Memorandum of appeal should be filed in the next 7 days.

6. In the end, the Motion application dated 25th January 2016 is hereby allowed. Costs to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 22nd day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondents