



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL MISC. APPLICATION NO. 64 OF 2013

JOYCE KANUGU SALESIO.....APPLICANT

VERSUS

RICHARD MWENDA ATUMA.....RESPONDENT

R U L I N G

1. This application is dated 13th August, 2013. The applicant states that it has been brought to Court under Section 79 G of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. The application seeks orders:-

1. That the applicant be granted leave to file her appeal out of time and within such period as the Court may deem fit in the circumstances.

2. That the Costs of the motion be costs in the intended appeal

2. The application is supported by the following ground:-

1. The applicant has sufficient and good cause for not filing the appeal on time.

3. The application is buttressed by the Supporting Affidavit of the applicant sworn on 13/08/2013 which says:-

“ I JOYCE KANUGU SALESIO, adult female of P.O Box 54, Mikinduri in Republic of Kenya do hereby make oath and solemnly swear as follows:-

1. That I am the applicant herein and I am competent to swear this affidavit.

2. THAT I filed before Meru Chief Magistrate Court Case No. 239 of 2008 against the respondent herein claiming Plot No. 82A, Mikinduri Market on behalf of the estate of my late husband, one M'Muguongo M'Angichia.

3. THAT before filing of the suit, I had obtained limited Grant Letters of Administration from the High Court empowering me to file the suit.

4. THAT the case proceeded to full hearing and the judgment of the Court was pronounced on the 30/10/12 by Mr. D.W Mburu, Senior Resident Magistrate.

5. ***THAT I felt aggrieved by the judgment of the Court and on the same date applied for typed proceedings and judgment of the Court to enable me file appeal. Copy of the letter annexed as JK1.***

6. ***THAT I paid to the Court a deposit to enable the commencement of typing the proceedings, Receipt annexed as JK 11.***

7. ***THAT the proceedings were not ready until the 16/3/2013 when they were certified -Copy annexed as JK 111.***

8. ***THAT by the time the record of the lower Court was typed , time for filing of the appeal had lapsed, hence this application.***

9. ***THAT the delay was caused by the Court's failure to prepare the record in time.***

10. ***THAT thereafter , I also got very sick and I had a long period of treatment and I was therefore unable to see my Advocate for instructions as shown by treatment notes marked JK 1V.***

4. The respondent has filed a Replying Affidavit in opposition to the applicant. The Replying Affidavit sworn on 24/09/2013 says:-

“ I Richard Mwenda Atuma of P.O Box 84 Mikinduri in the Republic of Kenya do hereby solemnly make oath and state as follows:-

1. ***THAT I am the respondent herein and therefore competent to make and swear this affidavit.***

2. ***THAT my Advocates on record M/S MAITAI RIMITA & CO, ADVOCATE have read out and explained to me the contents of the Applicant's application vide Notice of Motion and Supporting Affidavit thereof both dated 13th August, 2013 and it is in response and opposition thereto that I make and swear this affidavit.***

3. ***THAT the said application is fatally defective , has been brought after long and inordinate delay, is a waste of the Court 's Judicial time and the same ought to be struck out with costs to me.***

4. ***THAT the undue delay has not been certified by the Lower Court as being time requisite for the preparation and delivering to the Applicant of a copy of the order.***

5. ***THAT the delay to appeal was thus on the Applicant's part and not the Court.***

6. ***THAT the Applicant's decision to appeal is an after thought which has come too late and which lacks merit to satisfy the Court that there is good and sufficient cause for not filing the appeal in time.***

7. ***THAT among other reasons that made the Applicant fail to appeal in time is that he can raise a very weak appeal and this is manifested by Applicant's failure to even attach a draft memorandum of appeal to convince this Honourable Court or even show her readiness to provide security for the costs of the intended appeal.***

8. ***THAT in light of the foregoing and in the interest of justice and fairness, I pray this Honourable Court to dismiss the Applicant's application with costs to me as allowing the application will be wasting this Court's time.***

9. ***THAT whatever is deponed to herein is true to the best of my knowledge , information and belief.***

5. In her Written Submissions the applicant says that the apposite Judgment was delivered on 30/10/12 and that she paid for the typing of the proceedings 6 days later. She blames the Court for the delay in the typing of the proceedings which were certified on 6/3/2013. She says a Certificate of Delay was issued at her instigation on 01/10/2013.

6. The applicant submits that she has satisfied the Court that she had sufficient and good reason for failure to file her appeal in time. She laconically states that this application was brought without inordinate delay on her part. She says that considering that the subject matter is land and sensitivity of land matters, it would be fair to allow her an opportunity to exercise her right of appeal.

7. The applicant submits that in an application of this nature, there is no legal requirement that the applicant should attach a draft Memorandum of Appeal as contended by the Respondent. She states that whether an applicant has a strong or weak case is a matter to be considered by the Court that hears the appeal. She concludes that her right of appeal should not be curtailed for reasons beyond her control.

8. The respondent in his Submissions says that after false starts, the applicant's Counsel sought leave to file a further Supporting Affidavit which was filed out of the time given by the Court. He points out that the appeal was not filed within 30 days allowed by the law.

9. The respondent submits that the Certificate of Delay was only introduced after he had mentioned its non-existence in his Replying Affidavit. He further contends that it was not a genuine official Certificate from the Court. He says that the matter that spawned this application was heard by a Senior Resident Magistrate but the Certificate shows that it was signed by a Resident Magistrate. He also points out that it had no Court stamp or seal. The respondent also takes issue with the fact that whereas the application is dated 13th August, 2013, the Certificate of Delay is dated 10th October, 2013.

10. The respondent says that the delay in filing this application has not been sufficiently explained. He states that the applicant should not be allowed to use the Court as a scapegoat. He says that the proceedings and Judgment were ready on 16/03/2013 and he assumes that they were collected or should have been collected then. He points out that this application was filed six months later. He contends that the period of between 5 and 6 months has not been explained. He opines that this unexplained period constitutes inordinate delay.

11. The respondent asks the Court to consider whether or not it will be wasting its judicial and precious time on a useless appeal in view of the fact that no draft Memorandum of Appeal, was exhibited, even though he had raised this issue in his Replying Affidavit. The respondent concludes his submissions by saying that the application lacks merits and should be dismissed with costs to the respondent.

12. Section 79G of the Civil Procedure Act is germane. It states:-

“79 G. 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”.

I will shortly pronounce myself on if the intended appellant has shown sufficient cause to the Court for not filing her appeal on time.

13. I have carefully considered the pleadings and the submissions proffered by the parties in support of their respective assertions. I find it rather unorthodox that the Certificate of Delay is dated 10th October, 2013 almost two months after this application was filed. That the certificate has no Court stamp or seal brings into question its integrity.

14. The applicant says in her Supporting Affidavit that the delay to file her appeal was occasioned by failure of the Court to prepare the necessary record on time. She adds that after the record was ready she got sick for a long period of time and, therefore, was unable to give instructions to her Advocate as shown in the treatment notes Marked JK IV. I, however, note that those notes indicate that she was an out-patient at Mbeu Sub District Hospital on 4 days between 29/4/2013 and 22/7/2013. I do not accept that an out-patient can not give instructions to her Advocate. In any case, the notes show that she attended the named hospital on 29/4/ 2013 over one month after the typed proceedings and Judgment were ready on 16/03/2013.

15. I find that the applicant has not explained the delay between 16th March, 2013 when the records necessary for filing the appeal were certified, and 13th August, 2013 when this application was filed. In the circumstances, **I declare that this application is not meritorious. I dismiss it and award costs to the respondent.**

16. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF MAY, 2013 IN THE PRESENCE OF:-

CC: Daniel/Janet

Rimita for the Respondent

Mutura for the Applicant

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P.M.NJOROGE

JUDGE