



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS CIVIL APPLICATION NO. 14 OF 2014

IRENE MABUTI GITARI.....APPLICANT

-VERSUS-

ZACHARIA NJEGE GITARI.....1ST RESPONDENT

RULING

1. **IRENE MABUTI GITARI**, the applicant herein, has moved this Court through a Notice of Motion dated 3rd July, 2014 brought under **Section 79G** of the **Civil Procedure Act** and **Order 50 Rule 6** of the **Civil Procedure Rules** for the following reliefs namely:
 - i. *That she be granted leave to appeal against the judgment and order of Senior Principal Magistrate in Kerugoya Senior Principal Magistrate's Court Succession Cause No. 169 of 2009 dated 12th September, 2012 out of time.*
 - ii. *Costs for the application.*
2. The application is premised on the grounds on the face of the said application which are mainly the fact that the Applicant applied for certified copy of the proceedings and judgment but got them late and by which time the time for appeal had lapsed. She has asserted that she has an arguable appeal.
3. In her supporting affidavit sworn on 3rd July, 2014 the Applicant has deponed that the succession cause in the lower court involved the estate of her late father, Gitari Bwai Njeru (deceased) and that she was dissatisfied with the judgment delivered in the lower court which was read on 12th September, 2012 and applied for certified proceedings and judgment but was only supplied with the same on 25th June, 2014. She had annexed a copy of the certificate as exhibit "JMG2" to support her claims. She asserts that she filed the application now before court 9 days after being supplied with the copy of the proceedings because the copy of the judgment and the proceeding supplied had to be proof read.
4. The applicant has asserted that she has an arguable appeal and has annexed a copy of the draft memorandum of appeal as exhibit "JMG3" in her affidavit in support of her application. She has responded that though **Order 42 Rule 2** of the **Civil Procedure Rules** does not require proceedings to be filed together with the appeal, she required the proceedings in order to make an informed decision. In her view the delay of 9 days from the time she was supplied with the proceedings to the time she filed the present application is not inordinate but excusable. She further submitted that she was the administratrix to the estate and as far as she was concerned the estate is still in the name of deceased.
5. In answer to the claims by the Respondent that she failed to pay the requisite charges for the typing of the proceedings, the Applicant has replied that there is no evidence that the money was

- required and that the certificate of delay is self-explanatory that the delay was caused by technicalities involved in typing, and proof reading of the same.
6. In her view she had shown good and sufficient cause pursuant to **Section 79G of Civil Procedure Act** to deserve an extension of time.
 7. **Zacharia Njege Gitari**, the Respondent herein has opposed the application vehemently vide a replying affidavit sworn on 24th October, 2014 and written submissions filed on his behalf by his learned counsel A. N. Chomba Advocate. The Respondent has contended that judgment in the lower court was delivered on 12th September, 2009 and that the delay in filing appeal was caused by the applicant herself.
 8. In his view, the rules under **Order 42 rule 2** of the **Civil Procedure Rules** places no legal requirement for an intended appellant to file his/her appeal with the proceedings of the record of the case to appeal from. The Respondent has further deposed that the judgment has been executed and in his view there is no chance that the appeal would succeed. He deposed that his late father bequeathed the whole estate **L.R. NO. MUTIRA/KATHARE/291** to him because he was the only son adding that he has lived there for more than 10 years. He opined that the Applicant who is his sister is married and has land elsewhere and he did not wish to share what he had.
 9. The Respondent in his written submissions however, concedes that judgment was actually delivered on 12th September, 2012 and not 2009 as deposed in his replying affidavit. He has however, faulted the Applicant for coming to Court after two years accusing her attempts as an afterthought submitting that the Applicant should have filed her appeal 30 days after delivery of judgment. In his view the delay of two years is inordinate and not excusable.
 10. This Court has considered the application, the grounds upon which it is made and the submissions made by the Applicant's learned counsel Mr. P. M. Muchira. The Court has also considered the response advanced by the Respondent. The main factors to be considered in such applications are:

1. Length of delay.
2. Reasons for the delay.
3. Chances of success in the appeal

The above factors in my view constitute what is captured under **Section 79G Civil Procedure Act** which requires that appeals from subordinate courts to this court must be done within 30 days save where the appellant can satisfy the court that he had "good and sufficient cause" for not filing the appeal in time.

11. The Applicant herein has argued that she did not get proceedings on time and has annexed documents showing that she was supplied with the proceedings on 10th June, 2014 almost two years after judgment was delivered by which time the time of appeal had long lapsed. The Respondent has faulted the Applicant arguing that she did not require certified proceedings and judgment to file the appeal which is correct. The position in law under **Order 42 rule 2** of the **Civil Procedure Rules** as pointed out by the Respondent really requires an intended appellant to simply file a memorandum of appeal within 30 days after the delivery of the order or decree appealed from. The Applicant however, appeared to have suffered unnecessarily under a misconception that she required the certified copy of the proceedings to prefer a competent appeal against the judgment of the subordinate court. This could be the only occasion where misapprehension of the position of law is excusable contrary to the legal maxim "*ignorantia juris non excusat*" which is more applicable in criminal law.
12. This Court notes that the intended appeal related to a succession matter which is governed by **Law of Succession Act** (Cap 160) Laws of Kenya. **Section 50** of the Act gives a party dissatisfied from a decision from subordinate court a right to appeal to this Court. **Section 67** provides as follows:

"Where any period is fixed or granted by these Rules or by an order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired."

The Applicant really did not need to invoke the **Civil Procedure Act** for the remedy for the predicament she is facing. Luckily under **Rule 63** of the **Probate and Administration Rules**, applications for enlargement of time under **Order LIX** of the old Civil Procedure rules (now Order 50 of the Civil Procedure Rules) is among those rules that are applicable in succession matters.

13. This Court finds that the delay of two years coupled with the mistaken belief aforesaid is not inordinate. In the case of **KIHUNGU-VS- KIHUNGU (1989) KLR 179** Nyarangi J.A. (as he then was) in an application for extension of time to appeal such as the present one had this to say:

“It has become a basic concept of land disputes that unless there has been such delay as would make it clearly unreasonable and unjust to reopen the matter, an intended appellant should be allowed to institute an appeal. When it is a family land, the added advantage is that upon determination by the court peace and harmony in the family affected is restored. It seems unlikely that the Respondent and her children will be denied justice. In the circumstances the only matter for consideration was whether the delay in bringing the notice of motion was inordinate, inexcusable and unexplained.”

This Court being guided by the above principles in the authority is satisfied that the explanation given for the delay though not legal is plausible. I am further strongly persuaded to use my discretion in favour of the Applicant by the fact that the appeal is arguable and under **Article 50 (1)** and **159 (A)** of the Constitution this Court is satisfied that this is a proper case calling upon this Court’s discretion to be exercised in favour of the Applicant for the interest of justice. The Applicant deserves a seat in the temple of justice so that she can have her day in court where she can ventilate her grievances about the judgment of the subordinate court. The Respondent will not suffer any prejudice as he will have the opportunity to also advance his reasons in support of the decision to be appealed from. This position is informed by the *ratio decidendi* in the following cases:

1. Paul Musili Wambua -VS- Attorney General & 2 Others [2015] eKLR.
2. Paul Wanjohi Mathenge -VS- Duncan Gichane Mathenge [2013] eKLR
3. Festus Mwarimu & 2 others -VS- Genesis Ciarwigi Muchiri [2014] eKLR
4. Joyce Wamuhu & 2 Others -Vs Ruth Kalekye & Another [2005] eKLR

14. In view of the foregoing, I find merit in the Notice of Motion dated 3rd July, 2014. The same is allowed. The Applicant is granted 14 days from the date of this ruling to file and serve the appeal upon the Respondent and in view of the fact that the proceedings are ready, I will order that the Appellant does prepare a proper record of appeal and file the same as well to fast track the hearing and determination of the intended appeal. There is no order made on costs.

Dated and delivered at Kerugoya this 28th day of October, 2015.

R. K. LIMO

JUDGE

28.10.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Magee holding brief for Chomba for respondent

Irene Mabuti present

COURT: Ruling signed, dated and delivered in the open court in the presence of Magee holding

brief for Chomba for respondent and in the presence of Irene Mabuti.

R. K. LIMO

JUDGE

28.10.2015