

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Miscellaneous Application 4 of 2010

SUSAN NJERI NGUNJIRI..... APPLICANT

VERSUS

BETH WANJIKU NGUNJIRI..... RESPONDENT

RULING

The subject matter of this Ruling is the Notice of motion dated 21st January 2010 taken out pursuant to the provisions of section 79G Civil Procedure Act and order XLIX rule 5 of the Civil Procedure Rules. Basically the Applicant seeks for leave to appeal against the judgment in Kigumo Senior Resident Magistrate's Succession Cause No. 42 of 2007 out of time. The motion sets out the grounds in its based. The same is supported by the facts deponed in the affidavit of T.M. Njoroge. Beth Wanjiku Ngunjiri, opposed the application the motion by filing a Replying affidavit she swore on 2nd February 2010.

It is the submission of Mr. Njoroge learned advocate for Susan Njeri Ngunjiri, the applicant herein that the delay to file the appeal within time was due to the late supply of proceedings by the trial court. The learned advocate stated out that the applicant had applied to be supplied with the proceedings on 12th February 2009. The subordinate court supplied the same on 7th January 2010. A certificate of delay is attached to the affidavit of T.M. Njoroge. In essence, the applicant blames the subordinate court for the delay. It is also submitted that the intended appeal is not frivolous. On his part, Mr. Muchiri Gathoni urged this court to dismiss the motion on the basis that the delay is inordinate and inexcusable. It is further argued that it is not a requirement to file certified copies of proceedings under Order XLI rule 1(a) of the Civil Procedure Rules hence the reason for the delay is not tenable.

I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed for and against the motion. I have further considered the oral submissions made by both learned counsels. There is no doubt that the discretion donated by section 79G of the Civil Procedure Act and order XLIX rule 5 of the Civil Procedure Rules is unfettered.

I have considered the reasons given in the certificate of delay and it is clear that the delay was caused by the late supply of proceedings by the trial court. It may not be a requirement under Order XLI rule 1(a) of the Civil Procedure Rules to file certified copies of the proceedings. The applicant is of the view that it is a mandatory requirement to do so. As to whether or not certified copies of proceedings should be filed or embodied in the record of appeal is a matter of interpretation. If it turns out that it was not a requirement to do so, then, the applicant's advocate will be deemed to have made a genuine mistake which mistake should not be visited upon the client. In the end I am satisfied that the motion is well founded. It is allowed with costs abiding the outcome of the intended appeal. The appellant is given 10 days to file an appeal out of time against the judgment in Kigumo Senior Resident Magistrate's Succession Cause No. 42 of 2007.

Dated and delivered at Nyeri this 16th day of April 2010.

J.K. SERGON

JUDGE