



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HC MISC APL NO 42 OF 2008
JANET NYANDIKO APPLICANT

VERSUS

- 1. EPHRAIM AGADE**
- 2. ZABLON LIAGA RESPONDENTS**
- 3. JACKSON SEREBWA**

R U L I N G

This is an application for leave to appeal out of time. It has been brought pursuant to the provisions of **section 3A** and **79G** of the Civil Procedure Act.

The applicant is desirous of lodging an appeal to challenge a ruling which was made on 26th June 2008. The said ruling was made on a Preliminary Objection, which the respondents had raised in response to an interlocutory application. The interlocutory application was for an injunctive relief, intended to restrain the respondents from intermeddling with the estate of the applicant's mother.

Having heard the competing submissions on the Preliminary Objection, Hon. T. N. Bosibori RM upheld the same. She held that the applicant herein lacked the requisite *locus standi* to institute the suit because she had not obtained any grant of letters of administration, in respect to the estate of her late mother.

The learned magistrate proceeded to strike out both the interlocutory application for injunction, as well as the entire suit.

Being dissatisfied with the ruling, the applicant herein applied for a certified copy of the proceedings and the ruling. The said application was filed on 7th July 2008.

Thereafter, the applicant paid the necessary court fees, on 15th July 2008. However, it was not until 11th August 2008, that the court provided the applicant's advocates with the certified copies of the ruling and of the proceedings. Four days after receiving the ruling and the proceedings, the applicant's advocates filed this application, seeking leave to appeal out of time.

Pursuant to section 79G of the Civil Procedure Act, an appeal from a subordinate court to the High Court, is to be filed within 30 days from the date of the decree or order appealed against. However, in computing the 30 days, the period of time which the lower court certifies as having been requisite for the preparation and the delivery, to the appellant, of a copy of the decree or order, is to be excluded.

In this case, the applicant has not provided the court with a copy of the certificate, if any, issued by the lower court, indicating that the said court needed more than 30 days to prepare and deliver the decree or order to the applicant.

In any event, the applicant has not suggested that she was waiting for the lower court to prepare the decree or order appealed against. She has said that she was waiting for a certified copy of the;

“Proceedings and Ruling delivered in the above case on 25/6/08.....”

Had she been waiting for a copy of the decree or order appealed against, the applicant would now have only needed to obtain a **“certificate of delay.”** But because she was waiting for the certified proceedings, the lower court could not issue a certificate which could exonerate the applicant from the delay in filing her appeal. I believe that that is why the applicant has sought leave of this court, to appeal out of time.

A reading of the provisions of **Order 41 rule 1A** of the Civil Procedure Rules makes it clear that a memorandum of appeal may be filed in the absence of a certified copy of the decree or order appealed against. The rule simply requires the appellant who has filed his memorandum of appeal without a certified copy of the decree or the order appealed against, to file such certified copy as soon as possible, and in any event within such time as the court may order.

I do therefore accept as correct, the submissions of the respondent in that regard.

Strictly speaking therefore, the applicant was not legally incapacitated from filing her appeal within the time prescribed.

But, it is equally true that her legal advisers believed that without a certified copy of the proceedings and ruling, an appeal could not be filed. The said legal advisers therefore went about pursuing the lower court, for the issuance of the proceedings and ruling.

Right upto the close of submissions on the application before me, the applicant’s advocates held the view that their client’s appeal could not have been filed in the absence of the proceedings and ruling. Although, the said view was incorrect, it nonetheless stood in the applicant’s path, blocking her from lodging her appeal.

In my considered view, that explanation by the applicant’s advocates may be wrong, but it is nonetheless demonstrative of the obstacle which stood in the applicant’s path to the filing of her appeal. It constitutes a good and sufficient cause for the delay in filing the appeal.

I also hold that the appeal which the applicant intends to file raises arguable points of law. For instance, the question arises as to whether or not the matters raised in the plaint fell within the ambit of the Law of Succession Act. If the answer to that question was in the negative, then it would be necessary to explore the question whether or not, in those circumstances, the learned magistrate was right to have struck out the entire suit when she was determining the preliminary objection.

At this stage, the court has not had the benefit of giving consideration to the pleadings. Therefore, I have not the slightest idea as to who between the applicant and the respondent is right, regarding the scope of the claim in the plaint. It is therefore my considered view that the course of justice will be best served by allowing the applicant to appeal out of time. By so doing, the respondents will not be prejudiced at all, because they will have every opportunity to answer to the appeal substantively.

In the result, leave is granted to the applicant to appeal out of time. Her intended appeal should be filed within the next 15 days from today.

However, the applicant will bear the costs of the application in any event, because there is absolutely no reason why this court should burden the respondents with the said costs. The respondents played no role

in the delay in the filing of the appeal. The delay was solely attributable to the advise which the applicant got from her lawyers.

Dated, Signed and Delivered at Kakamega, this 19th day of March, 2009.

FRED A. OCHIENG

J U D G E