



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 80 Of 2004

CHRISTOPHER MURIITHI NGUGU APPLICANT

BETWEEN

ELIUD NGUGU EVANS RESPONDENT

RULING

The application dated 26th April 2005 by way of Notice of Motion is provided under Section XLIV Rule 1 and 6 of the Civil Procedure Rules, Rule 73 of the Probate and Administration Rules under Laws of Succession Act (Cap 160 Laws of Kenya).

The said Rules under the provisions of Rule 63 has provided that order XLIV of Civil Procedure Rules, amongst other orders specified therein, is applicable to the proceedings under these Rules.

Rule 73 thereof stipulates that inherent powers of the Court are preserved. Thus the aforesaid application is properly before the court and is not incompetent as is canvased by the Learned Counsel for the Respondent.

In my view the application is prosecuted on the ground of “*any other sufficient reasons*”. The late Hon. Kamau J. on application by the Learned Counsel of the Respondent dismissed the application by his order of 25th April, 2005. Apart from the reason of the absence of the Appellant’s Advocate, he also relied on the ground that there is absence of certificate of delay.

Rule 8B (4) of Order XLI of Civil Procedure Rules mentions the documents which should be on record. The certificate of delay is not one of them as is the case in appeal before Court of Appeal. In any event, I am aware that the Chamber Summons which was dismissed was seeking leave to file appeal out of time that means there is delay and hence the application. I have noted that the previous Counsel for the Appellant had applied on time for certified copies with requisite deposit paid. My said observations are no and should not be taken as comments over the order made. I make these observations as the same was submitted before. In any event nothing turns on these observations.

As averred it was the office of Counsel who neglected to file the appeal within time.

What is before me is only to determine whether the Appellant/Applicant has reasonable grounds to seek prayers for review of the said order.

The application is supported by the grounds stated on the face thereof as well as Affidavit of Mr. Mwangi Kigotho the Advocate on record and his court clerk Mr. Justus Kilima. The application is filed on the next day after the order was granted. Thus I can believe that the Applicant is keen to prosecute the original application order whereof is sought to be set aside or be reviewed.

I do have unfortune to hear this application due to impossibility for my brother judge to hear the same.

The said application was opposed vehemently and a replying affidavit by the Learned Counsel Macharia Muraguri is also filed.

I have carefully considered the application, the affidavits on record and the submissions made by both the Counsel.

I do not have to stress that the order sought is discretionary which discretion this Court has to exercise judiciously. I am satisfied that the absence of the learned Counsel was not deliberate and was due to circumstances beyond his control. As per his affidavit he tried his best to contact the counsel for the Respondent and also to get some advocate to hold the brief for him before the Honourable Judge.

The circumstances simply were against him and the application was dismissed.

Balancing the interests of both sides, I do not think grave damages shall be sustained by the Respondent. In Civil litigation usually the order of costs can remedy all the maladies and this is what I intend to apply.

I grant the application and set aside the ex-parte order of the court made on 25th April, 2005 dismissing the application (Chamber summons) 22nd December, 2004.

I further direct that the Appellant/Applicant pay costs of 25th April, 2005 as well as of this application to the Respondent. The ordered costs to be agreed upon or in failure of such agreement be taxed by the Deputy Registrar of the Court.

Dated and Signed at Nairobi this 22nd February, 2006

K.H. RAWAL

JUDGE

22.2.06