



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CIVIL CASE NO. 66 OF 2020**

**FRANCIS NJOROGE MWANGI.....PLAINTIFF**

**VERSUS**

**1. GLADYS MUKINA S. MBUGUA.....ADMINISTRATOR/RESPONDENT**

**2. JAMES GATUHA MBUGUA**

**3. LEAH WANJIKU GATAHO**

**4. JEMIMAH WAMBUI ENDICAH**

**5. PETER MWANGI MBUGUA**

**6. BENJAJIN KABATI MBUGUA**

**7. JOSEPH NJOROGE MUCHOKI.....RESPONDENTS**

**RULING**

**1. FRANCIS NJOROGE MWANGI (the applicant)** has filed before this Court an application dated 5<sup>th</sup> March, 2020 seeking enlargement of time for him to file an appeal against a Ruling delivered on 19<sup>th</sup> December 2019 by Thika Chief Magistrate's court in Succession Cause No. 189 of 2007. He also seeks that the proceedings in that Succession Cause in Thika be stayed pending the intended appeal.

**2. Section 79G** of the Civil Procedure Act Cap 21 provides the period within which a Civil Appeal should be filed. That Section provides thus:-

***“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 anytime 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.”***

**3.** The applicant, as seen from the above provision delayed by three months in filing the present application for leave to appeal out of time. The reason given by the applicant for delaying in filing his appeal is that he did not have finances to file the appeal out of time but that he now does have those finances and hence seeks that this Court will grant him leave to file an appeal out of time.

**ANALYSIS**

**4.** I have considered the applicant's affidavit in support of the application and his written submissions. The 2<sup>nd</sup> to the 6<sup>th</sup> respondents filed grounds of opposition and written submissions. Those respondents having not filed an affidavit their grounds and submissions where they rely on facts will not be considered by this Court because to do so would amount to evidence being tendered from the bar. The 1<sup>st</sup> and 7<sup>th</sup> respondents did not file any document in response to the application.

**5.** The applicant has moved this Court under the proviso of **Section 79G of Cap 21**. That proviso is in the following terms:-

***“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for filing the appeal out of time.”***

6. I am persuaded by the finding in the case of MAURENE AGUTU VS. PAUL MBOYA (2019) eKLR thus:-

*“8. The parameters for exercise of court’s discretion were concisely laid out in the case of MWANGI V KENYA AIRWAYS LTD [2003] eKLR where the Court of Appeal expressed itself thus:-*

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.*

7. Indeed this Court does have discretion in deciding whether to enlarge the period of filing an appeal. Discretion however has to be judicially exercised.

8. The applicant stated that the reason he failed to file the appeal in time was because he lacked finances to file the same. In my view that is a very sweeping statement. It needed to be expounded. For example the filing fee of a Memorandum of Appeal is a minimum of Kshs.850/=.

9. The applicant needed to state what his likely income was, if at all, then explain why that income was insufficient to provide the court fees. The applicant without much explanation stated in his affidavit in support of his application that:-

*“...nevertheless, I have now managed to obtain the necessary funds to file the appeal.”*

10. I make a finding that there is insufficient explanation by the applicant for the reason of delay in filing the appeal or in filing an application to file an appeal out of time by three months. A case in point is RICHARD MUTHUSI VS. PATRICK GITUMA NGOMO & ANOTHER (2017) eKLR as follows:-

*“62. On the issue of merit of application to extend time, it was held in NICHOLAS KIPTOO ARAP KORIR SALAT VS. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR:-*

*‘... It is clear that the discretion to extend time is indeed unfettered.*

*It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis. Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court. Whether there would be any prejudice suffered by the respondent, if extension is granted. Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

11. The delay of three months before approaching this Court was too long and as found above, that delay was insufficiently explained.

12. Bearing in mind the decision of the case MAUREEN AGUTU VS. PAUL MBOYA (supra), I now consider whether the proposed appeal has a chance of succeeding and whether there will be prejudice suffered if orders are granted as prayed.

13. The applicant before the Thika Court raised a preliminary objection, the content of which however was not brought to this Court’s attention. As a consequence, the court is left with the only option of deciphering it from the trial court’s ruling. That in my view is very unsatisfactory. The applicant was obligated to provide all necessary documents which would assist this Court reach a just determination. This is in view of the fact that the preliminary objection being the very basis the applicant requests for the enlargement of time to file an appeal. This Court can but only take a deem view of its exclusion from the documents filed in this matter. Indeed, the absence of that objection will be construed adversely against the applicant.

14. From what I can decipher, the applicant’s objection before the trial court was that, the application that court was considering was *res judicata*. The trial court, as can be seen by its ruling of 19<sup>th</sup> December, 2019 set out the prayers of the previous determined application then made a finding as follows:-

*“A cursory look at the application shows that the reliefs sought therein were different from the reliefs sought in the current application and cannot therefore a matter (sic) res judicata.”*

15. The trial court concluded that there was no merit in the objection raised by the applicant.

16. Being cognisant of the fact that the applicant sought the exercise of this Court’s discretion in his favour failed but failed to provide pertinent documents that could have assisted this Court reach a just decision and considering the reasons given by the trial court for rejecting the applicant’s objection, I find on prima facie basis the intended appeal has no merit.

17. Further, the trial court's ruling seemed to have recognized that there was criminal activity involved in the deceased's estate. By that ruling, the trial court stayed grants that had been issued and ordered that the criminal investigation be undertaken before further orders are made. For that reason, I make a finding that the respondents and all beneficiaries of the deceased estate will be prejudiced not only by un-meritorious appeal if filed, but also by the trial court's proceeding being stayed. Stay cannot be granted bearing in mind the holding of the case **KENYA WILDLIFE SERVICES VS. JAMES MUTEMBEI (2019) eKLR** as follows:-

***“Therefore the test for stay of proceeding is high and stringent. See Ringera, J in the case of GLOBAL TOURS & TRAVELS LIMITED; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus:-***

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)***

8. I am also of the view that the prayer for stay of proceedings cannot be granted in the absence of a filed appeal in this Court. This is what the Court of Appeal alluded to in the case of **NGURUMAN LIMITED VS. SHOMPOLE GROUP RANDI & ANOTHER (2014) eKLR** thus:-

***“20. It is now trite and as will be demonstrated later on in this ruling that the exercise of this Court's mandate is usually set in motion by either the lodging of a notice of appeal thereby signifying a party's intention to appeal or alternatively by the filing of the appeal itself...”***

## **DISPOSITION**

19. The Notice of Motion dated 5<sup>th</sup> March, 2020 is without merit and is dismissed with costs.

**RULING DATED and DELIVERED at KIAMBU this 3<sup>rd</sup> day of JUNE, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Ndege

Appellant : No appearance

2<sup>nd</sup> – 6<sup>th</sup> Respondent : Mr. Tumu

## **COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**