



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC CIVIL APPLICATION NO. E008 OF 2021

LUCY WANGARI MWANGLI.....1ST APPLICANT

JAMES GITHAE MATU.....2ND APPLICANT

TERESA NYAMBURA WANDERI.....3RD APPLICANT

GEORGE MAINA MATU.....4TH APPLICANT

SIMON KIMARU KAMAU.....5TH APPLICANT

DAVID MUCHIRI MATU.....6TH APPLICANT

PRISCILLA NJOKI MATU.....7TH APPLICANT

VERSUS

JACINTA KAMUYU GITHUNGU.....1ST RESPONDENT

ROSEMARY MWIHAKI IKUMBI.....2ND RESPONDENT

RULING

Brief facts

1. This application dated 1st March 2021 brought under **Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules** seeks for orders for extension of time to file an appeal against the judgment delivered on 20th November 2020 in Othaya SRMCC No. 194 OF 2018 In The Estate of John Ikumbi Githae, deceased.

2. In opposition of the said application, the 2nd respondent has filed a Replying Affidavit dated 26th March 2021 and filed in court on 31st March 2021.

The Applicants' Case

3. It is the applicants' case that judgement was delivered on 20/11/2020 which application dated 5/8/2020 was dismissed. Being aggrieved by the decision of the trial court, the applicants gave instructions to lodge an appeal but the statutory period to file an appeal had already lapsed. The applicants add that they were not in a financial position to lodge an appeal at the time. They argue that in the interest of justice they be granted an enlargement of time to file an appeal as they have an arguable appeal with a high probability of success.

4. The applicants contend that they have brought the present application without unreasonable delay.

The 2nd Respondent's Case

5. It is the 2nd respondent's case that the applicants sat on their right to appeal since the ruling was delivered and as such, the instant application is an afterthought and meant to dupe the court to resuscitate a concluded matter.

6. The 2nd respondent depones that the applicants' are financially upright as they have retained two independent legal counsels to represent

their interests in the lower court. Thus their excuse of being financially unable to lodge an appeal has been made in bad faith. The 2nd respondent depones that the applicants have not applied for certified proceedings from the trial court and that the orders sought are ineffective as they have not sought enlargement of time to file and serve the 2nd respondent with a notice of appeal.

7. The 2nd respondent further states she is unable to enjoy the fruits of her judgments because of the litigious actions of the applicants and the 1st respondent. She adds that this application is prejudicial to her because she has to keep raising funds to challenge frivolous claims. She states that litigation must come to an end and she should be able to enjoy the fruits of her judgments. The 2nd respondents prays that the instant application be dismissed.

8. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

The Applicants' Submissions

9. The applicants rely on the case of **Lydia Wambui Maina vs Catholic Diocese of Nakuru & Another [2007] eKLR** to buttress their point that financial constraints is a sufficient ground to warrant a court to extend time within which a party can lodge an appeal. The applicants ask the court to take judicial notice of the hard economic times experienced during the pandemic and find that the applicants deserve the court's mercy and extend time within which to file an appeal.

10. The applicants submit that the 2nd respondent will not be prejudiced as she is a wife of the deceased and continues to enjoy a life interest of the estate. In contrast to the applicants who will be prejudiced if the application is not allowed as they were not given a chance to ventilate their case before the trial court. In any event, if the 2nd respondent suffers any prejudice, she may be awarded costs.

11. The applicants contend that the appeal has high chances of success as they were recognized as children of the deceased pursuant to the chief's introductory letter. As such, such an issue ought to be ventilated in the appeal.

12. The applicants thus submit that their application has merit and the same ought to be allowed.

The 2nd Respondent's Submissions

13. The 2nd respondent urges the court to interrogate whether the present application has met the threshold in respect to **Section 79G of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules**, the case of **Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR** and **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**. In light of the above provisions and case law, the 2nd respondent submits that the applicants have not met the threshold because:- the delay of four months is unreasonable; the reason for the delay is not plausible as the requisite fees for lodging an appeal are nominal and the applicants have not taken any steps in preparation of the appeal such as filing a Notice of Appeal or applying for certified copy of proceedings from the lower court. The 2nd respondent further submits that the burden of proving sufficient cause lies on the applicants as indicated in the case of **Ratman vs Cumarasamy [1964] 3 All ER 933 and Savill vs Southend Health Authority [1995] 1 WLR** at 1259 which were cited with approval in **Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**.

14. The 2nd respondent submits that the appeal does not have high chances of success as the grounds raised in the Memorandum of Appeal were not subject of the ruling that the applicants are seeking to appeal from. The 2nd respondent adds that the applicants are acting in bad faith and the instant application is prejudicial to her as she has to keep raising funds to challenge frivolous claims which is denying her right to enjoy her judgment. As such, the 2nd respondent prays that the instant application be dismissed with costs.

Issues for determination

15. After careful analysis, we humbly submit that the main issue for determination is whether the applicants ought to be granted leave to appeal out of time.

The Law

Whether the applicants ought to be granted leave to appeal out of time.

16. It is trite law that the powers of the court in determining an application for extension of time to file an appeal are discretionary and unfettered.

17. The law on extension of time is to be found in **Section 95 of the Civil Procedure Act** which states as follows:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

18. **Section 79G of the Civil Procedure Act** provides:-

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 any time 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:

Provided that an appeal may be admitted out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

19. The parameters for the exercise of a court's discretion have been concisely laid out in the case of Mwangi vs 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 or not 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.”

The length and reason for the delay

20. Applying the above principles to the present case, the ruling herein was delivered on 20/11/2020 and the applicants filed the instant application on 1st March 2021. This is about 3months and a couple of days outside the time limited for filing an appeal. The applicants explained to the court that the reason why they delayed filing the appeal on time is because they were raising money to pay legal fees to lodge an appeal. The applicants herein have not satisfactorily explained the reasons that led to the delay. Despite the 2nd respondent averring in her affidavit that the applicants were financially upright and had two independent counsel during the lower court trial, the applicants did not dispute or counter this. In my view, that serves as an admission that they are financially upright. Furthermore, no proof of the financial constraints was given by the applicants and no mention was made as to why the applicants could not lodge the appeal themselves as they raise money to hire legal counsel in the appellate process. In that regard, I find the reasons for the delay are not plausible as the reasons given lack substantiation. Case law relied on George Mwenda Muthuri vs Mama Day Nursery and Primary School Nyeri CA No. Nyr No. 4 of 2014 (UR2/14) where a request for leave to extend time was declined because of inability to raise legal fees was not per se a reason. Similarly in Willis Oneko Opiata vs Fredric Omondi Wera [2021] eKLR.

21. Notably, the conduct of the applicants is also wanting. The applicants have not expressed their seriousness in their desire to pursue the intended appeal as they have not applied for typed proceedings. Furthermore, they have not given any reasons to the court as to why they have not applied for typed proceedings. In this regard, I am of the view that the applicants have not satisfied this prerequisite.

Whether the applicants have established that they have a prima facie arguable case

22. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR. Similarly in Willis Oneko Opiata vs Fredrick Omondi Wera [2021] eKLR the Court of Appeal held that **“an arguable appeal need not be one that must succeed, but one that warrants not only invitation to the opposing party to respond thereto, as well as the court's interrogation.”**

23. On perusal of the Draft Memorandum of Appeal, I am convinced that the appeal herein raises bona fide points worthy of consideration by the appellate court. The issues would warrant the respondent's response as well as the court's interrogation. As such, I find that the applicants have raised arguable grounds of appeal.

The degree of prejudice to the 2nd respondent if the application is granted.

24. According to the 2nd respondent, she submits that she will be greatly prejudiced if the application is granted because she has obtained judgments which she cannot enjoy and due to the litigious nature of the applicants, she has to keep looking for funds to defend the claims brought by them to court. On the other hand, the applicants contend that the 2nd respondent will not suffer any prejudice because she enjoys a life interest of the estate and in any event, she may be compensated by way of damages. The court has to balance between the injustices to the applicants in denying them an extension as against the prejudice to the 2nd respondent in granting an extension. I find that since the 2nd respondent holds a life interest in the suit property, no prejudice will be occasioned to her.

25. It is my considered view that the applicants have satisfactorily explained the reasons for delay which in my view is not inordinate.

26. I find the application merited and I hereby allow it the following terms:-

- a) That the applicants have 14 days to file the memorandum of appeal failure to which the orders will be deemed to have expired.
- b) That costs be in the cause of the intended appeal.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 22ND DAY OF JULY, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 22ND DAY OF JULY, 2021.