



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. APPLICATION P & A NO. E011 OF 2021

JOSEPH KARIUKI MWANIKI.....1ST APPLICANT

PAUL NGATIA MWANIKI.....2ND APPLICANT

VERSUS

DANIEL MIGWI KANG'ANG'I.....RESPONDENT

RULING

Brief facts

1. This application dated 22nd April 2021 brought is under **Section 79G of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules** seeking for orders of extension of time to file an appeal against the judgment delivered on 27th November 2020 in Nyeri CM Succession Cause No. 266 of 2016.
2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 24th May 2021.

The Applicants' Case

3. It is the applicants' case that judgement was delivered on 27/11/2020 and being aggrieved they gave their counsel instructions to lodge an appeal. It was dawned on them that the statutory period to file an appeal had already lapsed. The applicants applied for certified copies of proceedings and the judgement on 30th December 2020 and were supplied on 1st March 2021, and certificate of delay was obtained on 29th March 2021 thus explaining the cause of the delay in filing this appeal.
4. The applicants contend that they have an arguable appeal with a high probability of success. Further, the applicants argue that if leave to file an appeal out of time is denied, they shall suffer substantial loss. The applicants state that the respondent shall suffer no prejudice if the application is allowed.

The Respondent's Case

5. It is the respondent's case that the application is bad in law, incompetent and an abuse of the court process. The respondent argues that the delay in filing the application is untenable as judgment in this matter was delivered on 27/11/2020 and emailed to the advocates on the same day. Counsel for the applicants acknowledged receipt on the same date at 10.37 am. In any event, the respondent states that it is not a requirement that one obtains certified copies of judgment and proceedings to file a memorandum of appeal. Moreover, no reason has been offered by the applicants why they did not use the judgment sent to them on email to prepare a memorandum of appeal.
6. The respondent states that the applicants deliberately delayed in filing their appeal for no reason has been given for issue of the certificate of delay on 29/3/2021 and yet filed this application on 22/4/2021. The respondent further contends that the application is an afterthought and is meant to delay the execution of the judgment. As such, the respondent prays that the application be dismissed with costs.
7. Parties hereby agreed to dispose of the application by way of written submissions. The applicants filed their submissions but the respondent did not do so.

The Applicants' Submissions

8. The applicants rely on **Section 50 of the Law of Succession Act, Rule 67 of the Probate and Administration Rules, Section 79G of the**

Civil Procedure Act and the case of **Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR** and submit that they have a right of appeal and that they have satisfied the conditions set out to be granted leave to file an appeal out of time.

9. The applicants contend that the delay in filing the memorandum of appeal is not inordinate as it is only 25 days late. Judgment was delivered on 27/11/2020 and certified copies and judgement which were applied for on 3/12/2020 were ready for collection on 1/3/2021. A certificate of delay was issued on 29/3/2021 and the instant application was filed on 23/4/2021. The applicants argue that the application is not an afterthought as the request for typed proceedings and judgment was made five days after judgment was delivered.

10. The applicants submit that their appeal raises critical issues of infallibility of the decision of the trial court in the distribution of the estate of the deceased. It is argued that the grounds of appeal are plausible, persuasive and capable of overturning the origin verdict.

11. The applicants further submit that no prejudice will be suffered by the respondent if the court extends time to file the appeal. Thus, the applicants pray that time be extended within which they can file their appeal.

Issues for determination

12. The main issue for determination is whether the applicants have satisfied the court as to the grant of the orders 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.

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

14. 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.

15. **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.

16. 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

17. The record shows that judgment in the instant case was delivered on 27/11/2020 and the applicant filed this application on 23/4/2021. This is approximately 4 months and a couple of days outside the time limited for filing an appeal. The applicants explained that the delay was occasioned by getting the certified proceedings and judgment late. As noted by the respondent. The applicant had at his disposal the judgement sent on email in order to file memorandum of appeal. The applicant did not have to wait for long so long for the certified copies of proceedings.

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

18. 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.**

19. 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 namely the issue of jurisdiction among others.

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

20. The applicants have submitted that the respondent shall not be prejudiced in any way in the event the said application is allowed. Notably, the respondent has not pointed out how he will be prejudiced if the application for leave is allowed. In that regard, I am of the considered view that the respondent shall not suffer any prejudice that cannot be compensated by way of damages.

21. For the foregoing reasons, I am of the considered view that the applicants have demonstrated a sound basis for extension of time to lodge an appeal.

Conclusion

22. Consequently, I find this application merited and allow it accordingly. The applicant shall file his appeal within ten(10) days in default of which these orders will automatically be vacated.

23. Costs of this application are awarded to the respondent.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 14TH DAY OF OCTOBER 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 14th day of OCTOBER 2021