



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 288 OF 2019

BETWEEN

ISMAEL JUMA KIMANI.....APPLICANT

VS

ASHA WAHITO JUMA.....RESPONDENT

RULING

1. **ISMAEL JUMA KIMANI**, the applicant filed a Notice of Motion application dated 6th September, 2019 seeking for the stay of the grant issued by the Chief Magistrate's court Kiambu in Succession case No. 275 of 2011 and for leave to file an appeal out of time.
2. The application is opposed by Asha Wahito Juma.
3. I have considered the affidavit evidence and the written submissions of the parties.
4. The applicant deponed in his affidavit in support of the application that after the Ruling was delivered by the Kiambu Chief Magistrate's court on 20th March, 2018 his former advocate, who remained unnamed abandoned him. It is not clear what the word abandoned means in the context of the present application. The applicant further deponed that on his advocate abandoning him, he was unaware he was required to file a memorandum of appeal and it was not until 6th August, 2019 his new advocate undertook to regularize the position.
5. The respondent is of the view that the applicant had not provided valid grounds for failing to file the appeal within the 30 days provided under section 79G of the Civil Procedure Act which is in the following terms:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 preparation and delivery to the appellants of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal.” (underlining mine)

6. What is notable is that the above Section gives the court discretion to admit an appeal filed out of time. The court does not, in my view on the reading of that Section, permit leave to be granted to file an appeal out of time where such an appeal does not exist. This indeed was the holding in the case Gerald ***M'LIMBINO VS. JOSEPH KANGANGI (2008) eKLR*** thus:-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:

‘Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily’

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil

Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”

7. On that basis alone, the application will fail because the applicant has not filed an appeal.

8. Even if an appeal was on record I find that the applicant has not explained the delay in filing the appeal sufficiently. It was not enough to allege that he was abandoned (whatever that means) by an unnamed advocate. If indeed the applicant did not know he was required to file a memorandum of appeal why then did he write to the trial court a letter dated 15th August, 2018 seeking proceedings. Although it needs to be stated that the said letter does not bear the trial court’s stamp and it is doubtful that it was indeed presented to the trial court, I find it useful to refer to the discussion of the Court of Appeal in the case ***HENRY GATURA & 3 OTHERS VS. CHARLES OGINA & 4 OTHERS (2011) eKLR***, where although the Court of Appeal was making reference to its Rules, it is useful to our circumstances in this case. The Court of Appeal in that case stated:-

“The law is now well settled, that though the Court has discretion in such an application but that discretion must be exercised upon reasons and not on the whims of the Court nor capriciously. The guidelines that would help the Court in the exercise of such discretion are that the Court needs to know the period of delay; the applicant needs to offer explanation for such delay; the Court needs to see if the applicants’ intended appeal is arguable (but without delving into the main appeal itself), the Court needs to consider whether granting of the application will result into prejudice to the other party.”

9. I am tempted to adopt the words of the Court of Appeal and say that the applicant seeks the court to exercise its discretion on whim. This Court declines to do so.

10. Accordingly, the Notice of Motion dated 6th September, 2019 is without merit and it is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Mourice

For Applicant: Mr. Waithombe

For Respondent: Mr. Mundia Mwangi H/B Karie

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE