



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 369 OF 2018

MARCOS MUTISO KITUKUYU.....APPELLANT/APPLICANT

VERSUS

BENEDICT MULE MUTIE.....1ST RESPONDENT

JOYCE MBII MUTIE.....2ND RESPONDENT

RULING

1. The application dated 29th November, 2018 seeks the following orders:

“1. Spent.

2. That this honourable court be pleased to grant leave to extend and enlarge the time limited for filing the Notice of Appeal and Record of Appeal.

3. That Notice of Appeal and Record of Appeal herein be deemed as properly filed.

4. That this honourable court, do hereby order that the trial file being file number Milimani Commercial Court, CMCC 2005 of 2016 be brought before this honourable court as all efforts by the Appellant to trace the said file have been futile.

5. That the costs of and incidental of this application be in cause.”

2. It is stated in the grounds and the affidavit in support of the application that the Applicant was on 18th October, 2018 given 21 days to file the Record of Appeal but the said days lapsed before the Record of Appeal was filed. The failure to file the Record of Appeal is blamed on the non availability of the lower court file. It is deponed that the lower court has not been traced and that no explanation has been given by the Executive Officer as to the whereabouts of the lower court file. It is further contended that no Notice of Appeal has been filed herein due to the inadvertence of the Applicant's previous advocate.

3. The application is opposed. It is averred in the replying affidavit that the Applicant's side has been given sufficient time to file the Record of Appeal but failed to do so. That subsequently, the Applicant's counsel made an application to cease acting which application was allowed. That thereafter the Applicant who by then was acting in person asked for more time to file the Record of Appeal, giving his difficulties in filing the Record of Appeal as due to failure by his former advocate to release his file to him.

4. It is further stated that on the next hearing date the Applicant had appointed another advocate who requested for more time to file the Record of Appeal and was given 21 days to do so but there was no compliance. It is asserted that the Applicant's side has not demonstrated seriousness in filing the Record of Appeal. That prior to the filing of the application at hand, the issue of the missing court file did not arise. The Respondent saw the application as an afterthought and a diversionary tactic and urged the court to dismiss the application and end the trauma and mental anguish to the Respondents and to bring a stop the accumulation of the mortuary bills.

5. The Applicant filed a notice to act in person and filed a further affidavit in response to the replying affidavit. The Applicant reiterated the contents of his affidavit in support of his application and stated that he now has all the documents available and is ready to have the Appeal heard and disposed of in order to accord the deceased a befitting send off.

6. The parties opted to dispose of the application by way of written submissions. I have considered the application, the response to the same and the written submissions filed.

7. First, let me give a brief background of this matter. From the material before court, the suit in the lower court was instituted by the Applicant by way of plaint dated 5th April, 2016. The Applicant claimed to have been married to the deceased, Juliana Mbula Mule. The Applicant sought orders of injunction to restrain the Respondents (parents of the deceased) from interring the remains of the deceased, or managing any of the deceased's affairs or interring the remains of the deceased at Athi River Location, Kalawa Sub-county, Makueni County or any other place other than the deceased's matrimonial home situated at Kamutei Village, Maluma Location, Ikutha Sub-County Kitui County or side lining the Applicant from the burial arrangements and preparations of the deceased. Secondly, the Applicant prayed for an order that the deceased be interred at the deceased's matrimonial home in Kamutei Village, Maluma Location, Ikutha Sub-County Kitui County.

8. The Respondents filed a joint Statement of Defence and denied the Applicant's claim and prayed that they be allowed to bury the remains of the deceased in accordance with her wishes at plot No. 22 Mutembuku/Kibauni where the deceased had established a home after her marriage to the Applicant collapsed.

9. The trial magistrate in his judgment held, *inter alia*, that the Applicant and the deceased had lived separate lives for over one and a half decades. The trial magistrate dismissed the suit with costs. The Applicant was further ordered to meet the costs of the preservation of the remains of the deceased.

10. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**

as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 1. 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;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”**

11. The Applicant first appeared before this court on 9th August, 2018 when he filed an application seeking temporary orders to restrain the Respondents from interring the body of the deceased at land parcel No. Mutembuku/Kibauni/22 situate in Athi River, Kalawa Sub-county of Makueni County pending the hearing and determination of the Appeal. The Memorandum of Appeal was filed within time on 8th August, 2018. The file has passed through the hands of several judges. On 10th September, 2018, the court with the concurrence of the parties directed that the interlocutory application be done away with and the *status quo* be maintained for the Appeal to be expedited, this being a burial dispute. The Applicant requested for 7 days to file the Record of Appeal.

12. However, on the next date of appearance in court, the Applicant's counsel applied to cease acting. The Applicant was subsequently served with the application. The counsel was allowed to cease acting and the Applicant who was now appearing in person was not able to comply with the court's orders to file the Record of Appeal and was given more time. On the next date in court the Applicant had another counsel who had come on record who requested for 21 days to file the Record of Appeal which was given. However, the Record of Appeal was not filed within the 21 days and the instant application was subsequently filed.

13. The hearing of the instant application could not take off in time. Although the court was ready to hear the parties, due to indisposition, the Respondents' counsel delayed in filing a response. After the response was filed there was further delay due to the Applicant's indisposition. The Applicant had by now again filed a Notice to Act in person.

14. The Applicant blames the delay in filing the Record of Appeal on the non availability of the court file which he states could not be traced and that no explanation was given to him by the court registry. It is noted that the Applicant was directed to file the Record of Appeal on 10th September, 2018, yet it took him until 29th November, 2018 to come to court with the instant application. The court had severally extended time for the Applicant to file the Record of Appeal and at no time was there any mention of the allegedly missing lower court file.

15. In the further affidavit, it is deponed that the Applicant now has **“all the documents”** and requests for a hearing date of the Appeal. There is no explanation where the documents have resurfaced from and what the circumstances are. The court has bent over backwards to accommodate the Applicant. However, the delay on the Applicant's side in the circumstances of this case is inordinate and has not been

explained to the satisfaction of the court.

16. With the foregoing, this court is not persuaded to exercise its discretion in favour of the Applicant. The application is hereby dismissed with costs. Consequently, the interim orders of injunction given herein on 9th August, 2018 in terms of prayer No. 3 & 4 of the Notice of Motion dated 8th August, 2018 and any orders herein on the maintenance of *status quo* are hereby discharged.

Date, signed and delivered at Nairobi this 22nd day of Jan., 2020

B. THURANIRA JADEN

JUDGE