



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 90 OF 2019

IN THE MATTER OF THE ESTATE OF NJUGUNA MUCHIRI (DECEASED)

JANE MUCHIRI..... APPLICANT

VERSUS

JOSEPH KUNGU NJUGUNA.....RESPONDENT

RULING

1. The Applicant herein, together with others, had filed a protest against confirmation of a grant issued in **Githunguri Succession Cause No. 94 of 1999** in the matter of the Estate of **Njuguna Muchiri**. Following a full hearing, the protest was dismissed in the ruling of the lower court delivered on 20th December 2018. The protestors were thereby aggrieved but did not file an appeal in the stipulated period. They have now approached this court through their application filed on 25/2/2019, seeking leave to appeal out of time. In the supporting affidavit sworn by **Jane Muthoni Muchiri**, it is deposed that delay in filing appeal was caused by delay in the preparation of typed proceedings in the lower court. Annexed to the affidavit is the copy of the judgment ("**annexure JMM**") which was apparently certified on 28th December 2018. The Applicant has also canvassed matters touching on the merits of the said judgment.

2. Like the Applicant, the Respondent **Joseph Kungu Njuguna** in opposing the application dwelt on matters that properly belong to the appeal in his affidavit, and in addition deposed that the delay in this case is inordinate. He points out that no copy of request for proceedings in the lower court has been furnished, and that the application has been overtaken by events. At the hearing of the application, parties basically restated positions in their respective filings.

3. The court has considered the application and respective affidavits. The judgment to be appealed from was delivered on 20/12/18. Excluding the period stipulated in Order 50 Rule 4 of the Civil Procedure Rules when time does not run, the delay herein has to be reckoned from 14th January 2019 to 25th February 2019 when this motion was filed – one and a half months. That is not a long period, and the explanation for it, notwithstanding absence of the evidence of request for proceedings, is reasonable. The judgment of the court below was only certified on 28th December 2018.

4. Section 79G of the Civil Procedure Act provides that:

“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 appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

5. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

6. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

7. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

8. In this case, the delay is short and has been satisfactorily explained to the court. From the contested material in the parties’ affidavit, there could be serious questions for determination on appeal. And although the cause in the lower court was filed in 1999, there is no evidence that the Respondent will be prejudiced by the granting of the application, there being no evidence to support the statement in his affidavit that the **“status of the (estate) property has since changed”**.

9. Considering the circumstances of this case and the nature of the subject matter, I find it mete and just to grant leave to appeal out of time as sought in prayer (b) of the motion filed on 25/2/2019 and direct that the Applicant files the memorandum of appeal within 21 days of today’s date. There is no basis for granting stay as sought in prayer (e) as there is as yet no appeal filed. The court cannot issue the interim order sought therein *in vacuo*. Prayer (c) of the motion appears misplaced in the circumstances of this case and is declined. Nevertheless, in light of the nature of the subject matter, and in the interest of preserving the substratum of any further necessary application, upon the filing of the appeal, I would order that the status quo obtaining in respect of the estate of **Njuguna Muchiri**, and in particular the landed asset described as **LR No. Gatamaiyu/Nyanduma/1250** be maintained. This order will be in force for a period of 21 days from today’s date.

Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Nyakeriga holding brief for Mr. Machua for the Applicant

Ms. Muibu holding brief for Mr. Gachoka for the Respondent

Court Assistant - Kevin/Nancy