



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**SUCCESSION CAUSE NO. 14 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE VIRGINIA SANGALO LUSENO**

**WILLIAM NYONGESA FESTO LUNYELEKWE.....APPLICANT**

**VERSES**

**KENNEDY WANJALA MABONGA.....RESPONDENT**

**TRUSTEES FOR WOMEN FOR**

**COMMUNITY BASED ORGANIZATION.....INTERESTED PARTY**

**RULING**

1. The Applicant was dissatisfied with the judgement of this court dated **23<sup>rd</sup> July 2019**. His appeal to the Court of Appeal was struck out by the said court on **7<sup>th</sup> August 2020** for the reason that the Notice of Appeal was defective.
2. The Applicant has since filed the application dated **13<sup>th</sup> August 2020** praying that he be granted leave to file an appeal out of time to the Court of Appeal. He also prays that he be granted an extension of time to lodge a notice of appeal out of time to the same court.
3. The application is supported by his affidavit sworn on the even date together with the attached annexures. He admits that the earlier notice of appeal which he had filed was defective as found by the Court of Appeal. He therefore prays that he be granted a second chance to have a bite at the cherry.
4. Through her counsel on record advocate Beatrice Munialo, the Respondent has opposed the application basically on the grounds that the issue for determination has been dealt with by the Court of Appeal. She argues that it is only the said Court of Appeal that is able to pronounce itself again. In other words, the applicant should seek an extension of time at the said court.
5. This court is well seized of this matter. It is true that the Applicants notice to the Court of Appeal was struck out for failing to comply with Rule 75(3) of its rules. My understanding therefore is that the notice was simply struck out but not dismissed. The Applicant consequently is not precluded from approaching this court.
6. Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya provides as hereunder;

***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

***Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”***

7. A wholesome reading of the above portion of the law expects this court to consider such an application. Presumably, if this court denies a party the orders then he shall have the right to seek leave from the Court of Appeal.
8. The only issue to determine is whether the application is frivolous or vexatious and therefore this court should dismiss it. It is apparent that the applicant appealed to the Court of Appeal vide the defective notice within the required time. Were it not for the defect of the notice, the appellate court would have heard the Applicant.
9. Secondly, after the said notice was struck out the appellant did not waste much time in approaching this court.

10. It is now a practice that unless a matter is hopeless on the face of it, or it is vexatious and only meant to delay or embarrass an opportunity ought to be given for every litigant to exhaust the available legal remedy. In this case the issue at stake is the deceased estate. There is no prejudice the Respondent has exhibited that he may suffer should this application is allowed.

**i. Consequently, the application dated 13<sup>th</sup> August 2020 is hereby allowed, the Applicant is granted 14 days from the date herein to file his Notice of Appeal out of time and further to file his appeal out of time against the decision of this court dated 23<sup>rd</sup> July 2019.**

**ii. The Respondent shall have the costs of this application.**

**Dated, Signed and delivered at Kitale this 7<sup>th</sup> day of October 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**7/10/2020**