



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MISC. CIVIL APPLICATION NO. 20 OF 2020

JONATHAN NYUMU KAVITA.....APPLICANT

VERSUS

MARY WAYUA KIILU.....RESPONDENT

RULING

1. The Applicant's sole prayer in the application dated 14.2.2020 is that the applicant be granted leave to lodge an appeal out of time from the ruling of Hon C.A. Ocharo SPM in Machakos Chief Magistrates Succession Cause 141 of 2017 that was delivered on 30.1.2019. The application is brought under section 79G of the Civil Procedure Act, section 50(1) of the Law of Succession Act, Rules 67 & 73 of the Probate and Administration Rules. It is supported by the affidavit of Jonathan Nyumu Kavita.
2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a Succession Cause 141 of 2017 in the Chief Magistrates Court in Machakos where a ruling was delivered on 30.1.2019. There is a copy of the ruling as well as the draft memorandum of appeal annexed to the affidavit.
3. The grounds stated briefly in the Notice of Motion and expounded in detail in the affidavit in support of the application were that a ruling in the lower court was delivered and that the applicant is dissatisfied with the same. The applicant averred that it would be in the interests of justice if the orders sought are granted.
4. In opposition to the application is a replying affidavit deponed by Miriam Wayua Kiilu on 14.7.2020. The deponent averred that the application was misconceived, lacking in merit and is an abuse of the court process. It was averred that the applicant who is not a dependant sought to revoke the grant that was issued in respect of the estate of the deceased. It was pointed out that his application was dismissed and that the applicant was directed to channel his gravamen to the Environment and Land Court. The deponent averred that the application for review was dismissed and hence the applicant could not come back with an appeal after the channel for review was exhausted. It was averred that no sufficient cause had been shown for the delay in lodging the appeal within the prescribed time and that the applicant had been guilty of laches for a year. It was pointed out that the applicant could not have the luxury of blaming his previous counsel for the mistakes and wrong advice on their part and further that the intended appeal has no chances of success. It was pointed out that the validity of a claim for ownership was not vested with this court hence the respondent urged the court to dismiss the application.
5. The application was canvassed vide written submissions that are on record. Learned counsel for the applicant submitted that by dint of section 79G and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, the court has the requisite power to grant the orders sought. In appreciating the case of **Charles Nyambura & Another v Josephine Nthenya Mbulu (2020) eKLR**, it was submitted that the applicant had an arguable appeal and that the applicant ought not to be shut out of the hearing of the intended appeal.
6. In response, counsel for the respondent cited the provisions of section 79G of the Civil Procedure Act as well as section 50 of the Law of Succession Act and Rules 67 and 73 of the Probate and Administration Rules. In appreciating the case of **Thuita Mwangi v Kenya Airways (2003) eKLR** it was pointed out that the ruling was delivered on 30.1.2019 whereas the application for leave was made on 14.2.2020 hence the delay is inordinate and unreasonable and no sufficient cause had been shown for failure to file the appeal within time. It was submitted that the succession court could only apply the Law of Succession Act and hence the applicant's claim of ownership, that was a chose in action could only be channeled to the Environment and Land Court. The court was urged to dismiss the application.
7. The issue for determination in this application is **whether the applicant should be granted extension of time and leave to file the appeal out of time.**
8. The applicant has a right to appeal to this court by dint of section 50(1) of the Law of Succession Act that states;

“An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final”

Rule 63 of the Probate and Administration Rules provides:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”

I note that the above provision relates to what is now Order 50 of the Civil Procedure Rules and hence the same will apply to the present application.

9. Rule 67 of the Probate and Administration Rules provide for the Enlargement of time and it states that;

“Where any period is fixed or granted by these Rules or by an order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

10. The probate and administration rules are silent on the time within which to file an appeal to this court and by dint of section 47 of the Law of Succession Act that enjoins this court to make such orders as are necessary to meet the ends of justice, I shall draw analogy from section 79G of the Civil Procedure Act, that grants this Court the discretion, for sufficient cause, to extend time. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

“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.”

11. The above principles were considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484 where he stated thus;

"Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."

12. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] eKLR**. Listed the factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:

- a. The period of delay;*
- b. The reason for the delay;*
- c. The arguability of the appeal;*
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;*
- e. The importance of compliance with time limits to the particular litigation or issue; and*
- f. The effect if any on the administration of justice or public interest if any is involved.*

13. I will keep the above principles in mind as I proceed to determine this application. It is not in dispute that the applicant is aggrieved with the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the replying affidavit gives the reasons why the respondent is strenuously opposed to the application and which is to the effect that the applicant exhausted his chances of review; that the applicant delayed for a year before bringing the application.

14. I note that indeed the application was filed a year after the delivery of the impugned decision, I find the delay to be inordinate and the explanation is not satisfactory. However, I am unable to see the prejudice that the Respondent will suffer if the application is allowed. The interest of this court is to do justice to the parties and therefore have the intended appeal heard on its merits. I am guided by article 159 of the Constitution and the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**, where the court held that:

“....Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.”

15. Similarly, in the case of **Official Receiver v Sukhdev, Nairobi HCCC No. 423 of 1966 [1970] EA 243** Madan, J (as he then was) held

that:

“In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honorable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.”

I have taken note of the respondent’s arguments that the Applicant’s claim lies in the Environment and Land Court. Whereas that is their stand point, I find that the applicant who has chosen to approach this court through appeal ought not to be denied such a right. No prejudice will be caused to the respondent as each party will have their day in court.

16. In the result the applicant’s application dated 14.2.2020 has merit and is allowed as prayed save only that the Applicant is ordered to file and serve his appeal within 14 days from the date of this ruling.

It is so ordered.

Dated and delivered at Machakos this 3rd day of December, 2020.

D. K. Kemei

Judge