



**REPUBLIC OF KENYA**

**IN THE COURT OF KENYA**

**AT NYERI**

**MISC.CIVIL APPLICATION NO.N0 1 OF 2019**

**WILLIAM KIMONDO MUHUNI.....APPLICANT**

**-VERSUS-**

**FRANCIS MAINA MUGO.....1<sup>ST</sup> RESPONDENT**

**RICHARD WANJOHI MUGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application before me is the notice of motion dated 7<sup>th</sup> February 2019 brought under s.3A, 799 of the CPA. It seeks orders:-

- 1. THAT this honourable court be pleased to extend time and grant the applicant leave to file an appeal out of time.*
- 2. THAT costs of this application be in the cause.*

The grounds are set out as follows:-

- 1. THAT the time for filing the appeal has lapsed.*
- 2. THAT the court has the discretion to extend time*
- 3. THAT this court has the discretion to grant the leave sought.*

It is supported by the affidavit of the applicant William Kimondo Muhuni. It is opposed by the joint affidavit of the respondents Francis Maina Mugo and Richard Wanjohi Mugo.

In his affidavit, the applicant avers that he wishes to appeal against the judgment of the learned magistrate because the matter was determined by way of written submissions yet there was a factual matter that ought to have been brought to the attention of the magistrate, that the deceased had apportioned the estate, created boundaries and the applicant was bound to loose developments on the portion allocated to him by the deceased in his life time if the orders sought were not granted.

The respondents contend that the deceased died intestate and the court made orders that the estate be shared equally among the beneficiaries and in any event the applicant was represented.

The applicant annexed the memorandum of appeal setting out the grounds of the intended appeal:

- 1. The learned magistrate erred in law and fact in relying entirely on the written submissions which dwelt on law ignoring the facts on the ground.*
- 2. The learned magistrate erred in law and fact in not giving the appellant a chance to demonstrate the position on the ground which was that there were existing boundaries erected by the deceased during his life time.*
- 3. THAT the learned magistrate erred in law and fact in finding that the estate of the deceased should be shared equally amongst the children of the deceased while the deceased had put in place specific portion according to the houses.*

4. THAT the learned magistrate erred in law and fact in relying on insufficient/limited evidence in the affidavits.

5. THAT the learned magistrate erred in law and fact in ordering the sharing of the property according to the children which would mean that the appellant would lose his developments and be disinherited off some portions against the wishes and actions of the deceased.

The only issue for determination is whether the applicant has established grounds to warrant the orders sought.

**Section 79G of the CPA provides for Time for filing appeals from subordinate courts**

*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.*

On the applicable principles I take guidance from The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** citing **Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported)**, the Court expressed itself thus: -

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

Grant of the orders sought is discretionary- which discretion must be exercised judiciously- that means it must exhibit reasonableness and fairness. It must not be whimsical.

I have carefully considered the rival affidavits and the memo of appeal.

The ruling against which the appeal is intended was given by the lower court on the 29<sup>th</sup> September 2018. This application was filed on 7<sup>th</sup> February 2019, three months after the time for filing had lapsed.

The applicant explanation for the delay is found in his averment in the affidavit that he only became aware of the ruling in December 2018 when he went to the registry to check on the progress of the case. By his own admission he was present when directions were given that the matter proceeds by way of written submissions. How then can he say he was not aware of the date for the ruling yet he was also represented? The respondents contend that the applicant was aware of the proceedings including the day of the ruling, and especially because he was represented. What he says does not ring true. Hence the delay in bringing this application is not adequately explained.

What are the chances of success of the intended appeal? I am alive to the fact that at this stage it may be prejudicial to look too keenly into the appeal. However, it has become trite to see whether the appeal is frivolous or not.

In the memorandum of appeal, the applicant attributes numerous errors on the part of the trial magistrate. I have also perused the Judgment of the lower court. The errors attributed to the trial magistrate are clearly not attributable to her as the court acted according to the consent by parties to proceed by way of written submissions. The estate was ordered distributed according to the law. Nowhere in the judgment does the trial magistrate state the specific portions each beneficiary will occupy upon distribution to warrant the applicants fears of losing ‘developments’ already on the portion he occupies, and which he claims were bequeathed to him by the deceased before he died. These issues would not be relevant in the matter as dealt with under s. 38 of the Law of Succession Act. On the face of it the Ruling was according to the law.

The issues raised in the affidavit of support do not support the memorandum of appeal. What the applicant is seeking to appeal against was not awarded by the trial magistrate but may be a consequence of the same. There is no arguable appeal.

Is there any prejudice that the applicant will suffer? In my view, none. He has his equal share of the Estate. It is up and until the estate is distributed that he can come to complain about losses. As at now I see no prejudice that the applicant will suffer.

The application has no merit and must fail with costs to the respondents

**Dated, Delivered and signed at Nyeri this 9<sup>th</sup> May 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant: Jerusha

Francis Maina Mugo

Richard Wanjohi Mugo

No appearance for the applicant and Counsel Mr. Kamwenji.

**Judge**