



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 151 OF 2018

IN THE MATTER OF THE ESTATE OF WAIRIMU ALIAS LYDIA WAIRIMU KIRIU

BERNARD KABEU KIRIU.....APPLICANT

VERSUS

FRANCIS WAITHAKA KIRIU.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 27th July, 2018 expressed to be brought under Section 98 of the Civil Procedure Act, the Applicant sought leave to appeal out of time against the judgment delivered Thika Succession Cause No. 160 of 2006 by **Maina, SPM** on the 14th of December, 2017.

2. The Application is premised on among other grounds, that after judgment was delivered the Applicant applied for proceedings which were only supplied on 8th March 2018, while the certificate of delay was allegedly issued in June 2018.

3. The Applicant's counsel swore an affidavit in support of the motion. His depositions repeat the grounds on the face of the motion, and in addition asserts that the Applicant has a viable appeal.

The Respondent filed a replying affidavit in opposition to the motion, primarily pointing to the Applicants delay in making the present application after receiving the proceedings and certificate of delay.

4. The application was heard with by way of brief submissions based on filings on record. The court has considered the material canvassed in respect of the instant motion. The application is erroneously expressed to be brought under Section 98 of the Civil Procedure Act. The correct provisions to be invoked in an application this nature ought to be Sections 79 G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The judgment that it is sought to be appealed from was delivered on 14th December 2017.

5. 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.

6. 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 material* 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.”

7. While the discretion of the court is unfettered, an 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.

8. 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 burn 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.**

9. The total period of delay in this case was over 7 months since delivery of the judgment. It is a long period. The Appellant’s explanation covers the period ending on 8th March 2018. There was no reason in my view, or explanation for the delay of 3 more months purportedly in pursuit of the certificate of delay (**annexure MK iii**), itself undated but bears a court stamp with the date of 19th June, 2018. Or reason proffered as to why the certificate could not be obtained alongside the proceedings in March 2018. It seems to me that the undated certificate was deliberately stamped with the June 2018 date as a cover-up for the Applicant’s delay of over 3 months since March 2018 to June 2018. A party who seeks the exercise of the court’s discretion in his favour ought to demonstrate more candour.

10. Further, the delay between 19th June and 27th July 2018 when this motion was filed has not been

satisfactorily explained and is inordinate in the circumstances of this case. The Applicant could and should have moved the court in March 2018 for leave. No good and sufficient cause as envisaged in Section 79 G of the Civil Procedure Act has been demonstrated in this instance.

11. The judgment intended to be appealed from was delivered in December 2017. The succession cause in the lower court which is the subject of the intended appeal was filed in 2006 and had been in court for eleven years before the judgement in 2017. Courts cannot continue to suffer gladly parties who seem to litigate at their own leisure. Not only does this cause prejudice to the adverse parties, it also increases the cost of litigation, in addition to creating unnecessary gridlocks in the system of administration of justice.

12. I find no merit in the Applicant's motion filed on 27th July, 2018 and will dismiss it with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF SEPTEMBER 2019

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C. MEOLI

JUDGE

In The Presence of:-

Applicant – No appearance

Respondent - No appearance

Court clerk - Kevin