



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 384 OF 2008

IN THE MATTER OF THE ESTATE OF MARION NJERI MAGUA (DECEASED)

KENNETH KABURU KIMANI.....OBJECTOR/APPLICANT

VERSUS

MUGWE MAGUA..... PETITIONER/RESPONDENT

RULING

1. The Applicant, vide Notice of Motion dated 25th March, 2019 sought for extension of time to file an appeal against the decision in this cause delivered on 22nd January, 2019 and that upon hearing interpartes, the orders made therein be stayed pending the hearing and determination of the intended Appeal.
2. The application is predicated upon grounds set out on the face thereof and an affidavit in support deponed on 25th March, 2019 by Kenneth Kaburu Kimani in which he has explained the background to the application. In brief, the Applicant was dissatisfied with the Ruling of this Court which was delivered on 22nd January, 2019 and on 28th January, 2019, his advocate on record filed a Notice of Appeal against the said Ruling and served the Advocates of the Petitioner/Respondent.
3. It was his contention that the typed and certified copies of the proceedings and Ruling were not supplied to his advocates on record until the 18th March, 2019 by which time, the time of 30 days allowed by this Honourable Court within which to file an appeal against the Ruling had lapsed. Annexed to his Supporting Affidavit and marked "KKK6" is a Certificate of Delay dated 21st March, 2019 issued by the Deputy Registrar which indicates that the amount of time taken to prepare the typed proceedings was 54 days.
4. The Applicant urged the Court to allow his application for leave to appeal out of time and the leave so granted do operate as a stay of execution of the ruling dated 22nd January, 2019, otherwise the intended appeal would be rendered nugatory.
5. Mr. Ngugi, Learned Counsel for the Applicant, acknowledged that the Respondent was served with the Notice of Appeal out of time, however, it was his argument that this was not fatal. It was Learned Counsel's submission that the delay and reason why the Respondent was served with the Notice of Appeal on 8th February, 2019 was because the document was obtained from the Court on that date. He implored the Court to invoke **Article 159(2)(d) of the Constitution of Kenya** and consider substantive justice as opposed to procedural technicalities relied on by the Respondent.
6. The Application was opposed by the Replying Affidavit of Mugwe Magua dated 1st April, 2019 wherein he contended that the Application was incurably defective and aimed at delaying this cause. He asserted that the Applicant did not have a prima facie appeal with any chance of success. He cited **Rule 82(a) of the Court of Appeal Rules, 2010** and faulted the applicant for failing to lodge a Memorandum of Appeal and give security for the costs of the Appeal, which items do not require the typing of proceedings.
7. Mrs. Ndungu, Learned Counsel for the Respondent, asserted that the application was incompetent as it was brought under the provisions for review and argued that the Application was only meant to obstruct the cause of justice.
8. It was Learned Counsel's submission that the Respondent was not served with the application for a copy of the typed proceedings in the Superior Court, further, that the Applicant served the said Notice of Appeal outside the 7 days of lodging it contrary to the mandatory provisions of **Rule 77(1) of the Court of Appeal Rules**. Counsel referred the Court to the case of **Daniel Nkirimpa Monieri v Sayialele Ole Koilel & 4 Others [2016] eKLR** where the Court stated that **Rule 77 (1) of the Court of Appeal Rules** is couched in mandatory terms and compliance with the same is not optional.
9. As regards the application of **Article 159(2)(d) of the Constitution of Kenya**, Learned Counsel referred the Court to the case of **Patrick Kiruja Kithinji v Victor Mugira Marete [2015]eKLR** where the Court of Appeal stated as follows:

“In our view whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite law that this court has jurisdiction to entertain appeal filed within the requisite time and/or appeals filed out of time with leave of the court. To hold otherwise would upset the established clear principles of institutions of an appeal in this court. Consequently we find that an appeal filed out of time is not curable under Article 159.”

10. Mrs. Ndungu further argued that an Appeal filed out of time cannot be cured by **Section 1A and 1B** of the **Civil Procedure Act** where there are clear provisions under the Court of Appeal Rules. It was her submission therefore that the Applicant had not satisfied the Court that his application be granted.

Analysis and Determination

11. I have considered the application herein, the affidavit in support, the Replying Affidavit and submissions by the Counsels. The application presents two issues for determination:-

- i. Whether the Applicant has raised sufficient grounds to warrant the extension of time to file his appeal
- ii. Whether the orders of this Court issued on 22nd January, 2019 should be stayed pending the hearing and determination of the intended appeal

12. The power to extend time for any litigant to file appeal out of time is donated by **Section 7** of the **Appellate Jurisdiction Act** which states:

"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...."

13. The provisions of **Rule 67** of the **Probate and Administration Rules** also gives discretion to this Court to enlarge time. It states:

"Where any period is fixed or granted by these Rules or by an order of the court for doing of any act or thing, the court may 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."

14. The power of the Court to extend time for filing an appeal is however discretionary and must be exercised judiciously and only after a party places before the Court sufficient material to persuade the Court that the discretion should be exercised on their behalf and in their favour. The Applicant must convince the Court that there are sufficient reasons for the delay.

15. In the case of **Mwangi- vs- Kenya Airways Ltd [2003] KLR**, the Court of Appeal set down the following guiding principles in the exercise of such discretion:-

- a. The period of delay
- b. The reason for the delay
- c. The arguability of the appeal
- d. The degree of prejudice the respondents would suffer if extension is granted.
- e. The importance of compliance with time limits to the particular litigation or issue.
- f. The effect, if any, on the administration of justice or public interest involved.

16. This Court has considered the reasons given for the delay in serving the Notice of Appeal and subsequent filing of the intended appeal. The Applicant expressed his dissatisfaction of this Court's ruling delivered on 22nd January, 2019 by filing a Notice of Appeal on 28th January, 2019 together with an application for typed proceedings and certified copy of the said judgment. The Notice of Appeal was lodged in Court within 14 days from the date the impugned ruling was delivered as prescribed by **Rule 75 of the Court of Appeal Rules**. The Court however notes that the Respondent was served with the Notice of Appeal on 8th February, 2019, outside 7 days of lodging it contrary to **Rule 77(1) of the Court of Appeal Rules**.

17. A Certificate of Delay was issued to the Applicant's Advocate on 21st March, 2019 which indicates that the time taken to prepare and supply the copies of the proceedings was 54 days. The Applicant then proceeded to file the Application herein four days later on 25th March, 2019 and not too long after the delivery of the ruling on 22nd January, 2019. The period of delay is about two months and 4 days and the reason for delay is excusable given the circumstances.

18. On the issue of the arguability of the appeal, this Court notes that the underlying issue in the applicant's intended appeal is the emotive issue of land distribution out of succession. In my view merits or the demerits of such dissatisfaction should be substantially canvassed in the Court of Appeal, for the simple reason that this Court has rendered a decision on what was contested in this cause.

19. On the issue of compliance with time limits prescribed, the court has noted that although the Notice of Appeal was lodged in Court within the prescribed time, the Applicant served the Respondent's Advocate on 8th February, 2018 being seven days outside the time prescribed by **Rule 77(1)** of the **Court of Appeal Rules**. I am of the considered view that the delay in bringing the Application was not inordinate.

20. In the second issue for determination in this application, the Applicant has argued that if a stay is not granted, his intended appeal will be rendered nugatory as the subject property may be placed beyond his reach by the time the appeal is heard and determined. This Court is unable to see any substantial adverse effects that will be occasioned to the Respondent if the Applicant's prayer for stay of execution pending the filing of the intended appeal is allowed. As regards the furnishing of security, this is not a monetary claim hence security does not apply.

21. In view of the above findings, I am satisfied that in the interest of justice and in exercise of the wide discretion bestowed upon this Court on such matters, the Application dated 25th March, 2019 has merit. Accordingly, the application is allowed with orders as follows:

- a) This Court does allow the extension of time within which the applicant can appeal against the ruling delivered on 22nd January, 2019 for 30 days from this date.
- b) I order and direct that an order of status quo obtaining as of today shall be maintained in respect to Dagoretti/Uthiru/38 for the next 30 days and any other extension shall be sought in the Court of Appeal.
- c) For avoidance of doubt, the applicant has 30 days from today to file her appeal.
- d) Each party shall bear own costs.

It is so ordered.

SIGNED DATED and DELIVERED in open Court this 16th day of September, 2019

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Objector/Applicant

In the presence of.....Advocate for the Petitioner/Respondent