



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 20 OF 2019**

**MARY MUTHONI NJERU.....APPLICANT**

**VERSUS**

**DANIEL NJUE NJOROGE.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 13<sup>th</sup> March 2019 in which the applicant seeks leave to appeal out of time against the judgement of the trial court in Probate and Administration Cause No. 96 of 2014 which was delivered on the 18<sup>th</sup> September 2018 as well as stay of execution over the aforementioned judgement.
2. It is the applicant's case that the delay was occasioned by misadvice from her advocate on record who failed to disclose that judgement had been entered against her.
3. The applicant further states that she will suffer substantial loss if judgement is implemented as she will lose her husband's estate to 3<sup>rd</sup> parties who were not beneficiaries and thus failure to stay the judgement will render the appeal nugatory.
4. In rejoinder, it is the respondent's case that the applicant has failed to explain the inordinate 6 months delay in bringing forth the appeal. Further, it is the respondent's case that the intended appeal has no merit and is intended to deny the rightful beneficiaries entitlement over ancestral land Gaturi/Nembure/6625.
5. Parties filed submissions to dispose of the appeal.

**B. Applicant's Submissions**

6. It is submitted that she will suffer substantial loss if the judgement delivered is not stayed as the beneficiaries indicated in the confirmed grant will get her husband's land parcel no Gaturi/Nembure/6625.
7. The applicant further submits that she has explained the delay in filing the appeal, an explanation which she deems to be reasonable and as such her application ought to be allowed in the interests of justice.

**C. Respondent's Submissions**

8. It is submitted that the applicant has failed to meet the threshold for a grant of leave to file an appeal out of time as were laid out in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.**
9. Further, it is submitted that it is insufficient for the applicant to blame her former advocate on record without showing the measures she took to advance her case, as the case belongs to the litigant.
10. It is submitted that it is doubtful that the applicant learnt about the outcome of the judgement upon perusing of the court file as she has not annexed the payment receipt as proof thereof.
11. The respondent submits that the applicant has not sufficiently explained the delay even if she came to know of the judgement in February she does not explain why she waited until March to file her application.
12. It is also submitted that the applicant has failed to prove that he intended appeal has merit as she has failed to annex a copy of the

judgement appealed against as well as the proceedings. In addition to this, it is submitted that the applicant has failed to meet the prerequisites for grant of order of stay of execution.

13. It is submitted that the orders sought by the applicant are equitable in nature and as the applicant has been indolent, she is not deserving of the orders sought as equity does not aid the indolent.

#### **D. Analysis of Law**

14. I have considered the application. The issues that arise are *whether the applicant should be granted more time to file her appeal and whether stay of execution of the judgement of the trial court should be granted.*

15. It is worth noting that the factors which the Court of Appeal looks at in exercising its discretion under Rule 4 of the Court of Appeal Rules are the self-same factors that this Court considers in entertaining an Application under section 7 of the Appellate Jurisdiction Act. The test is also the same one this Court applies in extending time to file an appeal from the subordinate Courts under section 79G of the Civil Procedure Act. The Court of Appeal in **Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. NAI 332 OF 2004 (unreported)** stated the test thus:

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”***

16. These are the same factors this Court considers in deciding the merits of Applications under section 7 of the Appellate Jurisdiction Act and section 79G of the Civil Procedure Act. Indeed, our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be exercised judicially and on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

17. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. 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.***

18. On extension of time, the applicant has deponed that she did not understand the details of the Court’s judgement of 18/9/2018 as her advocate at the time advised her that the parties had been advised to negotiate. The applicant states that she became aware of the consequences of the judgement sometime in February 2019 when she heard rumours that the respondent wanted to sub-divide the land. She subsequently brought the instant application on the 13<sup>th</sup> March 2019.

19. The respondent submits that the applicant has not sufficiently explained the delay even if she came to know of the judgement in February she does not explain why she waited until March to file her application and as such she was guilty of further laches for not timeously filing her Application soon after learning of the judgement.

20. Looking at all the factors in totality, I do not buy the respondent’s argument that the delay in bringing the present application is inordinate or that it is actuated by bad faith or that it is an afterthought. I say so for the following reasons.

21. First, it is not denied that the applicant did not understand the details of the court’s judgement of 18/9/2018 as her advocate at the time advised her that the parties had been advised to negotiate and that she became aware of the consequences of the judgement sometime in February 2019 when she heard rumours that the respondent wanted to sub-divide the land.

22. Second, I do not agree with the respondent that the intended appeal is not arguable and that it has little chances of success. These arguments were not supported by any facts or evidence. Of course, as I state below, all the applicant have to show at this stage its arguability. However, the applicant has a constitutional right to appeal and a right to be heard. Extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and

especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way.

23. Third, I am acutely aware that the underlying issue in this controversy is the emotive issue of land distribution out of succession. It is in this area where our decisional law is particularly sensitive in applying its policy preference to have matters determined on their merits whenever possible.

24. Fourth, the tardiness in perfecting the appeal in this case can squarely be placed at the doorstep of the applicant's lawyer. As the Court of Appeal stated in **Phillip Keipto Chemwolo & Another V Augustine Kibende [1986] KLR 495** where the Court stated that:

***“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of having his case determined on its merits.”***

25. Fifth, I am unable to see any substantial adverse effects granting this order will have on the respondent other than facilitating the applicant to exercise a preciously cherished right of appeal. 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.

26. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered; the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

27. The Court of Appeal has dealt with the issue in the case of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR**. The Court of Appeal held the following view on the issue of substantial loss;

***“The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”***

28. In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR**, the Court held the following view on the issue of substantial loss;

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”***

29. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein N. Chesoni [2002] 1KLR 867**, and also in the case of **Mukuma v Abuoga**. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under **Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules**, respectively, emphasized the centrality of substantial loss thus:

***“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***

30. In the present application, the applicant has stated that she will suffer substantial loss if judgement is implemented as she will lose her husband's estate to 3<sup>rd</sup> parties who were not beneficiaries. In my considered view the loss of inheritance amounts to potential substantial loss.

31. The final condition to be met by the Applicant is the rendering of security. A successful litigant is entitled to the fruits of his judgment and if he is kept away from these, there must be a guarantee of due performance of the decree or order. In monetary decrees, the issue of security is always straightforward and invariably involves order for deposit of the decretal sum or a substantial party thereof.

32. The court has power to grant orders for preservation of the subject matter pending hearing and determination of appeal in the event that this application is found to be merited.

33. It is my finding that this application has merit and it is hereby allowed in terms of prayers 2 and 4.

34. The applicant is hereby ordered to file his appeal within 7 days from the date of this ruling.

35. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthoni for Applicant**

**Ms. Rose Njeru for Respondent**