



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 7 OF 2017

MOHAMED AHMED YUMEN (Suing as Legal

Representative of the Estate of the Deceased

AHMED SWALLEH MOHAMED).....**APPLICANT**

VERSUS

SALMA KARIM).....**RESPONDENT**

(An application for extension of time to file a Memorandum of Appeal out of time against the decision and Ruling of **Hon. M. Mvudi Kadhi II** made on **1st December, 2016** in **Kitui Kadhi's Court** in **Succession Cause No. 5 of 2015**)

BETWEEN

SALMA KARIM).....**APPLICANT**

VERSUS

MOHAMED AHMED YUMEN (Suing as Legal Representative of the

Estate of the Deceased

AHMED SWALLEH MOHAMED).....**RESPONDENT**

RULING

1. **Mohamed Ahmed Yumen**, the Legal Representative of the Estate of **Ahmed Swalleh Mohamed** (Deceased) filed a Notice of Motion dated **27th April, 2017** seeking leave to file an appeal out of time.
2. The application is premised on grounds that he was dissatisfied with the Ruling delivered on the **1st December, 2016**; The delay in filing the Appeal was occasioned by financial constraints; The Appeal has merit as the **Plot No. 11/51** within Kitui Township was considered as part of the Estate of the Deceased but it had been given to him as a gift and that he will suffer substantial loss if the application is not allowed.
3. The Applicant deposed an affidavit in support of the application where he deposed *inter alia* that the **Hon. Kadhi** disregarded the lease document and transfer papers in respect of the plot.
4. The Respondent filed grounds of opposition where he stated that the Ruling was delivered on **1st December, 2016** in the presence of the Applicant and he obtained a copy thereof on **10th January, 2017**. That the issue of appealing is an afterthought resorted to after the Respondent filed an application to stop him (Applicant) from subletting the Estate property of the Deceased being a family residential house. That the issue of financial stability does not arise because the Applicant has sublet the Estate property and house having chased her away and the delay is inordinate and unexplained.
5. **Section 79G** of the **Civil Procedure Act**, provides thus:

“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.”

The question to be answered is whether the Applicant herein had a good and sufficient cause for not filing the Appeal in time.

6. In the case of **Nicholas Kiptoo arap Korir Salat vs. I. E. B. C. & 7 Others SC Application No. 16 of 2014** the Court set principles that guide a Court in exercising the discretion to allow a party to extend time thus:-

“(i) Extension of time is not a right of a party. It is an equitable to a deserving party at the discretion of the court.

(ii) The party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.

(iii) As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis.

(iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(v) Whether there will be any prejudice to be suffered by the respondents if the extension is granted.

(vi)”

7. The Applicant is the Legal Representative of the Estate of the Deceased. On the **3rd August, 2016** he filed summons for confirmation of grant where he listed **Plot No. Kitui Township Block 11/51/1.2521Ha** as part of the Estate of the Deceased. He proposed to hold all properties in trust for himself and other beneficiaries. On **17th October, 2016**, prior to the application for confirmation of grant being heard, the Applicant filed an application dated **17th October, 2016** seeking an order for transfer of one of the properties – **Kitui Township Block 11/51** situated in Kitui Town to himself, the same having allegedly been transferred to him. In a Ruling delivered on the **1st December, 2016** the **Hon. Kadhi** found that this particular property belonged to the Deceased therefore was to be shared amongst all his heirs. It is against this order that the Applicant seeks to appeal out of time.

8. I do note that after the delivery of the Ruling, the application for confirmation of the grant was canvassed by way of *viva voce* evidence on the **5th March, 2017** and **23rd March, 2017** respectively and a Ruling delivered on the **12th day of April** and the properties of the Deceased shared amongst the heirs in accordance with the provisions of the **Holy Quran**.

9. No doubt the Applicant being the Administrator of the Estate of the Deceased participated in what transpired. He was aware of the timeframe within which he was to file the Appeal. He stayed for **sixteen (16) months** prior to making the application to appeal out of time. He alleges that he was constrained financially that is why he did not file the Appeal within the required **thirty (30) days**. In **March, 2017** one of the beneficiaries to the Estate filed an application seeking issuance of restraining orders against the Applicant to prohibit him from sub-letting the property in issue pending distribution of the Estate.

In his response the Applicant denied the allegation and stated that he was renovating the property. A person carrying out renovation on a building cannot allege to be financially constrained such that he could not file an Appeal.

10. In the circumstances, I find the Applicant having failed to adduce a plausible reason for the delay in filing of the Appeal. Therefore the application lacks merit and is dismissed accordingly.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 8th day of February, 2018.

L. N. MUTENDE

JUDGE