



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 923 OF 2012

IN THE MATTER OF THE ESTATE OF RACHEL WAMBUI CHEGE (DECEASED)

EVANS MUTHEMBA CHEGE.....APPLICANT

VERSUS

MARY WAITHERA CHEGE..... RESPONDENT

RULING

1. By the notice of motion application dated 29th March 2017 the applicant filed the present application seeking extension of time for filing of the Notice of Appeal, so that the Notice of Appeal filed on the 20th March 2017 is deemed to have been filed and served within time; leave to appeal to the Court of Appeal out of time against the judgment delivered on 24th January 2017 in Succession Cause No. 923 of 2012; and stay of proceedings in Succession Cause No. 923 of 2012 pending the hearing of the appeal *inter-parties*. The application is based on the grounds that the delay in lodging the Notice of Appeal was caused by his former advocate's carelessness, and that his appeal has overwhelming chances of success and it will render the proceedings in the High Court a waste of judicial time if the orders sought are not granted.

2. The application was supported by the affidavit of the applicant dated 29th March 2017. It was his case that being dissatisfied with the judgment of A.O. Muchelule delivered by Justice W. Musyoka on 24th January 2017, he instructed his former advocates, T.K Rutto & Company Advocates to file a Notice of Appeal and sent him Kshs.20,000/= via *mpesa* to facilitate the same but that he discovered one month later that the advocate had not filed the Notice of Appeal as earlier indicated. He stated that he instructed Gikandi & Company Advocates to lodge a Notice of Appeal and they did on 10th May 2017. He blamed the delay in filing the Notice of Appeal on his former advocate's careless mistake and stated that he was likely to be prejudiced if the orders sought were not granted. He also stated that his appeal had overwhelming chances of success and that it would render the proceedings.

3. The application was opposed by the replying affidavit of John Kibara Chege, one of the beneficiaries of the estate of the deceased. His case was that any person who desires to appeal to the Court of Appeal should give notice of such appeal in writing and such notice does not require leave of court, yet the applicant did not give any Notice of Appeal in time. On stay, he stated that it had emerged from the hearing during the proceedings that the only property in dispute was Kabete/Lower Kabete/2008 and stay of proceedings would mean all other properties not in dispute will be affected. He also stated that stay of proceedings would result to the respondent not accounting for all the proceeds from Kabete/Lower Kabete/2008 of Kshs.1,344,000/= which he illegally acquired and continues to illegally possess and that he continues collecting rent from Kabete/Lower Kabete/2006 which amounts to intermeddling.

4. Parties filed their written submissions which I have considered.

5. **Section 7 of the Appellate Jurisdiction Act, CAP 9**, gives the High Court power to extend time for the filing of a Notice of Appeal. The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR** thus:-

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”

6. It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Notice of

Appeal. The discretion of the court is free to be exercised judicially in accordance with the circumstance of each case. In applying the guidelines set out above to the circumstances of this case, it is considered that the judgment appealed from was delivered on 24th January 2017 and a Notice of Appeal in respect thereof filed on 10th March 2017. Under **Rule 75 (1) and (2)** of the **Court of Appeal Rules**, the applicant was under an obligation to file his appeal within fourteen (14) days from the date of the judgment. In this case, the Notice of Appeal was filed on 10th March 2017, which was out of time by 33 days. The applicant blamed the delay in filing of the Notice of Appeal on his former advocate whom he had instructed to lodge the appeal but did not. A delay of a few days caused by the mistake of a legal adviser is considered a proper cause for the exercise of discretion and leave (**Gatti vs Shoosmith [1939] 3 All ER 916**). In **Transnational Bank Ltd v Jemimah Moraa Sobu, Civil Application No. 91 of 2002; [2002] LLR 5948 (CAK)**, it was held that an oversight on the part of the applicant's advocate is a fit and proper case for the exercise of discretion to extend time to file notice of appeal and record of appeal.

7. An appeal which is filed out of time can be validated by an application for leave to validate the appeal, as provided by **Section 79G** of the **Civil Procedure Act**. It would be a focus on procedural technicalities at the altar of substantive justice and contrary to the overriding objectives of the law as espoused in **Sections 1A and 1B of the Civil Procedure Act** if the court were to find otherwise (**Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR**). In short, I am satisfied that the application has merits. The appeal shall be deemed to have been filed and served within time. Leave to appeal to the Court of Appeal against the judgment delivered on 24th January 2017 is therefore granted.

8. On the issue of stay, it was not disputed that the only property of the estate that was affected by the intended appeal was Kabete/Lower Kabete/2008. This court will not stay the entire proceedings and distribution of the estate on the basis of one property. I therefore issue a restraining order against Kabete/Lower Kabete/2008, and order that the distribution of the same be stayed pending the hearing and determination of the appeal. Each party to bear their own costs.

DATED and SIGNED at NAIROBI this 17TH day of JULY 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 18TH day of JULY 2018

J.N. ONYIEGO

JUDGE