



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 203 OF 1987
IN THE MATTER OF THE ESTATE OF JUSTUS MBOGO (DECEASED)
THOMAS KANAKE GWANDARUAPPLICANT
- VERSUS -
ANNE MICERE MBOGO.....RESPONDENT
R U L I N G

1. In his Notice of Motion dated 25th May 2015 brought under **Section 1 A, 1B, 3A** of the **Civil Procedure Act, Order 43 Rules 2 and 3** and **Order 51 of the Civil Procedure Rules, 2010** the Applicant Thomas Kanake Gwandaru (hereinafter the Applicant) seeks two orders. The First is that the court be pleased to extend time within which he may apply for leave to appeal and deem this application as properly filed. The Second is that this court do grant the Applicant leave to appeal against the ruling and order of Justice G. B. M. Kariuki given at Nairobi on 26th July, 2013 and to deem the Notice of appeal filed herein on 8th August, 2014 duly and properly filed.

2. The grounds of the application as contained in the face of the application are that the Applicant is aggrieved by the said ruling and order of the court made on 26th July, 2013 and intends to appeal. That the Applicant filed a notice of appeal against that ruling and applied to this court for proceedings, which have not been supplied to him.

3. The Applicant also asserts that when the said ruling was delivered, the Applicant was represented by the firm of the late G. Kamonde Advocate, who passed-on on 16th November, 2014. The Applicant alleges that the delay in applying for leave to appeal was occasioned by Mr. Kamonde having been sickly whilst the suit was pending, and was not able to follow through with the matter. That the matter appears to have escaped the attention of the firm and was not assigned any particular advocate when Mr. Kamonde's health deteriorated and he eventually died.

4. The Applicant stated that on 6th December, 2014 he instructed the firm of Kamau Kuria & Company Advocates to take over the matter from the firm of G. Kamonde Advocates on his behalf. Upon consideration of the mater by the firm of Kamau Kuria, he has been advised that there is need to appeal and that leave to appeal is a prerequisite.

5. The Applicant contends that the delay is excusable and no prejudice will be occasioned to the Respondents in that, though proceedings were requested for, they are yet to be typed and availed to the Applicant to lodge the appeal. That the notice of appeal was filed and served in good time as soon as

instructions were given to that effect and this is an appropriate application to regularize the notice of appeal, which was filed without leave of the court.

6. The Applicant has sworn an affidavit dated 25th May, 2015 in which he reiterates the grounds of his application. He urges that the Court of Appeal held in **Murai v Wainaina (1982) KLR, 38** that the mistake of an advocate is a good reason for the extension of time for taking the appropriate action. He has annexed to this affidavit the forensic Pathologists report with regard to the late G. Kamonde's condition at the relevant time and as proof that counsel subsequently passed on. He has also annexed the notice of appeal and copies of letters addressed to the Deputy Registrar, Family Division in which he requests for copies of the proceedings for purposes of appeal.

7. On the law **section 7 of The Appellate Jurisdiction Act (Cap 9 laws of Kenya)** provides as follows:

“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.”

The court does therefore have the jurisdiction to consider the matter. The power is however, discretionary and not as of right.

8. The Applicant must however demonstrate that he is deserving of the relief sought. The reasons that the court may consider when granting the relief sought were set out in the case of **Wasike v Swala [1984] KLR pg. 591**. As Rule 4 of the Court of Appeal Rules was, at the time that Wasike's application came before a single judge, a person applying for an extension of time within which to serve or institute an appeal had to account satisfactorily for the delay in filing his appeal and if he succeeded in doing that, then he had to show that there was some merit in his appeal. The applicant did not have to show that his appeal had an overwhelming probability of success.

9. In due course and before the reference to the full court the rule was amended. Kneller and Hancox JJA and Nyarangi Ag JA held as follows regarding the amended rule:

“1.

2. As rule 4 now provides that the court may extend the time on such terms as it thinks just, such an applicant must now show, in descending scale of importance, the following factors:

a. That there is merit in his appeal

b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

c. That the delay has not been inordinate.”

Sufficient reasons must therefore, be shown in the three areas set out above before the court can exercise its jurisdiction to grant extension of time.

10. I shall not delve into the question as to whether there is or there is not merit in the intended appeal. I shall leave that determination to the Appellate court as I deem it inappropriate to arrogate to myself the appellate function, over a ruling rendered by a judge who, at that time, was exercising jurisdiction concurrent to mine.

11. On the question of prejudice M/s. Muhoro opined that no prejudice would be suffered by the Respondent, since they were served with the notice of Appeal in good time. The Respondent's Advocate on record was served with the hearing notice with regard to this application on 4th May 2016 but had filed no response thereto as at 14th June 2016 when the matter came up for hearing. There is therefore no

material before the court upon which to find that the positions of the parties may have changed on the ground as a result of the ruling of 26th July, 2013. There has been no further action on the file besides the change of Advocate on the part of the Applicant and the filing of this application.

12. On the question as to whether the delay has been inordinate, I note that the Notice of Appeal was filed in court and served upon the firm of Osoro Mogikuyu Advocates for the Respondent on 2nd August, 2013. The Advocates for the Respondent's stamp on "TKG13" a copy of the notice, acknowledges receipt. This was about seven days after the impugned ruling had been rendered, and well within time. There was however a lapse on the part of counsel to seek the leave of court before filing the Notice of Appeal.

13. The delay in filing the appeal itself has been attributed to two reasons. The first is that although the applicant wrote to the court to supply him with a certified copy of proceedings for purposes of appeal as evinced from the two letters attached as "TKG2", the proceedings have not been availed to date. The two letters are dated 2nd August, 2013 from the firm of G. Kamonde the initial Advocates on record, and 19th February 2015 from the firm of Kamau Kuria & Co, the current Advocates respectively. Both letters are addressed to the Deputy Registrar, Family Division and seek to be supplied with certified copies of proceedings.

14. The second reason for the delay was attributed to failure by the Applicant's Advocate, to follow the matter through and ensure that the proceedings were availed and the appeal filed. The Applicant has however annexed evidence in the form of a Forensic Pathologist's report which shows that Mr. Kamonde was in a sickly state of health during the time the ruling was delivered and that as a result he did pass on. Counsel's poor state of health is the reason assigned for failure to follow through with the processes necessary for the filing of the appeal. That even after counsel passed on, there appears to have been some disarray in the office so that the Applicant's matter was not assigned to any other counsel. It only began to move when he engaged new counsel.

15. In the circumstances of this cause it is my considered view that although the delay in seeking leave was inordinate, coming almost two years after the ruling, the court does however find that for the reasons set out above, the delay was excusable. The Notice of Motion dated 25th May, 2015 is therefore, allowed, with the following orders:

- i. The Appellant is hereby granted extension of time within which he may apply for leave to appeal. The application on record is hereby deemed as properly filed and the leave is duly granted.
- ii. Leave is hereby granted to the Appellant to appeal against the ruling of the court dated 26th July 2013.
- iii. The appeal shall be filed within sixty (60) days of this date failure to which these orders of the court shall stand automatically vacated.
- iv. These orders be extracted and served upon the Hon. Deputy Registrar in charge Family Division to expedite the typing and certification of the proceedings for purposes of the appeal.
- v. The court further orders that although the Applicant has succeeded in what he set out to do in this application when he approached the court, he shall nonetheless bear the costs of this application because the failures leading to the application herein were not of the Respondent's making.

These are the orders of this court.

SIGNED DATED and **DELIVERED** in open court this 7th day of July 2016.

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L. A. ACHODE

JUDGE