



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CASE NO. 64 OF 2010

**GENESIO MURITHI BORE LEGAL REPRESENTATIVE OF THE ESTATE OF M'BOORE
M'MURANGA(DECEASED)**

FESTUS MWARIMU.....1ST APPLICANT

мбака муранга.....2ND APPLICANT

РАИНИ МУРАНГА.....3RD APPLICANT

VERSUS

GENESIA CIARWIGI MUCHIRI.....RESPONDENT

R U L I N G

In an application dated 27th April, 2010 brought pursuant to Section 3 and 3A of the Civil Procedure Act and Order XLIX Rule 5, L Rule 1 and 2 of the Civil Procedure Rules the Applicant sought leave to appeal out of time against the judgment of D. O. Onyango(SRM) at Runyenjes in Succession Cause No.63 of 2003 delivered on 19th November, 2009.

The application is based on the grounds on the face of the application and supported by an affidavit deponed upon by Genesio Murithi on his behalf and that of his co-applicants. The application on the other hand is opposed by the respondent through her replying affidavit dated 29th March, 2014.

I have carefully perused the applicants notice of motion, the affidavit in support together with the annextures thereto and the opposing affidavit of the respondent. The court has also considered the respective oral submissions by Mr. Nyaga Nyamu, learned Counsel for the applicants and the respondent's submissions as well as the relevant provisions of the law referred to the court by Counsel for the applicants. The issue for determination in this application is whether the applicants have satisfied the conditions for granting leave to appeal out of time.

The facts of this case are that judgment in Succession Cause NO.23 of 2003 was delivered on 19th November, 2009. The applicants applied for certified copies of proceedings and judgment on 23rd November, 2009. The proceedings were signed on 10th March, 2010 and certificate of delay was issued on 9th April, 2010. The application for leave to appeal out of time was filed on 27th April, 2010. The delay in filing the appeal is asserted by applicants not intentional but was due to delay in supplying the applicants with the proceedings.

The respondent on her part averred that the applicants did not need the proceedings and judgment to lodge the appeal as the same could be obtained later after filing of the appeal. She alleges the applicant are 4 ½ years out of time in filing an appeal and sought the application be dismissed. She further submitted the applicants have no arguable case and that if the application is granted she would be prejudiced as distribution of the estate would be delayed. She also averred that the provisions of Civil Procedure are not applicable in Succession matters hence the application is bad in law and court lacks powers to extend time or grant leave for filing appeal out of time.

Mr. Nyaga Nyamu, learned Counsel urged the court to grant the application relying on various provisions of the Law of Succession Act and the Constitution of Kenya. He referred to **Section 50 of the Law of Succession Act** which states appeals shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and that the decision of the High Court shall be final. He urged that if court fails to allow applicants leave to appeal out of time they would be prejudiced as the issue involves family land. He urged that **Rule 67 of the Probate and Administration Rules** gives court power to enlarge time and that **Rule 63(1) of the Probate and Administration Rules** allows application of some of the provisions of the Civil Procedure Rules such as Order XLIX of Civil Procedure Rules now Order 50 of the new Civil Procedure Rules to enable court extend time. He further urged that **Rule 73 of the Probate and Administration Rules** gives court inherent powers to make necessary orders as may be necessary for the ends of justice or to prevent abuse of process of the court. He submitted the delay was caused by court and upon receipt of the proceedings they moved without undue delay and that by allowing the application the respondent won't be prejudiced. He finally referred to **Article 50(1) of the Constitution of Kenya** urging that the applicants are entitled to fair trial.

In the instant application the applicants have demonstrated that they applied for proceedings and certified copy of the judgment within time and immediately after delivery of the judgment. The proceedings and judgment were supplied after period for filing an appeal had lapsed. The applicants applied and obtained certificate of the delay and filed a Draft Memorandum of Appeal, a draft whereof is in the certificate. The draft Memorandum of Appeal dated 27th April, 2010 raises arguable grounds of appeal. The applicants have acted diligently and without unreasonable delay on their part. The issues raised in the draft Memorandum of Appeal raises in questions concerning family land and is an issue on inheritance.

Section 50 of the Law of Succession Act is clear that an appeal from Resident Magistrate court in respect of any estate lies to the High Court. The aforesaid **Section 50 of the Law of Succession Act** provides :-

“50. (1) An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.”

Rule 67 of the Probate and Administration Rules gives High Court power to enlarge time. **Rule 67 of the Probate and Administration Rules** provides:-

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

Further the order relied upon by the applicants to seek on enlargement of time being Order XLIX of Civil Procedure Rules (now Order 50 of Civil Procedure Rules) is one of the Orders mentioned under **Rule 63 of the Probate and Administration Rules** which provides:-

“63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (P practice and P procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”

Further to the above nothing in the **Probate and Administration Rules** states shall limit or affect the inherent power of the court to make necessary orders for the ends of justice.

In the case of **KIHUNGI V KIHUNGI (1989) KLR 178 NYARANGI JA** as he then was on application for extension of time to file appeal out of time held:-

1. **It has become a basic concept of land disputes that unless there has been such delay as would make it clearly unreasonable and unjust to reopen the matter, an intending appellant should be allowed to institute an appeal.**
2. **When it is family land, the added advantage is that upon determination by the court peace and harmony in the family affected is restored.**
3. **It seemed unlikely that the respondent and her children would be denied justice. in the circumstances, the only matter for consideration was whether the delay in bringing the notice of motion was inordinate, inexcusable and unexplained.**
4. **The delay was not inordinate and this court accepted the explanation for the delay.**

I am guided and bound by the above mentioned case in this application which is similar to the above mentioned case. In this application the delay in filing the appeal has been explained, the delay is not inordinate nor is it inexcusable and unexplained. I find the delay not inordinate and this court accepts the explanation of the delay was not due to fault of the applicants. That by refusing to allow the application the court would be going against express provisions of **Article 50(1) of the Constitution of Kenya** which provides:-

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Further if the application is denied the applicants would be denied the right to ventilate their case in court of law and justice won't be done on their part by refusing the application. I find by allowing the application the respondent won't be prejudiced as she will have an opportunity to respond to the applicants appeal during the time of the hearing of the appeal.

Further by allowing parties to exhaust all legal process and have their rights determined to finality, it would not only result in finalization of the dispute but the final decision would make all parties satisfied that they have exercised their rights in pursuing their claim to finality and the courts determination may bring peace and tranquility in the family. Lastly courts should in land disputes and especially in Probate and Administration matters not deny parties extension of time to appeal out of time unless it is clear that the delay is unreasonable, unjustifiable and incapable of being explained.

In view of the foregoing I proceed to make the following orders:-

1. ***Application dated 27th April, 2010 is meritorious and is allowed.***
2. ***Applicants are granted 21 days from today to file and serve the Memorandum of Appeal upon the respondent.***
3. ***As both parties are family members I order that each party bear its own costs of this application.***

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF JUNE, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:-

1. Mr. Nyaga Nyamu for the applicant

2. applicant in person – present

J. A. MAKAU

JUDGE