



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPLICATION NO. NAI. 220 OF 1999

BETWEEN

ZEUDI
MIRACH ...
.....
.....A
PPLICANT

VERSUS

1. GIDE
FISSAH
ALE
GOITOM)

2. DEHEB
BEHRANE
ABED)
.....R
ESPONDE
NTS

(Application for extension on time to file and serve
Memorandum and Record of appeal out of time from
Judgment of the High Court of Kenya at Nairobi (Hon. Justice Khamoni) dated 3rd November,
1997

in

Succession Cause No. 843 of 1995)

RULING

Zeudi Mirach is the applicant in this Notice of Motion brought under **Rule (4)** of this Court's rules. She seeks an order from this Court extending time to enable her file and serve a Notice of appeal, memorandum of appeal and record of appeal. The affidavit filed in support of the application by Mr. Musyoka, counsel for the applicant states inter alia; that Khamoni (J) delivered a judgment in **Succession Cause No. 843 of 1995** on 3rd November, 1998. The applicant, who had maintained that she was the only wife of the deceased, Fisahaye Goitom was dissatisfied with the judgment.

The effect of the judgment was that the administration of the deceased's estate be carried out

jointly with the family of the other wife Deheb Berhawe Abed, who had objected to the applicant's petition as a sole administrator.

The applicant promptly filed and served a notice of appeal on 14th November, 1997 and thereafter a memorandum of appeal in appeal case **No. 138 of 1998 on 17th July, 1998.**

The appeal came up for hearing on 11th February, 1999. The same was struck out as being incompetent on the ground that some two documents produced as exhibits in the superior court and which formed part of the record of appeal to this court, contravened **Rule 85(1) (f) of the rules of this Court.** In that they had not been translated from Amharic language into TEhnigsl iasphp.lication for extension of time was not filed till the 17th of August, 1999. The delay of about five months forms the main ground upon which M/s Guserwa, counsel for the respondent has objected to the application. Her argument is that the applicant did not require five months to have two documents translated so as to file this application. The delay according to her is inordinate. It is being used to serve the interest of the applicant since she is in possession of the whole of the deceased's estate, benefiting from it and wasting the same to the disadvantage of the respondent.

Furthermore that it is only in the interest of justice that this litigation comes to an end.

I am not oblivious to what M/s Guserwa is saying. In this kind of litigation there can be no doubt that the party who is not involved in the actual administration of the estate and is not being provided for from the income of the estate, must of necessity be suffering. To my mind this is a factor that should be taken into consideration in deciding whether there was a good enough reason for the occasioned delay. Or as alleged in this application, the application is only meant to cause injustice by delaying the process of the court.

The cause of delay in this case is that once the appeal was struck out, the applicant embarked on the exercise of finding an interpreter. This of course should not have been a problem since there are many Ethiopians living in Kenya. It would appear that the problem arose when the interpreted documents had to go through our Ministry of Foreign Affairs to the Ethiopian Embassy for certification. This was a fact that M/s Guserwa did not dispute save that it had taken long.

I agree with her, but this was a process that was not entirely under the control of the applicant.

While I am mindful of the fact that litigation must come to an end, there is the other side of the coin which I can only express in the words of the learned Judges, Shah, J.A in

JEREMIAH KARIUKI VS NATIONAL BANK OF KENYA LTD. Civil Application No. Nai. 138 of 1995 (unreported) , and Omolo, J.A in **GICHOHI KIMIRA VS SAMUEL NGUMO KIM OTHO & ANOTHER Civil Application No. Nai. 243 of 1995 (unreported)** where he said:

"I am aware that litigation ought to come to an end and that is unfair that one case should hang over the heads of parties indefinitely. But that consideration must be weighed against the wide interest of justice, namely that where possible, cases should be brought to a close after a hearing on the merits".

I am minded to grant the applicant the time she seeks notwithstanding the five months delay and which I have found was not inordinate.

My decision on the motion therefore is that the same is hereby allowed. The applicant shall file and serve her notice of appeal within 7 days from today's date, thereafter file her memorandum and record of appeal within 7 days from the date of filing of the notice.

The costs of this application shall be in the intended appeal. Those shall be my orders.

Dated and delivered at Nairobi this 22nd day of October, 1999.

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR