



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. CIVIL APPLICATION NO. 5 OF 2018

NANCY WANGARI KINYUA.....PLAINTIFF

VERSUS

ROSE WAMBUI.....1ST DEFENDANT

CAROLINE NJERU.....2ND DEFENDANT

RULING

The Applicant Nancy Wangari Kinyua moved this Honourable Court under certificate of urgency vide the Notice of Motion dated 21st May 2018 seeking leave to file Appeal out of time. The application is brought under **Order 50 Rule 6 CPR**. In her supporting affidavit sworn the same date, the Applicant deponed that initially she filed a case before the Magistrate's Court in Kerugoya being CMCC No. 267 of 2001. After the case was heard, the trial Court dismissed her claim on 19th January 2012. She then filed an appeal before this Honourable Court and judgment was delivered on 19th May 2017. In that appeal, she partially succeeded. Upon delivery of that judgment, the Respondent moved the Court to have her name expunged from the title in land parcel No. MWERUA/GITAKU/827. Being aggrieved by the decision of the Court arising from that application, the Applicant filed an application before the Magistrate's Court for review of its orders issued on 19th October 2017. On 8th March 2018, the Magistrate's Court dismissed that application for review. On 9th April 2018, the Applicant filed a Notice of Appeal against the decision of the Magistrate issued on the said 8th March 2018. She now contends that being a lay person, she did not know that she was supposed to file a Memorandum of Appeal and not a Notice of Appeal. She therefore seeks leave to file Appeal out of time due to that error.

In a replying affidavit filed on 29th June 2018, the 2nd Respondent opposed the application stating that the Applicant ought to have known that she was required to file a Memorandum of Appeal within 30 days from the date of the ruling instead of a Notice of Appeal as ignorance of the law is not a defence. The Respondent further deponed that the reasons given by the Applicant are not good enough to warrant granting the orders sought and even if the orders are granted, nothing will change since the Applicant did not appeal against the judgment of Justice Olao in ELCA No. 48/2014.

APPLICANT'S SUBMISSIONS

The Applicant through the firm of Wangechi Munene & Co. Advocates submitted that due to ignorance of law, the Applicant filed a Notice of Appeal instead of Memorandum of Appeal within the stipulated 30 days. She submitted that the Applicant was acting in person and did not have the benefit of legal counsel. Her mistake, she submitted was not intentional, deliberate or meant to delay execution of the decree herein. She cited the case of *Kinyanjui Muguta Vs Wotuku Muguta (2018) e K.L.R.*

RESPONDENTS SUBMISSIONS

The Respondent through the firm of A.N. Chomba & Co. Advocates submitted that for an application for leave to appeal out of time to succeed, an applicant must establish a threshold as follows:

(1) Delay was not inordinate and has been sufficiently explained.

(2) The appeal was arguable.

(3) No prejudice would be caused to the Respondent.

(4) If it is just to allow.

The learned counsel submitted that the purported Notice of Appeal was filed one day after the mandatory 30 days had elapsed and 2 months after the impugned decision was delivered. As such, the Respondent submitted that such a delay has not been explained. He submitted that the application fails all the four tests and that the same should be dismissed.

I have considered the affidavit evidence by the Applicant and the Respondent. I have also carefully considered the submissions by the counsels and the applicable law. The application is seeking leave to appeal out of time **Section 79 G of the Civil Procedure Act** provides as follows:

“79 G - Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the late 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 same provision is similar with ***Rule 4 of the Court of Appeal Rules***. From the grounds given by the Applicant, she actually lodged her appeal within the thirty (30) days but she filed a Notice of Appeal instead of a Memorandum of Appeal. She said that she is acting in person and did not have the benefit of legal counsel to advise her on the proper document to file. She only came to realize that she filed the wrong documents much later. She now seeks this Court's leave to file Memorandum of Appeal out of time and that the delay or error or mistake was not intentional or deliberate.

It is trite that an application for leave to file Appeal out of time is a discretionary power that can be exercised judicially and not whimsically. An applicant must give sufficient reasons for the delay, mistake or error. The Court must of necessary examine and test the nature or quality of the mistake (s).

In this case, the Applicant attempted to file the Appeal but in the wrong format. The mistake by the Applicant is excusable as she was acting in person. In the upshot, I find the application has merit and the same is hereby allowed on the following terms:

(1) The Applicant is granted leave to file and serve Memorandum of Appeal within 7 days from today.

(2) The costs of the application to be costs in the cause.

READ and SINGED in open Court at Kerugoya this 13th day of February, 2019.

E.C. CHERONO

JUDGE

13TH FEBRUARY, 2019

In the presence of:

1. Ms Wangechi Munene - present
2. Chomba & Co. Advocate - absent
3. Mbogo - Court clerk - present