



**Rajab v Kaur; Bamrah (Interested Party) (Civil Appeal (Application)
E073 of 2023) [2024] KECA 565 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 565 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E073 OF 2023
AK MURGOR, JA
MAY 24, 2024**

BETWEEN

ASHA RAJAB APPLICANT

AND

SUKHJIT KAUR RESPONDENT

AND

ARJINDERPAL SINGH BAMRAH INTERESTED PARTY

(An application for stay of execution of the Ruling and order of the High Court at Mombasa (Gregory Mutai, J.) dated 4th August 2023, in Succession cause no.38 of 2018 in the Matter of the Estate of Inderjeet Singh Sobhanpal (Deceased))

RULING

1. The applicant, Asha Rajab filed a Notice of Motion dated 28th August 2023 pursuant to section 3A of the *Appellate Jurisdiction Act*, rule 4 of the *Court of Appeal Rules, 2010* seeking *inter alia* that this Court admit the Notice of appeal dated 21st August 2023 filed and served on the 21st August 2021 out of time and for the Notice to be deemed as filed within time, or in the alternative, that this Court do extend time for the applicant to file a fresh Notice of appeal and the same be admitted as the proper Notice of appeal against the decision of High Court made on the 4th August 2023 that the applicant intends to appeal against.
2. The applicant's motion that was supported by an affidavit of Martin Tindi Khaemba sworn on 28th August 2023 is brought on several grounds on its face, more particularly that, the advocates on record received instructions on the 18th August 2023 and attempted to file a notice of appointment and a Notice of appeal on the same day; that on the material day, the Court's electronic filing system was down and remained that way until the next working day which was the following Monday 21st August,



2023 when they were able to file the documents. It was deponed that the documents were filed one day after the prescribed timeline which was excusable, and that they had sufficiently explained the delay. In the alternative, it was the deponent's prayer that this Court order a fresh Notice of appeal to be filed. Annexed to the application was the impugned Notice of appeal dated 21st August 2023 and a draft Memorandum of Appeal raising various grounds of appeal.

3. In a replying affidavit sworn on 7th March 2024 filed on behalf of the respondents, Mr. Sukhjit Kaur Sohanpal, opposed the application and deposed that the Ruling was delivered on 4th August 2023 and the applicant's Notice of appeal dated 21st August 2023 was filed on the same date; that the applicant ought to have filed its Notice of appeal within 14 days from the date of the ruling pursuant to rule 76 (2) as read together with rule 79 (1) of the *Court of Appeal Rules 2022*; that furthermore, the letter bespeaking the typed proceedings from the High Court was not served upon them as is mandated by rule 84 (2); that the applicant has not provided any plausible or reasonable explanation for the inordinate delay in filing Notice of appeal out of time and the explanation of a change of Advocates and the 14th day of filling Notice of appeal falling on a Friday are untenable reasons.
4. It was further deponed that the respondent stood to suffer great prejudice by being dragged through unnecessary litigation were time to be extended as, the Estate of the deceased continues to be wasted for lack of administration for over 6 years now.
5. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997.
6. In her motion, the applicant seeks for time to be extended to file and serve the Notice of appeal dated 21st August 2023 out of time on account of a delay of one day. In this regard, the trial court's ruling was rendered on 4th August 2023 and a Notice of appeal dated 21st August 2023 was lodged on the same day, a period of 17 days later. In effect, the delay in filing was 3 days. As observed by the respondent, the rules of this Court specify that the Notice of appeal ought to have been filed 14 days after the ruling or judgment and the request for proceedings should have been lodged within 30 days of the date of the ruling or judgment and a copy of that request served upon the respondent.
7. As to whether the delay has been explained, the applicant stated that the delay in filing the Notice of appeal was occasioned by the change of advocate, and the failure to file the notice on the 14th day which was a Friday that was occasioned by a failure in the Court's electronic filing system, but which filing was undertaken the following Monday.
8. A consideration of the Notice of appeal shows that it was indeed filed on the 21st August 2023 which was a Monday. However, there is nothing that is supportive of the contention that there was a failure in the Court's electronic filing system on Friday 18th August 2023, or that any attempt was made at filing on that date because the Notice of appeal was dated 21st August 2021 and not 18th August 2023 when the failure of the court filing system was alleged to have occurred. Consequently, the applicant cannot rely on this as the reason to explain the delay in the filing of the Notice of appeal.
9. That said, the other explanation advanced by the counsel was that the delay was also occasioned by a change of advocates from Mutuku & Co Advocates. I have considered the Notice of Change dated 21st August 2023 and it is true that there was a change in the applicant's representation. I am prepared to



find that the change of advocates was the reason for the 3 days delay, which would mean that the delay, which I do not consider to be inordinate has been explained.

10. With regard to whether the applicant's intended appeal has chances of success, I have considered the ruling and the complaints raised in the draft memorandum of appeal attached to the application. The appeal is concerned with whether the deceased, Inderjit Singh Rattan Singh Sohandal's Will dated 15th June 2016 was valid, and whether the learned judge rightly found that the deceased died intestate. This being a dispute in a succession cause, I consider the grounds raised to be pertinent and ought to be ventilated before this Court. In this regard, I do not consider that the respondent will suffer any prejudice were time to be extended to file the Notice of appeal. My view is that it would be mutually beneficial to all parties for the dispute to be settled once and for all by the applicant's appeal being heard and determined with finality.
11. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time for lodging the Notice of appeal dated 21st August 2023 and accordingly deem it as having been properly filed.
12. Having reached the above conclusion, I find it unnecessary to go into the merits of the alternative prayer sought.

Costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

