



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 262 OF 2019

BETWEEN

ROSE NYARURU KIARIE.....APPLICANT

AND

ZIPPORAH SENTURA.....RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal out

of time from the Judgement and Decree of the High Court of Kenya at Nairobi

(M. W. Muigai, J.) dated 03rd December, 2018 in Succession Cause No. 2153 of 2013

RULING

Rose Nyaruru Kiarie, the applicant herein moved the Court by a motion on notice, seeking the following orders;

- a) *THAT the Applicant be granted leave to file a Notice of Appeal out of time.*
- b) *THAT the Applicant be granted leave to apply for proceedings out of time.*
- c) *THAT the costs of this application be provided for.*

Judges of this Court have over the years, in the exercise of their free and unfettered discretion, devised principles to be applied in the consideration of Rule 4 applications. They are now old hat. In the oft-cited LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231 they were stated as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” (Emphasis added)

The motion is founded on 8 grounds on the face of it and the same is supported by an affidavit sworn by the applicant. She deposed that the judgment was delivered on 3rd December 2018 without notice to either her or her advocates. As such, they were unaware of its delivery until a letter dated 17th May 2019 was received by her advocates on 29th May 2019. It was from the Deputy Registrar of the Family Division informing them of the same.

She affirmed that the judgment was initially to be delivered on 30th November 2017, however, on the said date it was communicated that the same would be delivered on notice. After a considerable time lapsed, her advocates made enquiries about the judgment via two letters to the registry dated 16th May 2018 and 19th June 2018. This is what prompted the letter from the Deputy Registrar. By then the statutory timelines for filing a notice of appeal, seeking typed proceedings and lodging an appeal had already lapsed. She opined that the failure to lodge the notice of appeal was neither her advocates', nor her fault and was occasioned by factors beyond their control. The delay is excusable. It is also not inordinate.

The applicant urged that the repercussions of the judgment, which declared that she was no wife of deceased, are dire and therefore in the interest of justice, this application ought to be allowed.

I have given this matter careful consideration. I have borne in mind the considerations I have adverted to, conscious that my discretion is wide and unfettered. It must be exercised on sound principle for the attainment of the ends of justice. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must give some reasonable and plausible explanation for the delay. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR.**

Even though I am far from impressed with the conduct of the applicant and her advocates who appear to have been content to just wait for the judgment that was to be on notice upon being adjourned on 30th November 2017, I am not sure they are guilty of indolence. They waited until 16th May 2019, more than a year and five months later, to follow up on whether or not the judgment was delivered. They certainly could have done better. However, the court had indicated that it would, and indeed was under obligation to, issue notice of delivery of the judgment. There is no evidence that such promised and expected notice in fact issued. And it would be a little on the harsher side, bordering on the unconscionable, to punish the applicant's patience.

I think the situation is worsened and assumes an embarrassing aspect by the fact that the judgment, having been already adjourned on 30th November 2017, was not delivered until more than a year later, on 3rd December 2018, and without notice to the applicant's advocates. It would be hypocritical of me to view with unbending strictness the applicant's seeming tardiness in the face of the glaring delay by the court below. I would be pointing a finger of scoffing blame at a litigant's eye while ignoring the log in the judicial system's eye. And that I cannot in conscience do.

In the circumstances, I allow the motion. The applicant shall file and serve the notice of appeal within seven (7) days of the date hereof. For efficacy of the grant of this motion, the applicant shall lodge and serve a record of appeal within thirty (30) days thereafter. The prayer regarding a request for proceedings is unnecessary and I ignore it.

Costs of the motion shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR