



**IN THE COURT OF APPEAL**

**AT NYERI**

**CIVIL APPLICATION NO. 66 OF 2020 (UR 56/2020)**

**(CORAM: OKWENGU, JA (IN CHAMBERS))**

**GICHERO KIBANYA.....1<sup>ST</sup> APPLICANT**

**MICHAEL NJERU KIBANYA.....2<sup>ND</sup> APPLICANT**

**MARY WANJIRA KIBANYA.....3<sup>RD</sup> APPLICANT**

**AND**

**PETER KIBANYA GICHERO.....1<sup>ST</sup> RESPONDENT**

**BENSON WACHIRA KIBANYA.....2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to file and serve the record of appeal out of  
time against the judgment (M. Matheka, J) delivered on 16th August, 2019*

*in*

*Nyeri HC Succession Cause No. 1357 of 2012)*

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**RULING**

[1] The applicants, **Gichero Kibanya, Michael Njeru Kibanya and Mary Wanjira Kibanya**, were protestors in a succession cause in which **Peter Kibanya Gichero** and **Benson Wachira Kibanya** (the respondents) had applied for confirmation of the grant for the estate of Kibanya Gichero (deceased). The learned Judge confirmed the grant and distributed the estate.

[2] Being dissatisfied with the judgment, the applicants lodged a notice of appeal on 27th August, 2019. They also filed a draft memorandum of appeal raising 9 grounds which include: the learned Judge having erred in failing to apply and appreciate the doctrine/right of survivorship (*jus accrecendi*), and arriving at a wrong conclusion in the distribution of the estate; and redistributing part of an estate which had already been distributed by another competent court in Kerugoya High Court Succession Case No. 435 of 2012, where no appeal had been lodged.

[3] The applicant is now before us with a notice of motion dated 1st July, 2020 seeking orders that the Court do grant leave to file and serve the record of appeal out of time, and that the appeal be deemed as properly and duly filed.

[4] Under Rule 75(2) of the Court of Appeal Rules, an appellant has to file a notice of appeal within 14 days from the date of delivery of the judgement, and under Rule 82(1) of the Court of Appeal Rules, institute the appeal in the appropriate registry within 60 days from the date from which the notice of appeal was lodged.

[5] In the circumstances herein, judgment having been delivered on 16th August, 2019, the notice of appeal filed on 27th August, 2019 was filed in time. A certificate of delay availed to the Court shows that the Deputy Registrar of the High Court at Nyeri certified that the applicants applied for certified copies of the proceedings and judgment on 23rd August 2019, and the same were paid for on 27th August 2019, and collected on 18th February, 2020. The Deputy Registrar therefore certifies that the time taken by the court to prepare and supply copies of the proceedings and judgment was from 27th August, 2019 to 18th February, 2020.

[6] Under the proviso to Rule 82(1) of the Court of Appeal Rules, in computing the time within which an appeal is to be instituted, the time certified by the Registrar of the High Court as having been required for the preparation and delivery to the applicant of such copy is excluded provided the applicant had served a copy of the letter bespeaking the proceedings upon the respondents.

[7] In his affidavit sworn in support of the motion Gichero Kibanya the 1st applicant, explains that although the proceedings and judgment were ready for collection on 18th February 2020, they only managed to collect the same on 10th March, 2020 as the court file had not been returned back to the registry. The 1st applicant further explains that the attempt to file the appeal was affected by the directive issued by the Chief Justice due to the Covid-19 pandemic, which affected the court operations from 16th March, 2020. The applicants therefore plead that the delay in filing their appeal was caused by circumstances beyond their control and urge the Court to allow them to file their record of appeal out of time.

[8] The applicants have also filed written submissions in which they cite **Fakir Mohammed vs Joseph Mugambi & 2 others [2005] eKLR**, and **Nicholas Kiptoo Arap Korir vs IEBC [2014] eKLR**, urging the Court that the delay in filing the record of appeal was not inordinate, but was occasioned by the impact of the directive issued by the Chief Justice, and that the applicants managed to collect the typed proceedings on 10th March, 2020 just before the directive issued by the Chief Justice on 13th March, 2020. The applicants further submit that their intended appeal has high chances of success.

[9] The application was scheduled to proceed by way of written submissions without the appearance of the parties or their counsel. The respondents did not however file any replying affidavit or written submissions.

[10] I have considered the motion before me in relation to the law. In **Nicholas Kiptoo Arap Korir vs IEBC** (supra), the Supreme Court set out the principles to be applied in an application for extension of time as follows:

***“1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***

***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

***3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

***4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***

***5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***

***6. Whether the application has been brought without undue delay; and***

***7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

[11] The applicants filed their application for extension of time on 15th July, 2020. The notice of appeal having been filed on the 27th August 2019, the record of appeal was due for filing on or before 25th October, 2019. That is to say, that as at the time the applicants filed the application for extension of time, there was a delay of about 8 months. The respondents have not filed any reply, and have not disputed having been served with the letter bespeaking the proceedings. If the period from 27th August, 2019 to 18th February, 2020 is excluded from computation of time, the period of delay is actually 4½ months.

[12] The applicants have explained that the delay arose because of the restrictions and directives imposed as a result of the Covid-19 pandemic. The applicants have demonstrated that they actually followed up the typing of proceedings and were ready to file the appeal were it not for the Covid-19 pandemic. The applicants have also availed a draft memorandum of appeal from which it is evident that the applicants intend to raise issues of law such as the application of the doctrine of ‘*jus accrescendi*’ in succession matters, and whether the court redistributed part of an estate that had already been distributed by another competent court.

[13] In the circumstances, I find that the applicants have satisfactorily explained the delay and that the delay is not inordinate. I find it appropriate to allow this motion so that the applicants can have their day in court. Accordingly, I issue orders in accordance with the notice of motion dated 1st July, 2020. Costs of the motion shall be in the appeal.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of June, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**