



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 398 OF 2019

BETWEEN

JAMES MITHIA GICHOMBO..... APPLICANT

AND

LUCIA MUTHONI SILAS1ST RESPONDENT

GEORGE GICHOMBO MUIGAI.....2ND RESPONDENT

(Being an application for leave for extension of time for the admission of the Notice of Appeal out of time in this Appeal from the Judgment/Order of the High Court of Kenya in Nairobi (Ali-Aroni, J.) delivered on 17th day of October, 2019

in

HC. Succession Cause No. 1903 of 2015)

RULING

As a son of Silas Muigai Gichombo. (the deceased) died intestate on the 10th of March, 2001, the applicant expected to be included in the distribution of the former's estate. According to the widow, who is also one of the administrators, the distribution was done strictly in accordance with the deceased's wish and took into consideration what the deceased had gifted, *inter vivos*.

Weighing the evidence before her, Ali-Aroni, J noted that, whereas all the parties appeared satisfied with widow's proposed list on distribution, three of her sons, James Muthia Gichombo, (the applicant), George Gichombo Muigai and Dennis Thuo Muigai were aggrieved, particularly with the proposed distribution of the petrol station. While the applicant wanted it for himself, his two brothers proposed that it be shared equally amongst all the beneficiaries.

The family insisted that, since the deceased had gifted the applicant during his life time, the applicant was not entitled to any part of the estate.

On 17th October, 2019, the learned Judge adopted the mode of distribution proposed by the widow, save for L.R. Gatamaiyu/Kagwe/193, which she directed to be retained by widow for her life time and thereafter to revert to one of the sons, Joseph Kuria Muigai and the Petrol Station to be held by the widow in trust for herself and all the 6 beneficiaries in equal shares and the income from it to be shared equally between the beneficiaries.

Dissatisfied by this decision, the applicant intends to challenge in this Court but is unable because the time within which to do so has elapsed. For example, he filed the notice of appeal on 14th November, 2019, yet by the provisions of **rule 75** of this Court's Rules, a notice of appeal ought to have been lodged within fourteen days of the date of the decision in question.

By the present application, he is asking the Court to deem that notice of appeal to have been lodged within time stipulated by the said rules of the Court. The respondents do not think he is deserving of the remedy; that though the delay is only for 14 days, it is nonetheless prejudicial to the respondents; that the applicant has not explained the delay; that the dispute has been in court since 2007; and that in view of the age (90 years) of the 1st respondent, the Court should dismiss the application.

Whether or not to extend the time for filing a notice of appeal or record of appeal is essentially discretionary. In exercising that mandate, the matters that must be taken into account include the length of the delay, the reason for the delay, the degree of prejudice and (possibly), the chances of the appeal succeeding if the application is granted.

See **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** (1999) 2 EA 231.

It has been conceded that the delay was only for 14 days. But even with that kind of delay, the applicant was required to explain it. Unfortunately, there is no explanation in the supporting affidavit. There is a casual mention by the advocates in the affidavit in support that they took over the conduct of the case from the applicant's previous advocates and filed the notice of appeal immediately.

Addressing the Court orally, Mr. Onyango, advocate explained from the bar that it took the previous advocates some time before they handed over to the current firm of advocates; and that at this time, most firms had closed, I presume, for Christmas recess.

In my considered view, the delay was no inordinate and the explanation, not fully articulated in the affidavit, is reasonable. The prejudice and inconvenience presented by the delay can be compensated by an award of costs.

A balance between the 1st respondent's age and the applicant's right of appeal must be struck, so that this family dispute can be resolved with finality.

Accordingly, the application is allowed with costs to the respondents. The notice of appeal on record is deemed to have been lodged within the stipulated time upon payment of requisite fees. The applicant has 21 days within which to file and serve the record of appeal.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR