

IN THE COURT OF APPEAL

AT NYERI

[CORAM: KANTAL, JA IN CHAMBERS]

CIVIL APPLICATION NO. 106 OF 2018

BETWEEN

AGNES TIRINDI KIARA.....APPELLANT

AND

VIOLET KAGWIRIA..... 1ST RESPONDENT

PAMELA KAGWIRIA.....2ND RESPONDENT

PENNINAH KATHURE..... 3RD RESPONDENT

(An application for extension of time to file and serve a record of appeal out of time from the judgment delivered on 1st February, 2018 by A. Mabeya, J,

IN

MERU SUCCESSION CAUSE NO. 499 OF 2015)

R U L I N G

The applicant Agnes Tirindi Kiara by a Motion on Notice brought under Rule 4 of the rules of this Court prays that I be pleased to extend time to enable her file and serve record of appeal out of time against the judgment delivered by the High Court of Kenya at Meru on **1st February, 2018** in a Succession Cause. In grounds in support and in an affidavit sworn by the applicant on **22nd August, 2018**, it is stated *inter alia* that the applicant is the mother of the late **Julius Kiragu Kiara** who died in the year 2015; that the applicant had filed a Succession Cause in respect of the estate of her deceased son; that the respondents **Violet Kagwiria, Pamela Kagwiria** and **Penninah Kathure** had protested against grant of letters of administration claiming to be children of the deceased; and that after a hearing the High Court had revoked the grant in favour of the applicant but ordered that the same be re-issued jointly to the applicant and the 1st and 2nd respondents. Further, that the applicant had filed and served a Notice of Appeal respectively on **6th and 7th February, 2018** but that subsequent to that filing she started ailing until July, 2018 when her health improved. She further depones that during her illness she was unable to keep contact with her lawyer who did not file a record of appeal. She has attached to the motion a Notice of Appeal and some correspondence to show episodes of her illness. There is also a draft Memorandum of Appeal attached to the application.

The respondents did not file an affidavit in reply.

The motion came up for hearing before me on **25th of March, 2019** when **Mr Gikonyo Mwangi** advocate appeared for the applicant while **Mr Gichunge Muthuri** advocate appeared for the respondent.

Mr. Mwangi referred me to the letter from Consolata Hospital, Nkubu, and a letter from County Government of Meru Department of Health to support his submission that the applicant had health problems hence unable to file record of appeal. According to counsel for the applicant the intended appeal is arguable as the respondents were not, according to counsel, entitled to be administratrix of the estate of the deceased.

In opposing the motion **Mr Gichunge** submitted that the applicant had not followed the timelines set out in the Rules of this Court. According to counsel the applicant had no role to play in filing an appeal because she had a lawyer on record. Counsel also complained that he had not been served with letter bespeaking proceedings.

I have considered the motion and the submissions made and this is what I think about this matter.

The exercise of power to extend time is discretionary and the factors which guide a Judge in considering such an application are not exhaustive but some were recognized in the case of **Mutiso vs. Mwangi Civil Appeal No. 255 of 1997** where the following passage appears:

"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: firstly, 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"

Has delay in this matter been explained? Judgment of the High Court was delivered on **1st February, 2018** and a Notice of Appeal was lodged on **6th February, 2018**. That Notice of Appeal was lodged and served within time. It is explained on behalf of the applicant that she fell ill and was unable to instruct her lawyer to file a record of appeal. I note from a medical report of Consolata Hospital Nkubu dated **15th September, 2016** by **Doctor Brian Marete** that the applicant was his client who suffered hypertension. **Doctor Guantai Koome** of Meru Teaching and Referral Hospital within the County Government of Meru wrote a report dated **25th July, 2018** stating amongst other things that the applicant then aged 82 years had been a patient on follow-up at that hospital suffering some health problems. The applicant requests me to consider her state of health as the contributing factor for the delay. On this aspect and in view of medical evidence available I am satisfied that the applicant who filed Notice of Appeal timeously was incapacitated by some health issues and was unable to instruct her lawyer to file record of appeal on time. So delay is explained.

On whether the proposed appeal has any chances of success I have perused the draft Memorandum of Appeal annexed to the application. It is stated amongst other grounds that the Judge erred in failing to appreciate that the respondents had not proved dependency or relationships that would entitle them to be beneficiaries of the estate of the deceased person. It is also taken as a ground that the Judge failed to appreciate that official government records had proved that the respondents were not children of the deceased. I think these are not frivolous grounds. They are arguable. I do not think in the circumstances that the respondents are prejudiced if I grant leave.

In the circumstances I allow the Notice of Motion dated **22nd August, 2018**. The applicant shall file and serve record of appeal within thirty (30) days of today. Costs of the motion will abide the outcome of the intended appeal.

DATED & delivered at Nairobi this 5th Day of April, 2019.

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR