



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 141 OF 2019

BETWEEN

PURITY KAMUNDI CILINDI.....APPLICANT

AND

GATAKAA NTWIGA.....RESPONDENT

IN THE MATTER OF THE ESTATE OF GIDEON M'MURUNGI

M'MUTHARA ALIAS MURUNGI NJARA ALIAS MURUNGI MUTHARA (DECEASED).

(An application for extension of time to file and serve the Record of Appeal out of time in an intended appeal against the Judgment of the High Court at Chuka (R.K. Limo, J) dated 15th October, 2018 in Succession Cause No. 54 of 2016)

RULING

The applicant herein has filed this application seeking extension of time to file and serve the record of appeal under **Rule 4** of this Court's Rules.

The applicant, who had protested against the distribution of the estate of the deceased, was the widow of the respondent's brother, Simon Kamunde Gideon. The applicant's husband and the respondent were therefore the sons of the deceased, Gideon M'Murungi M'Muthara, *alias* Murungi Njara *alias* Murungi Muthara. The applicant, it follows, was the deceased's daughter-in-law.

Her case was that the succession cause was filed without her knowledge; that the chief's introductory letter in the cause was a forgery and that the chief himself had disowned it; and that her evidence and that of her witness were ignored. Aggrieved by the decision of the trial court, the applicant filed a notice of appeal dated 25th October, 2018 expressing her intention to challenge the aforesaid decision. This was done within the prescribed time. The record of appeal was however not filed within the prescribed time hence the instant application.

Appearing in person, the applicant explained that all along she had been assured, indeed misled by her advocate that her appeal had been filed at Nyeri; that upon learning that this was not the position, she decided to personally take up the matter, though not conversant with court processes; that after this discovery, she applied for proceedings on 16th October, 2018 and subsequently, filed the notice of appeal on 25th October, 2018, as stated above; that the proceedings took long to be prepared; that she only received them on 24th April, 2019, after the time allowed for the filing of the record of appeal had elapsed; and that the decree and certificate of delay were supplied by the court on 11th July, 2019. For all these reasons, she submitted that the delay was not inordinate or intentional and urged this Court to excuse her. Further, she posited that she stands to suffer as the respondent may proceed to distribute the estate in accordance with the grant thus rendering the intended appeal nugatory.

The respondent did not file a response to the application and failed to appear during the hearing of this motion.

On the strength of a long line of authorities, it is settled that whether or not to extend time for filing a notice of appeal or lodging the appeal itself is discretionary and will depend on the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted. See **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Appeal No. 255 of 1997.

It is conceded that the notice of appeal was filed and served within time; that, according to the certificate of delay, the time taken to prepare the proceedings was between 16th October, 2018 and 24th April, 2019; and that the delay up to the time of filing this application was 70 days. The applicant has attributed the reason for delay partly to the late receipt of proceedings from the High Court and being misled by her advocate to believe that the appeal had already been filed at Nyeri when, as a matter of fact it had not.

This application seeking leave to file and serve the record of appeal out of time, I reiterate was brought 70 days outside the prescribed time within which the applicant ought to have filed the record of appeal.

For the reason that the applicant has been candid and truthful that she had relied on her advocate's advice which turned out to be incorrect forcing her to act in person, and bearing in mind that the delay was for 70 days, I am prepared to excuse her and hold that, in the circumstances, the delay was neither unconscionable nor unreasonable; and that the explanation proffered for delay are also plausible. Further, in light of the fact that this is a family dispute around the distribution of the estate of the deceased, it is my view that an injustice will be occasioned to the applicant, if she is locked out and prevented from ventilating her grievance; and that she is likely to be disinherited if the appeal from the decision of the High Court is not determined on merit. On the other hand, there will be no prejudice against the respondent.

In view of the questions involved in the appeal, it is just and fit to grant leave to the applicant in terms of prayer 1 and 2 of the motion lodged on 3rd September, 2019 and direct her to file and serve the record of appeal within twenty-one (21) days from the date of this ruling.

Dated and delivered at Nairobi this 20th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR