



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 38 OF 2018 (UR NO. 21/2018)

BETWEEN

RAMADHAN BARAZA OZULA.....APPLICANT

AND

ROSE ADIJAH BARAZA.....FIRST RESPONDENT

FRIDAH NECHESA ODERO.....SECOND RESPONDENT

*(Application for extension of time to Appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 18<sup>th</sup> February, 2013*

in

SUCC. CAUSE NO. 264 OF 2001)

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RULING

[1] By a notice of motion filed on 23<sup>rd</sup> April 2013, Ramadhan Baraza Ozula (herein the applicant) has moved the Court for orders of extension of time to enable him file an appeal against the judgment delivered by the High Court (Chitembwe J) on 18<sup>th</sup> February 2013. The reasons given for the delay are: that Honorat Baraza Akwenda who was the original intended appellant had filed a notice of appeal on 21<sup>st</sup> March 2013 and applied for proceedings. Honorat Baraza Akwenda died on 14<sup>th</sup> May 2017 before receiving the proceedings. The applicant obtained a Limited Grant of Letters of Administration *ad litem* allowing him to proceed with the matter.

[2] The applicant through his counsel obtained the proceedings and the certificate of delay confirming that the applicant applied for certified copies of proceedings on 6<sup>th</sup> December 2013 and again on 8<sup>th</sup> December 2017, and that the same were supplied on 20<sup>th</sup> February 2018. The applicant therefore contends that the delay was due to circumstances beyond his control.

[3] The respondent objects to the application through a replying affidavit sworn by Rose Adijah Baraza (1<sup>st</sup> respondent). Mr. Athung'a, learned counsel who appeared for the respondent submitted that the notice of appeal was not served on them within fourteen days as required; that the application was being made after an inordinate period of five years that has not been satisfactorily explained; that there is no evidence that the original intended appellant was sick for a long time; that the letter requesting for proceedings was not copied to the respondents advocate; and that the certificate of delay does not give the date when the proceedings were requested for.

[4] I have considered the application. Under Rule 4 of the Court Rules, I have discretion to extend time for the filing of the appeal. However, that discretion must be exercised judicially. In *Gitetu vs Kenya Commercial Bank Limited [2009] KLR 545*, this Court held that for an applicant to succeed in an application under Rule 4 of the Court of Appeal Rules, he has to satisfy the Court that:

***“(a). the delay was not inordinate and has been sufficiently explained;***

***(b). the intended appeal was arguable; and***

***(c). no prejudice would be caused to the respondent if the application to extend time was allowed.”***

[6] In this case, judgment having been delivered on 18<sup>th</sup> February 2013, and the applicant's motion having been filed on 23<sup>rd</sup> April 2018, it is evident that there is a delay of five years. The applicant has explained that the original intended appellant died, and a limited grant of letters of administration *ad litem* has been produced confirming that he died on 14<sup>th</sup> May 2017. Counsel for the applicant stated from the bar that the original applicant was sick for a while before he died.

[7] It is evident that Letters of Administration were issued on 5<sup>th</sup> March 2018 and therefore the applicant moved the court more than a month after the letters were granted to him. The applicant did not avail a copy of the judgment but has availed a copy of the memorandum of appeal from which it is evident that the intended appeal is not frivolous. In the circumstances, I find it appropriate that in the interest of justice I do exercise my discretion in the applicants favour.

[8] Accordingly, I allow the notice of motion filed on 23<sup>rd</sup> April 2013 and direct that the applicant shall file and serve a record of appeal within thirty (30) days from the date hereof. I make no orders as to costs of the motion.

**DATED and delivered at Kisumu this 14<sup>th</sup> day of September, 2018**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**