



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. MUSINGA, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 243 OF 2015 (UR 202/2015)

BETWEEN

ANNE WAMBUGU GITHAIGA.....APPLICANT

AND

STEPHEN MAINA GITHAIGA.....RESPONDENT

(An application for extension of time to file and serve notice of appeal and lodge the record of appeal out of time from the judgment and orders of the High Court of Kenya at Nairobi (Musyoka, J.) dated 8th November, 2013

in

Succession Cause No. 327 of 1994)

RULING

1. The applicant and the respondent are appearing in person. That may explain the inappropriate manner in which some of the prayers in the applicant's application dated 24th September, 2015 have been crafted. This is a single judge application brought under **rules 1(2), 4 and 42** of this Court's Rules. It is essentially for leave to file a notice and record of appeal out of time. The applicant has however added other prayers that I cannot deal with. She also seeks stay of execution of the judgment sought to be appealed from. She has even urged the court to set aside the High Court judgment. I will only deal with the prayer for leave to appeal out of time since I do not have jurisdiction as a single judge to consider the other prayers.
2. The judgment sought to be appealed from was delivered on 8th November, 2013. The judgment was delivered in the absence of the applicant's advocates Lucy Njiru & Company. It was not until 2nd February, 2015 when the applicant's advocates learnt that the judgment had been delivered. On the same day the said advocates filed a notice of appeal and on 5th February, 2014 the advocates wrote to the Chief Justice complaining about delivery of the judgment without any notice to them.
3. Thereafter the applicant was unable to raise funds to pay the necessary legal fees to her advocates. She therefore filed a notice to act in person on 13th February, 2015.
4. The draft memorandum of appeal that is annexed to the applicant's affidavit reveals that the intended

appeal is not frivolous. One of the issues that the applicant intends to argue in her proposed appeal is that the High Court judgment was largely premised on an undated and unsigned consent letter, which, in her view, was inadmissible in evidence.

5. The respondent has opposed the application. In his replying affidavit, he does not dispute the fact that the judgment was delivered without notice to the parties. He however disputes the applicant's averments that she was unable to raise funds to pay to her advocate to mount an appeal on her behalf. He stated that the applicant leases the land in dispute and is well able to raise sufficient amount of money to pay to an advocate as legal fees.

6. Lastly, the respondent states that if the application for leave to appeal out of time is granted, he shall suffer "**irreparable loss**" (*sic*) because the applicant utilizes a bigger portion of the subject land than his, which she is leasing out. He urged the court to dismiss the application.

7. I have considered the contents of the affidavits sworn by the parties. The applicable principles in an application of this nature are well settled. The court has to consider the length of the delay; the reasons for the delay; the chances of success of the intended appeal; and the degree of prejudice that the respondent is likely to suffer if the application for extension of time is granted.

8. The delay in filing the notice of appeal was one year and two months or thereabout. The judgment was delivered without notice to the applicant. The protest letter by the applicant's erstwhile advocate says it all. That is not disputed by the respondent. The applicant is not to blame for the delay in filing the notice of appeal.

9. After the applicant's advocate filed the notice of appeal and the applicant filed notice of intention to act in person on 13th February, 2015, there was a delay of nearly seven (7) months before she filed the present application. Although the applicant's explanation that she had financial hardship that caused her inability to instruct legal counsel is, *per se*, not satisfactory, taking a global view of all the relevant factors, I am inclined to exercise my discretion in favour of the applicant.

10. The intended appeal is arguable and I do not think the respondent stands to suffer serious prejudice if the applicant is granted leave to appeal out of time, which I hereby do.

11. Consequently, the notice of appeal filed on 2nd February, 2015 is deemed to have been filed in time. In the event that it was not served upon the respondent, that should be done within the next seven (7) days from the date hereof.

12. The memorandum and record of appeal should be filed and served within thirty (30) days from the date of this ruling. Each party shall bear their own costs of the application.

Dated at Nairobi this 16th day of September, 2016.

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR