



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 71 OF 2016**

**In the Matter of an Intended Appeal**

**BETWEEN**

**JEDIDAH MATHEMBO NDUNDA.....APPLICANT**

**AND**

**RAEL MUTUNGE.....RESPONDENT**

***(Being an application for extension of time to file and serve the Notice of Appeal out of time and for stay of execution in an intended appeal from the Ruling and Order of the High Court of Kenya at Kitui (Mutende, J.) dated 16<sup>th</sup> December, 2015***

***in***

***Succession Cause No. 319 of 2015)***

**\*\*\*\*\***

**RULING**

By her motion dated 16<sup>th</sup> March 2016 and brought under Rule 4 of this Court's Rules, the applicant **Jedidah Mathembo Ndunda** seeks two substantive prayers namely;

***2. THAT this honourable court be pleased to grant the applicant an extension of time to file and serve a notice of appeal against the ruling/order delivered in Kitui High Court Succession Cause No. 319 of 2015.***

***3. THAT in the alternative, the honourable court be pleased to order that the notice of appeal filed on 19<sup>th</sup> February, 2016 be deemed to have been filed within time.***

The application is founded on some eighteen grounds which seem to be a *replica* of the nineteen-paragraph supporting affidavit of the applicant. I think that this is a misapprehension of what ought to be contained in the grounds that support a motion. Evidence and narration of facts belong to the affidavit and not in grounds which ought to be brief and precise speaking only to the principles applicable for the grant of the particular application present before Court.

The gist of the supposed grounds and the affidavit, which were amplified in submissions before me by the applicant's learned counsel, is that a notice of appeal was filed on 19<sup>th</sup> February 2016 by the applicant's advocates who were not on record for her at the High Court when the impugned ruling was made on 16<sup>th</sup> December 2015. She asserts that bearing in mind the excluded days during part of the Christmas Vacation, the delay is of about 20 days which is not inordinate. That delay is explained as caused by the applicant's former advocates' failure to take the necessary step of initiating the appeal process necessitating the applicant's search for a new advocate. That search led to the law firm of Ojukwu Bosire & Associates Advocates whom she instructed on 25<sup>th</sup> January 2016. Even though the said advocates led her to believe by their letter dated 5<sup>th</sup>

February 2016 purporting to bespeak proceedings together with an unsigned copy of a notice of appeal, both of which she has exhibited, that they had initiated the appeal process, the applicant learnt later upon visiting the High Court Registry at Kitui, that they had not in fact done so. Let down by those advocates on whom she had placed reliance, she moved to her current advocates who filed a notice of appeal out of time on 19<sup>th</sup> February 2016 and the present application on 16<sup>th</sup> March. It is urged for the applicant that this is a succession dispute between two houses involving a vast estate comprising over 41 parcels of land and that she intends to challenge the High Court's holding that the respondent was a wife of the deceased by presumption of marriage, among other grounds that show the intended appeal to be merited as sought to be demonstrated by the annexed draft memorandum of appeal.

Mr. Owang cited MARITIM vs. KIBARU and GITETU vs. KENYA COMMERCIAL BANK LTD [2009] KLR 545 on the applicable principles in urging that the delay herein is not inordinate and is excusable.

The respondent opposed the application by way of a replying affidavit sworn on 2<sup>nd</sup> August 2016 in which she avers that the application is **“unmeritorious an afterthought and otherwise an abuse of the process of the Court”** and dismisses the explanation given for the delay, that is that the applicant had instructed the firm of Ojukwu Bosire & Company who failed to take appropriate action. According to her, the documents from that law firm were **“quickly prepared with the sole intention of misleading the Court thus the glaring errors”** including the fact that they appear to have been intended for filing at the High Court in Nairobi and not Kitui. She swears that the said documents are a fabrication only meant to mislead the Court. She also contends that the applicant has no arguable appeal as she admits the existence of a relationship between the respondent and the deceased Gibson Kinuka Ndunda.

**Mr. Mburu**, learned Counsel for the respondent in his submissions reiterated that the applicant was guilty of inordinate and unexplained delay. He contended that to grant this application would occasion the respondent immense prejudice as “she has taken steps, which to enjoy the fruits of her favourable ruling at the High Court. He also urged that the applicant having acknowledged that the respondent was the deceased's mistress, it is no longer tenable to argue that the respondent was not a wife and so the intended appeal is not arguable. He urged me to dismiss the application with costs and cited in aid the rulings of G.B.M. Kariuki JA in AVIATION CARGO SUPPORT LTD vs. ST. MARK FREIGHT SERVICES LTD [2014] eKLR and HILDA KAARI MWEDWA vs. ZAKAYO M. MAGARA & 2 OTHERS [2016] eKLR.

I have considered all the material placed before me, the submissions made and the authorities cited. In determining this application, I am mindful that what the applicant seeks from me is the exercise of discretion. The discretion is wide and unfettered but exercisable on sound principles but not capriciously in accordance with personal inclination or sympathy. Some of the matters it would necessarily consider include the length of the delay; the reasons for the delay; the degree of prejudice that the respondent might suffer as a result of extension of time and, possibly, whether the applicant has an arguable appeal. See POTHIWALLA vs. KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LTD & 3 OTHERS [2005] KLR 733.

It follows that delay that is long and unexplained is unlikely to attract a judge's favourable discretion. There is no hard or fast rule as to what constitutes long delay as each case varies in accordance with its

circumstances. What matters is that some explanation be given to enable the judge to exercise discretion on a rational and objective basis within his wide discretion which is designed to avoid injustice to either party.

In the matter before me, it is conceded that there was a delay of at least twenty days between the delivery of the impugned ruling and the filing of the notice of appeal. There was also some delay in bringing this application to regularize the position. The applicant urges that the delay is not inordinate and has attempted an explanation of it, the respondent contends that it is inordinate, inexcusable and the explanation given is wanting.

Having carefully considered the material placed before me, I am unable to agree with the respondent's contention that the application is without merit and that the proofs offered are tailor-made to defeat the cause of justice. I am satisfied that the applicant did instruct the firm of Ojukwu Bosire & Associates to take up her case for purposes of an appeal to this Court. I think it human and understandable that upon suffering a reversal or having an unfavourable ruling at one level of our courts system, a litigant may feel that she will be better served by a change of advocates. This may also take a while and I therefore do not consider inordinate the delay in instructing that firm of advocates on or before 5<sup>th</sup> February 2016.

The applicant has sworn that the said advocates availed to her copies of a letter dated 5<sup>th</sup> February 2016 purporting to bespeak proceedings, ruling and order of the learned judge as well as a notice of appeal which led her to believe that the said advocates had initiated the appeal process. In truth, this was not the case. What am I to make of the disconnect between what the applicant's then advocates told and showed her, and the reality that they had taken no action? It seems to me that it would be harsh and unrealistic were I to merely drive the applicant from the seat of justice with the callous idea that she chose those advocates and must bear the consequences of their less than forthright dealings with her. I rather accept that a wholly diligent and conscientious litigant intent on driving her litigation forward may yet be let down, deceived even, by her advocates. Even without subscribing to the all too generous view that an advocate's mistakes should not be visited on a party, I do think that where there is evidence of industry and interest in her own affairs by a party it would be harsh and unconscionable to blame her wholesale. I think that litigants are entitled to place a degree of reasonable trust in the professionalism and industry of their legal advisers and when they are let down in circumstances not indicative of their own sloth or indifference, their pleas for discretionary favour should be hearkened to.

In the present case it is uncontroverted that it is the applicant herself who discovered on a visit to the High Court Registry at Kitui that the impression given by her instructed advocates that they had initiated the appeal process was nothing more than make believe. It is also not challenged that upon such discovery she moved to seek yet another advocate hence her current advocates on record. A litigant who makes such efforts is deserving of enlargement of time unless it is shown that to do so would be prejudicial to the respondent or altogether contrary to the tenets of justice. I do not see that it is.

I need not consider, though it is open for me to, the likelihood of success of the applicant's intended appeal. I can however state that the respondent overstates the point when she declares that the applicant does not have an arguable appeal. Having perused the draft memorandum of appeal I am not sure I would be entitled to say that the same is frivolous and devoid of any merit. The less I say on the matter, including on whether a mistress is necessarily a wife as argued by the respondent, the better.

The upshot is that I find the prayers herein merited. Time is enlarged as prayed and the Notice of Appeal filed on 19<sup>th</sup> February 2016 be and is hereby deemed to have been filed within time. The applicant shall if she has not done so, lodge and serve a record of appeal within forty-five days of the date hereof.

Costs shall be in the intended appeal.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of November, 2016.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**