



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 191 of 2006

VIRGINIA KANUGU KATHIGO ..... APPLICANT

AND

PRISCILLAH WARUGURU GATHIGO ..... RESPONDENT

*(Application for extension of time to file Record of Appeal from a judgment of the High Court of Kenya eri (Okwengu, J) dated 16<sup>th</sup> November, 2004 In H.C. Succession Cause No. 31 of 2001)*

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RULING

By this application expressed to be brought under *rule 4* of the Court of Appeal Rules, the applicant seeks leave to file a record of appeal out of time.

Judgment the subject matter of the intended appeal was delivered on 16<sup>th</sup> November, 2004. The applicant, the unsuccessful protestor against the confirmation of the grant of Letters of Administration to the estate of the deceased Joseph Gathigo Kabuito who died intestate, being aggrieved by the said decision filed a notice of appeal on 26<sup>th</sup> November, 2004. I observe **that** this was done timeously.

However, it is common ground that no record of appeal was filed within the time limited by the Rules and the failure to do so has been explained by he applicant in her affidavit in support of the application as due to the fact that the superior court file could not be “*traced in the registry until February, 2006*” as a result of which the proceedings could not be supplied in time.

The record shows that the counsel for the applicant, in a somewhat haphazard manner, applied for the copies of proceedings on 19<sup>th</sup> January, 2005, slightly more than two months after the delivery of the judgment. The application was not copied to the respondent. As a result of this omission the applicant, by dint of **rule 81 (2)** of the Rules shall not be entitled to rely on the proviso to **sub-rule (1)** of **rule 81**. It follows, therefore, that the Certificate of Delay dated 3<sup>rd</sup> May, 2006 and issued by the Deputy Registrar of the superior court which states that “*due to pressure of work*” the proceedings could not be supplied is of no consequence and will not help the applicant.

The delay in applying for the copies of the proceedings has not been explained to my satisfaction. Again, though the proceedings were supplied on 12<sup>th</sup> April, 2006, no reason has been given to me as to why this application was lodged more than two months afterwards.

Certainly, the applicant and her counsel have been guilty of grave laches.

The dispute between the parties is acrimonious. It involves land over which co-wives and their many respective children are literally at war with each other. The superior court denied the protestor and her children a right to the estate. They were aggrieved and hence a move to appeal. I have considered the subject matter of the intended appeal and the fact that the applicant has been let down by an incompetent counsel. The question then is, should the applicant in these circumstances be denied the right to be heard by this Court though she has expressed a desire to be heard?

True, each case of this kind must be judged on its own facts. I would loathe to deny a part of a family a hearing before this Court, especially where land issues and paternity are concerned. But the Rules of the Court must be observed. Further, public policy demands that litigation must not be prolonged unnecessarily. In the result I would not exercise my discretion in favour of the applicant. I refuse the application. I dismiss it with costs.

Dated and delivered at Nyeri this 18<sup>th</sup> day of May, 2007.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**