



REPUBLIC OF KENYA



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**Cheruto & another v Kirwa (Civil Application 1 of 2017)
[2018] KESC 68 (KLR) (8 November 2018) (Ruling)**

Hellen Cheruto & another v Sisilia Mwikali Kirwa [2018] eKLR

Neutral citation: [2018] KESC 68 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 1 OF 2017
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
NOVEMBER 8, 2018**

BETWEEN

HELLEN CHERUTO 1ST APPLICANT

JAMES KIPROTICH 2ND APPLICANT

AND

SISILIA MWIKALI KIRWA RESPONDENT

(Being an application for extension of time to file a notice of appeal and appeal from the Judgment of the Court of Appeal in Kisumu, Appeal No. 60 of 2014 (D.K Musinga, S. Gatembu & A.K Murgor JJ.A) dated 6th November, 2015)

Considerations governing the Supreme Court's exercise of discretion to enlarge time allowed for purposes of filing a Supreme Court appeal.

The main issue for determination was whether the Supreme Court would enlarge time for the filing of a notice of appeal, memorandum of appeal and record of appeal where there was a delay in filing the same. The Supreme Court issued considerations governing the Supreme Court's exercise of discretion to enlarge time allowed for purposes of filing a Supreme Court appeal before dismissing the appeal.

Reported by Beryl A Ikamari

Appeals - appeals to the Supreme Court from the Court of Appeal - time allowed for the filing of a notice of appeal, memorandum of appeal and record of appeal - delay in filing of a notice of appeal, memorandum of appeal and record of appeal - enlargement of time for purposes of lodging a Supreme Court appeal - whether an applicant had established that there was reasonable cause for the delay to the satisfaction of the Court - Supreme Court Rules 2016, rule 53.

Brief facts

The applicant sought orders for enlargement of time within which to file and serve a notice of appeal, memorandum of appeal and record of appeal. The Court of Appeal judgment which was the subject of the



intended appeal was delivered on November 6, 2015 and the application for extension of time was filed on January 18, 2017. The applicants explained that the reason for the delay was that they had instructed their firm of advocates to file an appeal but the firm failed to do so while misleading the applicants that the appeal had been filed.

The dispute originated from High Court, Succession Cause No. 25 of 2009 in which a grant of letters of administration was issued and the grant was confirmed on November 16, 2010. The grant was objected to on grounds that it was obtained through defective proceedings and confirmed through fraudulent misrepresentation and concealment of material facts. It was said that the deceased left a valid written will. The objection, at the High Court, was successful; the High Court found that there was a valid will and it proceeded to distribute the deceased's property. The respondent filed an appeal at the Court of Appeal but the appeal was dismissed. The Court of Appeal found that there was a valid will and the deceased's property could not be distributed as an intestate estate.

Issues

Whether the Supreme Court would enlarge time for the filing of a notice of appeal, memorandum of appeal and record of appeal where there was a delay in filing the same.

Held

1. Rule 53 of the Supreme Court Rules 2016 allowed the Supreme Court to extend time in situations where time for taking certain actions was limited by the Rules or by the Supreme Court's decision. In exercising discretion on whether to extend time, the following were the underlying principles that the Court would consider:-
 - a. extension of time was not a right of a party - it was an equitable remedy that was only available to a deserving party, at the discretion of the Court;
 - b. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the Court;
 - c. whether the Court should exercise the discretion to extend time, was a consideration to be made on a case- to- case basis; and,
 - d. where there was a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 - i. whether there would be any prejudice suffered by the respondents, if extension was granted;
 - ii. whether the application had been brought without undue delay; and
 - iii. whether in certain cases, like election petitions, public interest should be a consideration in extending time.
2. Apart from stating that the delay was occasioned by the advocates' failure to file an appeal as instructed, the applicants did not provide evidence to establish their reason for the delay. The receipts attached to their supporting affidavit and marked as *HJ2a* and *HJ2b* were described 'as payment for legal fees in Court of Appeal No 60 of 2014' and not fees for filing of an appeal before the Supreme Court. That was not sufficient to satisfy the Court that there was reasonable cause for the delay.
3. There was evidence that the applicants had applied to the Court of Appeal for typed proceedings on March 1, 2016. That was almost one year after the delivery of the Court of Appeal judgment. The application for enlargement of time was made on January 18, 2017. The applicants failed to demonstrate that the application for enlargement of time had been brought without undue delay.

Application dismissed.

Citations

Statutes

None referred to



Advocates

None mentioned

RULING

A. Introduction

1. The Applicants filed their application to this Court on 18th January, 2017 September, 2014, seeking Orders as follows:
 - i. That the time within which the applicant ought to have lodged and served the Notice of Appeal be extended and/or enlarged.
 - ii. That the time for lodging the memorandum and record of appeal be extended.
 - iii. The costs of the application.
2. A directive was issued on 26th July, 2017 that the application would be determined by way of written submissions.

B. Background

3. The origin of the dispute in this matter is a succession suit before the High Court, Succession Cause No. 25 of 2009 which culminated in issuance of grant of letters of administration intestate to the respondent on 27th March, 2009 and confirmation on 16th November, 2010. By an application dated 4th March, 2011, the applicants objected to the grant on grounds that proceedings to obtain the same were defective in substance, that the grant was obtained and confirmed fraudulently through false statements and concealment of material facts and that the deceased had left a valid written will.
4. The High Court, (Chitembwe J) found that the deceased had left a valid will and in addition that the respondent was also a dependent of the estate of the deceased. The Court proceeded to redistribute the suit land to the applicants, respondent and other dependants of the deceased's estate.
5. Dissatisfied with the Judgment of the High Court, the respondent filed an appeal to the Court of Appeal, No. 60 of 2014, on grounds that the learned Judge erred in revoking the grant and issuing a fresh one in favour of the respondents; that there was contradiction between the sworn and oral evidence in support of the revocation; that the applicant did not disclose some of the beneficiaries of the estate.
6. In a Judgment dated 6th November, 2015, the Court of Appeal dismissed the appeal on the premise that it had not been persuaded that a basis had been laid for the Court to interfere with the redistribution by the High Court. The Court held that:

“We agree with counsel for the respondent that considering that the deceased left behind a valid will, her estate cannot therefore be administered or distributed as an intestate estate in a manner the appellant would wish.”
7. The instant application is for enlargement of time to file the Notice of Appeal and Memorandum of Appeal to challenge the decision of the Court of Appeal. The contestants of the Judgment were the two respondents before the Court of Appeal.



C. Supreme Court

(i) Application dated 18th January, 2017

8. The application before the Court is dated 18th January, 2017 and filed on even date. It is seeking extension of time within which to lodge and file the Notice of Appeal and the Memorandum of Appeal as well as costs of the appeal.
9. The applicants' grounds are that; Judgment was delivered on 6th November, 2015 and aggrieved by the same, the applicants instructed their advocates to file an appeal before the this Court; that the firm failed to file the appeal and misled the applicants that an appeal had been lodged with this Court; that time to lodge the appeal had since lapsed when the applicant learnt of the misgiving; that the delay was not a mistake of the applicant; that the applicant have an arguable appeal.
10. The applicants filed their submissions dated 1st February, 2017 reiterating the grounds in the application and in addition argued that justice demands that mistakes of counsel should not occasion an injustice and prejudice to litigants and that the intended appeal has a high chance of success.

(ii) Response to the Application

11. The respondent has neither filed a reply nor submissions to the application despite service of the same. There is affidavit of return of service of the application and submissions by the applicants dated 20th January, 2017 and 16th February, 2017, respectively. The Supreme Court registry has also sent numerous requests and reminders to the respondent to file her response and submissions if any. This Motion is therefore unopposed.

D. Issues for Determination

12. The only issue for determination in the application is whether the respondents are entitled to the prayer for enlargement of time to file an Appeal out of time.

E. Analysis

13. The main Order sought by the applicants, is one for granting extension of time to file a Notice and Memorandum of Appeal to this Court out of time. Our analysis will proceed from the focal point of the law on enlargement of time to file an appeal out of time and whether the respondents have met the requisite standards.
14. As regards extension of time, Rule 53 of the Supreme Court Rules 2016 allows this Court to enlarge time in these words;

“The Court may extend time limited by these Rules, or by any decision of the Court.”

15. This Court has also laid down certain guiding principles. In *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others Application 16 of 2014 [2014] eKLR*, it was thus held:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.



... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
- b. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
- d. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 - a. Whether there will be any prejudice suffered by the respondents, if extension is granted;
 - b. Whether the application has been brought without undue delay; and
 - c. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”

16. Have the applicants demonstrated that there was reasonable cause for the delay? The applicants approached this task by attributing delay, in particular, to their advocates on record before the Court of Appeal. They submitted that the delay was occasioned by their advocate’s failure to file the appeal as instructed. They have not attached any evidence to support that submission. The receipts attached to their supporting affidavit and marked as HJ2a and HJ2b are described ‘as payment for legal fees in Court of Appeal No 60 of 2014’ and not fees for filing of an appeal before this Court. This therefore, is not sufficient demonstration to the Court’s satisfaction that there was a reasonable cause for the delay.

17. Has the application been brought without undue delay? The letter by the applicants to the Court of Appeal registry for request of typed proceedings also attached to the supporting affidavit and marked HJ3 was dated 1st March, 2016. This is a confirmation that at the date of the said letter, the applicants were informed of the existence of the Court of Appeal Judgment. The application before this Court was filed on 18th January, 2017 almost a year later. The applicants have therefore failed to demonstrate that the application for enlargement of time has been brought without undue delay.

F. Orders

18. Upon this premise, the applicants have failed to lay a basis, to the satisfaction of the Court for Orders of enlargement of time. Consequently it is our opinion that the application dated 18th January, 2017 cannot be allowed and is hereby dismissed. As the application is undefended, there shall be no Order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2018.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar,

Supreme Court of Kenya

