



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**P & A. CASE NO. 92 OF 2001**

**IN THE MATTER OF THE ESTATE OF**

**THE LATE BATHOLOMEW WAFULA LULE.....(DECEASED)**

**AND**

**IN THE MATTER OF**

**CAROLYNE AKINYI WAFULA.....PETITIONER/APPLICANT**

**VERSUS**

**MARY NADUTU LUKA.....OBJECTOR /RESPONDENT**

**RULING**

**Background**

By way of application dated 3<sup>rd</sup> June 2018 brought under t to section 47 of the Succession Act Cap 160 of the Laws of Kenya, Rules 49,63(1) and 73 of the Probate and Administration Rules, Section 3(a) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules the Petitioner/applicant seeks orders;

***i. SPENT***

***ii. That this Honourable court be pleased to grant leave to the Applicant to file an appeal of the ruling delivered on the 27<sup>th</sup> March 2018 out of time***

***iii. That this Honourable Court be pleased to issue a stay of enforcement of the ruling delivered on the 27<sup>th</sup> March 2018 pending hearing and determination of this application.***

***iv. That this Honourable Court be pleased to issue a stay of enforcement of the ruling delivered on the 27<sup>th</sup> March 2018 pending filing of the said appeal by the applicant.***

***v. That this Honourable Court do award any other orders it may deem just, fit and expedient to award in the interest of justice.***

***vi. That the cost of this application be provided for.***

The application is supported by affidavit of Carolyn Akinyi Wafula briefly on the following grounds: -

i. That this honourable court issued a ruling dated the 27<sup>th</sup> day of March,2018 in the succession Cause No.92 of 2001.

ii. That in the said ruling, the court directed that the applicant and her family vacate the property known as **BUNGOMA TOWNSHIP /11** within 30 days from the date of the said ruling.

iii. That applicant being dissatisfied with the said ruling immediately gave instructions to her advocates to appeal the same and to file an application staying the enforcement of the aforementioned ruling pending appeal.

iv. That the said advocates seemed to cooperate and the applicant was all along under impression that the said Advocates had

initiated the appeal process but on enquiring on an update she learned that the same had not been filed.

v. That on confrontation the advocate showed her the pleadings which had been accessed and paid for but the Advocate indicated that she could not file that same as she could not trace the file and later received a letter from the said advocate expressing their reservations and reluctance to continue acting for the applicant.

vi. That the letter indicating intention to withdraw came in late and the 30 days' notice given by the court for the Applicant and her family to vacate the property had already lapsed.

vii. That the said property hosts her family home and there is imminent risk that they might be evicted on the strength of the said ruling.

viii. She states that the negligence and inaction and/or omission of the said Advocate should not be visited upon her.

The Respondent opposed the application and filed replying affidavit sworn on the 3<sup>rd</sup> October 2018 briefly stating that the application herein is destitute of any merit and that this court lacks jurisdiction to grant some of the prayers sought by the applicant. She deponed that the allegations that the applicant's counsel was negligent and/or she deliberately failed to file an appeal against the ruling is incapable of belief.

By consent the application was canvassed by way of written submission, Mr. Okatch for applicant submitted that the applicant was under impression that the Notice of appeal had been filed in good time only for the said firm to inform her that it had not filed the appeal and the advocate withdrew his service vide letter dated 2<sup>nd</sup> May 2018. It is applicant submission that the delay in filing the appeal was due to the Applicant's former advocates and their mistake should not be visited upon the applicant. He submitted that the intended appeal raises triable issues and no prejudice will be occasioned.

Mr. Ocharo counsel for the Respondent submitted that the notice of appeal was not filed within stipulated time. He submitted that this court lacks jurisdiction to entertain the application on ground that the extension of time under the provisions of Appellate Jurisdiction Act is a preserve of the court of appeal and he further submitted that if we assume that this court were for one reason or the other has jurisdiction to hear this application there is no demonstration that the alleged instructions to madam Chunge former advocate were 'full' instructions and the applicant was under an obligation to demonstrate that indeed she paid fees for intended action and he prayed that this application be dismissed.

Having considered the pleadings, affidavits and submissions before this court the main issues for determination is whether this court has jurisdiction to hear and determine this application and whether this court can grant orders sought in the application.

The Application for extension of time is primarily predicated on section 7 of the Appellate Jurisdiction Act which provides:

**S. 7: Power of High Court to extend time**

***The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

Section 7 of the Appellate Jurisdiction Act as it expressly donates the power to extend time of filing notice of appeal upon the High Court, the contention that this court does not have jurisdiction to entertain this application is therefore not proper.

This application seeks leave of this court to file appeal out of time. To determine whether the Applicant should be granted leave to file appeal out of time. Rule 77(1) of the Court of Appeal Rules further provides that the ***"intended appellant shall, before or within 7 days after lodging the notice of appeal serve copies thereof on all persons directly affected by the appeal."***

Further, the sum effect of Rules 82(1) and 83 of the Court of Appeal Rules is that an appellant who has served a notice of appeal ought to file his appeal within 60 days of the lodgment of the notice and in default, is deemed to have withdrawn his appeal.

Indeed, our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a judgment or ruling to file an appeal out of time. The most important consideration is for the Court to address its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be exercised judiciously. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on his favour.

Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were ably stated by the Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR***. They include;

***a) The period of delay;***

***b) The reason for the delay;***

***c) The arguability of the appeal;***

**d) The degree of prejudice which could be suffered by the Respondent is the extension is granted;**

**e) The importance of compliance with time limits to the particular litigation or issue; and**

**f) The effect if any on the administration of justice or public interest if any is involved**

I have considered the application herein together with supporting documents to the application and also the response to the application by the respondent it is my finding a ruling was issued on the 27<sup>th</sup> March 2018 to evict the applicant from property known as **Bungoma Township/11 within 30 day from the date of the said ruling.**

The applicant herein stated that she instructed former advocate to file appeal against the ruling and she believed the same had been filed only to turn out the same had not been filed. I have perused the annexed documents and specifically draft of memorandum of appeal that was to be filed. I have also considered the annexed receipt of court fees that had been assessed for payment. It is also my finding that the appellant did not file any notice of appeal as a requisite or necessary step when a party intend to file an appeal against decision of superior but made attempt to file a memorandum of appeal per evidence provided.

It is also my finding that the applicant has annexed a letter from former advocate dated 2/5/2018 written to applicant herein to engage another lawyer in the matter which I will find this might be reason why the memorandum was not filed on time.

Also, party requires leave of the High Court to file an Appeal in the Court of Appeal in succession matters since the right of appeal is not automatically given in the statute. See, **Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja and Salome Njeri Karanja, CA Civil App. NAI 69 of 2004** the court stated:

*We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court.*

Accordingly, this court has power to enlarge time for filing of notice of appeal. But this being a succession cause, permission of the court to file appeal is required.

Reading from the above case, leave to appeal will normally be granted where, *prima facie*, it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. Without determining the prospects of the intended appeal, these questions matters are relevant. The applicant herein is claiming beneficial ownership in the suit land which court need to determine. The Court of Appeal is needed in determining whether, in the circumstances of this case, there is any serious matter requiring serious judicial consideration by the said Court. Accordingly, I grant the applicants leave to file notice of appeal and memorandum of appeal in 30 days of today.

With regard to prayer sought on stay of enforcement of the ruling the order is also granted pending filing of the appeal.

It is so ordered.

**Dated and Delivered at BUNGOMA this 19<sup>th</sup> day of June, 2019.**

**S.N. RIECHI**

**JUDGE.**