



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NO E1 OF 2020**

**IN THE MATTER OF THE ESTATE OF MICHEAL KINYUA MURUNGU.....DECEASED**

**SWABRA YUSUF WATTS.....PLAINTIFF**

**JOHN KATEMBE KINYUA.....DEFENDANT**

**RULING**

The matter involved an application dated 17.11.2020 filed in court on 18.11.2020 against the impugned decision of the Magistrate court the notice of motion expressed to be brought under Section 3A, 79G and 95 of the Civil Procedure Act seeks the following substantive orders:

**(a) An order of injunction do issue to stop the respondent from using, declaring and or relying on the Limited Grant ad Colligenda Bona issued on the 18.2.2020 to issued eviction notices, harassing and or interfering with the applicants and her tenants occupation of the premises on plot No. 445 KKB Kilifi pending the determination of the intended appeal.**

**(b) That the court be pleased to grant leave to the applicant to appeal out of time against the ruling made by Hon. Chepseba on the 14.10.2020. In support of the application is an affidavit of Swabra Yusuf and attached annexures dated 17.11.2020.**

Learned Counsel for the applicant also referred to the intended memorandum of appeal which lays grounds to challenge the impugned ruling.

The applicant in her affidavit reiterated that she is one of the surviving spouses of the deceased with full rights to seek the remedy on extension of time to file an appeal and an injunction to preserve the estate property pending the determination of the intended appeal

That the intestate proceedings initiated by the respondent proceeded without her involvement and consent as one of the beneficiaries. That on lodging an application for revocation of grant ruling dated the 14.10.2020 failed to take into account the evidence presented under section 76 of the Act to have the grant revoked. It was also deposed in the affidavit that the Learned erred Magistrate failed to give notice of the date, he was to deliver the ruling, to accord her the opportunity to file an appeal within time. Predicating her arguments on the desired memorandum of appeal and reasons for the delay to comply with the statutory timelines, she urged this court to extend time for the appeal to be admitted for hearing.

In this motion I have weighed the affidavit evidence and relevant, materials raised therein to persuade this court to exercise discretion to grant the reliefs sought.

### **The Law**

In matters of this nature the applicable criteria to determine the merits or demerits of the requirements to be met are set out in **Salat vs Independence Electoral & Boundaries Commission & 7 Others (2014) KLR**. That is the reason for delay, the degree of prejudice to the respondent, the application has been brought without unreasonable delay, it's an equitable remedy that is only available to a deserving party at the discretion of the court. The court also in **Leo Sila Mutiso v Rose Hellen Wangare Mwangi Court of Appeal No. 225 of 1997** held as follows:

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are”**

**First, the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding, if the appeal is granted and fourthly, the degree of prejudice to the respondent if the application is granted.**

**Whether this court exercises discretion in favour of the applicant or declines it altogether. That basis must bear in mind the principles as stated in the comparative case of *Ratnam v Cuts Rasamy (1964) 3 ALL ER 933* where it was held thus;**

**“The rules of court must, prima facie, be obeyed, and in order to justify a court in expediency. The time during which some step and procedure requires to be taken, there must be some reason in which the court can exercise discretion. Unless the laws were observed, otherwise a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules meant to provide for a timetable for the conduct of litigation”**

The inference to be drawn from the above case law is that the discretion to extend time to an aggrieved party is indeed unfeathered. Having these principles in mind, the point initial, on the reasons for the delay alleging failure of the court to give notice of the ruling. It can purpose supplying a copy of the decision. Timeously can be construed as sufficient and good cause for extension of time to be allowed.

On the chances of success in the intended appeal one of the key grounds is whether the applicant's right to inheritance as a spouse to the deceased was properly adjudicated upon by the Learned Trial Magistrate to render her to suffer irreparable harm not compensatable by way of damages.

The issue of descent and dependency under section 29 of the Law of succession as referred in the annexed affidavit raises a prima facie case to be argued in the intended appeal. The other question which arises is whether the Learned Trial Magistrate erred in law and fact in disallowing summons for revocation under Section 76 of the Act.

The answer to the contentious issues are found in the affidavit of the applicant. In my view the applicant has shown good and substantial reasons for the Failure to appeal within time as provided for under Section 79 ( G) of the Civil procedure Act. It is also clear from the record that the applicant has an arguable appeal with a prospect of success which she seeks to ventilate at the hearing of the appeal.

Substantially, the question of the legality of the special letters of Grant of Administration Colligenda bona is an instrument issued under the pretext of Section 67 (i) of the law of succession. An inquiry, in broad circumstances is whether the respondent conduct will result to an injustice to the beneficiaries to the estate of the deceased.

In consideration of the notice of motion as a whole, I find no reason to decline grant of the relief sought by the applicant. The inescapable conclusion is that the applicant has leave of the court to file an appeal out of time. The draft memorandum of appeal be deemed as duly filed within time. The applicant has 14 days' to file the record of Appeal together with submissions in support of the appeal

The respondent is also accorded a period of 21 days to file a rejoinder to the appeal. Having found the estate is yet to be distributed, through a confirmed grant of letters of administration, an order of temporary injunction do hereby issue against any intermeddling,

With the estate property pending the hearing and determination of the appeal. It follows therefore that rent so collected from the estate property from now henceforth be deposited in the joint names of the legal counsel to both parties, in an account opened in one of the financial institution within 21 days. In compliance with the order the applicant has 30 days to fix the hearing of the main appeal.

Costs of the application be in the cause

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>th</sup> DAY OF JANUARY, 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**Mr Nyongesa for the Respondent present**



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