



REPUBLIC OF KENYA



**In re Estate of Nanga Okungu (Deceased) (Succession Cause
148 of 2014) [2023] KEHC 1418 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 148 OF 2014**

JN KAMAU, J

FEBRUARY 21, 2023

IN THE MATTER OF THE ESTATE OF NANGA OKUNGU (DECEASED)

BETWEEN

ANDREW ODHIAMBO NANGA PETITIONER

AND

PITALIS ARINGO OBUODHO NANGA 1ST OBJECTOR

THOMAS NGWESO OBUDO NANGA 2ND OBJECTOR

ELISHA ONYANGO KIBUYE 3RD OBJECTOR

SAMSON OULO KIBUYE 4TH OBJECTOR

RULING

Introduction

1. In his Summons to seek leave to appeal dated 8th June 2021 and filed on 14th July 2021, the 3rd Objector herein sought orders that he be granted leave to appeal the Ruling of Cherere J that was delivered on 7th March 2019. He had also sought leave to be allowed to act in person in place of the firm of M/S S.O. Odingo & Co Advocates that was acting for him in this matter. This latter prayer was overtaken by events as the firm of M/S Maube Muyeya & Co Advocates filed a Notice of Appointment dated 7th October 2021 on 8th October 2021,
2. In his Affidavit that he swore in support of the said this application on 8th June 2021, the 3rd Objector pointed out that the aforesaid learned judge dismissed the Preliminary Objection dated 5th October 2018 on the ground that the same was not merited having found that the Petitioner herein as the grandson of Nanga Okungu (hereinafter referred to as “the deceased”) had priority rights over him when it was clear that he was not related to the deceased.



3. He asserted that he was aggrieved by the said decision and wished to appeal against it at the Court of Appeal but that the same required leave of this court. It was his averment that his intended appeal had overwhelming chances of success and that the Petitioner would not suffer any prejudice if leave was granted by this court.
4. He contended that he did not file his Appeal within fourteen (14) days from the date the Judgment was delivered because he was experiencing financial crisis and that the family was still discussing the way forward in view of the said decision. He thus prayed that this court allow his application as had been prayed.
5. In opposition to the said application, the Petitioner swore a Replying Affidavit on 10th September 2021, The same was filed on 8th December 2021.
6. He termed the present application as incompetent, vexatious, misconceived, an afterthought, an abuse of the court process which amounted to a fishing expedition having been filed two (2) years after the decision was delivered. He was emphatic that the 3rd Objector ought to have filed a Notice of Appeal while he was still discussing with the family members.
7. He asserted that this court was functus officio and could not grant the orders the 3rd Objector herein had sought. He pointed out that matters to be dealt with at the Court of Appeal were points of law and not of fact which had been dealt with in Tamu Principal Magistrate's Court in ELC No 3 of 2018 and which the 3rd Objector had refused to comply with the orders issued therein. It was his contention that the 3rd Objector had not expressed good reason why this court should exercise its discretion in his favour.
8. He pointed out that he was suffering from economic and mental stress as a result of the 3rd Objector's action. He was apprehensive that the 3rd Objector would also not respect the decision of the Court of Appeal. He therefore asked this court to dismiss the present application.
9. The Objector's Written Submissions were dated and filed on 25th February 2022 while those of the Petitioner were dated 4th July 2022 and filed on 7th July 2022. The 2nd Respondent did not file any response and/or submissions. This Ruling is therefore based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

10. The 3rd Objector submitted that the learned judge erred when she found that the Petitioner was the deceased's grandson and that he had the nearest consanguinity to the deceased compared to the Objectors herein. He thus argued that he had an arguable appeal.
11. It was his submission that he had brought the present application without unreasonable delay and had explained the cause of the delay. He reiterated that the Petitioner had not demonstrated any prejudice that he would suffer in the event this court granted him leave to appeal the decision of the aforesaid learned judge.
12. He relied on the cases of *Julius Kamau Kithako v Waruguru Kitaka Nyaga & 2 Others* [2013] eKLR, *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR and *In Re Estate of Sarastino M'chaban Múkabi (deceased)* [2019] eKLR where the common thread was that leave of the High Court was necessary before an appeal against its decision could be lodged Court of Appeal and that where leave was declined, a party could seek leave from the Court of Appeal.



13. On his part, the Petitioner argued that the 3rd Respondent did not have an arguable appeal for the reason that there was sufficient evidence to establish the degree of consanguinity. He reiterated that the 3rd Objector delayed in having filed the present application and was thus denying him the fruits of his judgment.
14. Notably, Section 47 of the [Law of Succession Act](#) Cap 160 (Laws of Kenya) stipulates that:-
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:
- Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
15. Further, Section 50 of the [Law of Succession Act](#) provides that:-
1. An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final (emphasis court).
 2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis' Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.
16. It is clear from Section 50 (2) of the [Law of Succession Act](#) that appeals from the Kadhis' court are automatic to the High Court. However, there is no automatic right of appeal from the High Court on the decisions of the Kadhis' court. The Court of Appeal can hear an appeal on any point of Muslim law from the High Court only with leave of the High Court. It is evident that there is no express provision as to whether the Court of Appeal can hear any appeal from the High Court on any other point of law.
17. In this respect, this court had due regard to the case of *Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another* (Supra) where the Court of Appeal held as follows:-
- “... under the [Law of Succession Act](#), there is no express automatic right to the Court of Appeal: that an appeal will lie to the Court of Appeal from the High Court exercising its original jurisdiction with leave of the High Court or where leave of the High Court is refused, with leave of the Court of Appeal. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious consideration.”
18. The Court of Appeal re-affirmed its position in the case of [John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another](#) [2019] eKLR. It stated as follows:-
- “It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in *Makhangu v Kibwana* [1996] EA cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held 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. (See also *in Re Estate of Mbiyu Koinange (Deceased)* [2015] eKLR; HCC Succession Cause No. 527 of 1981).”

19. Without belabouring the point, this court found and held that the present application was properly before it for determination because the 3rd Objector could not lodge an appeal at the Court of Appeal without leave of this court and if denied leave by the High Court, with leave of the Court of Appeal.
20. Before this court could grant the 3rd Objector leave to file an appeal at the Court of Appeal, it had to be satisfied that he had sufficiently explained the cause of delay.
21. He had argued that he did not appeal within a period of fourteen (14) days because the family was still discussing the Judgment and that he did not have money to lodge the appeal.
22. The guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were then laid out in the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR and were reaffirmed in the case of *Growth Africa (K) Limited & Another v Charles Muange Milu* [2019] eKLR.
23. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act.
24. The right to appeal is paramount in resolution of dispute and that as much as the court’s intervention was discretionary, it must be cautious not to deny a party that right. Indeed, every party has a right to access any court or tribunal to have his or her dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya. Even where a party delays in doing an act, there is always a provision of the law that would give it reprieve to seek justice.
25. Order 50 of the *Civil Procedure Rules*, 2010 states as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
26. Indeed, Rule 63 of the Probate and Administration Rules, 1980 provides as follows:-
 - “(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
 - (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of



deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

27. Further, Rule 73 of the Probate and Administration Rules stipulates as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

28. This court associated itself with the holding in the case of *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR where it was held that the discretion of the court could only be unlocked by a cogent, full, honest and plausible disclosure for the reason of the delay.

29. A period of two (2) years herein was inordinate. However, it could be remedied. Indeed, the court has wide discretionary powers to enlarge time to do a lawful act where such leave for enlargement has been sought as has been seen hereinabove.

30. It is not an uncommon in our jurisdiction for litigants not to prosecute matters in court due to the cost implications. Legal fees are exorbitant and often times, out of reach of the ordinary man. Lack of finances is therefore a plausible reason to explain why a party can fail to take appropriate legal action within periods stipulated by the law. A court should therefore restrain itself from denying impecunious litigants who at some point get financial ability their right to proceed with their cases.

31. Going further, in determining whether or not to grant an order for extension to do any act, the court also had to consider if the opposing side will suffer any prejudice if extension of time was granted. This court was not satisfied that Petitioner would suffer any prejudice if the 3rd Objector herein exercised his constitutional right of appeal. If there was any prejudice, he did not demonstrate the same. He merely stated that the 3rd Objector had refused to comply with the decision that was delivered in Tamu Principal Magistrate’s Court in ELC No 3 of 2018 and that he was apprehensive that the 3rd Objector might also refuse to comply with the orders of the Court of Appeal.

32. It was the considered view of this court that mental and economic stress that the Petitioner had stated had plagued him due to the dispute herein was not a sufficient ground to deny the 3rd Objector herein his right to appeal against the decision of the aforementioned learned judge.

33. Taking all the factors hereinabove into account and weighing the 3rd Objector’s right to have his dispute determined fairly in a court of law as provided in Article 50(1) of *the Constitution* of Kenya and the equally important Petitioner’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2)(b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the 3rd Objector if he was denied an opportunity to ventilate his intended Appeal on merit.

Disposition

34. For the foregoing reasons, the upshot of this court’s decision was that the 3rd Objector’s Summons to seek leave to appeal dated 8th June 2021 and filed on 14th July 2021 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein. The 3rd Objector be and is hereby directed to lodge his Appeal at the Court of Appeal within seven (7) days from the date of this Ruling.

35. Although costs follow the event as stipulated in the proviso of Section 27 of the *Civil Procedure Act*, this was a suitable case for the court to depart from this principle in view of the inordinate delay in filing the present application. The 3rd Objector be and is hereby directed to pay the Petitioner’s throw



away costs in the sum of Kshs 10,000/= within thirty (30) days from today failing which the Petitioner will be at liberty to institute proceedings for the recovery of the same.

36. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY 2023

J. KAMAU

JUDGE

