



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 109 OF 1987**

**IN THE MATTER OF THE ESTATE OF JOHN MAGANGA OKWARO (DECEASED)**

**JOHNSTONE OMBIMA OKWARO.....1<sup>ST</sup> ADMINISTRATOR**

**MARY ASIKO OKWARO.....2<sup>ND</sup> ADMINISTRATOR**

**DORCAS OKWARO .....3<sup>RD</sup> ADMINISTRATOR**

**VERSUS**

**JULIAH SHIHORE .....APPLICANT**

**RULING**

1. On 1<sup>st</sup> February 2021, this court directed that the 1<sup>st</sup> Administrator's Notice of Motion application dated and filed on 26<sup>th</sup> August 2020 and the Beneficiaries' Summons for Rendering Accounts dated 9<sup>th</sup> September 2020 would be heard together. Parties filed Written Submissions in respect of both applications.

2. The 1<sup>st</sup> Administrator's Written Submissions were dated 14<sup>th</sup> June 2021 and filed on 18<sup>th</sup> June 2021 while those of the Beneficiary were dated 26<sup>th</sup> March 2021 and filed on 29<sup>th</sup> March 2021.

3. Notably, the court addressed the 1<sup>st</sup> Administrator's applications first for the reason that if the same was merited, then the 3<sup>rd</sup> Administrator's Summons for Rendering Accounts would have to be kept pending awaiting the hearing and determination of the 1<sup>st</sup> Administrator's Appeal, if at all.

**I. LEAVE TO APPEAL**

4. In his Notice of Notice of Motion dated and filed on 26<sup>th</sup> August 2020, the 1<sup>st</sup> Administrator sought leave to appeal out of time to the Court of Appeal against the Ruling by Majanja J that was delivered on 20<sup>th</sup> December 2017.

5. In support of his application, he swore an Affidavit on 26<sup>th</sup> August 2020. He averred that on 20<sup>th</sup> December 2017, this court delivered a Ruling confirming the Grant to the estate of the deceased without making a determination of the true and correct beneficiaries of the deceased and on the following day, 21<sup>st</sup> December 2017, he issued Certificate of Confirmation of the said Grant.

6. He contended that he was dissatisfied with the said decision and filed a Notice of Appeal through M/S Otieno, Yogo Ojuro & Co Advocates who were then his advocates. He pointed out that his intended appeal to the Court of Appeal in Kisumu CA Number 72 of 2018 (UR 47/2018) collapsed as he had not sought leave to appeal pursuant to Sections 72 and 75 of the Civil Procedure Act.

7. He stated that upon learning of what transpired, his present advocates advised him to seek leave of this court to enable him file an appeal. He averred that it was in the interest of justice that he be allowed to appeal. He explained that the delay in bringing the present application was caused by a breakdown of communication from the previous Advocates.

8. In response to the said application, on 1<sup>st</sup> October 2021, the 2<sup>nd</sup> Administrator filed an Affidavit that she swore on even date in which she indicated that she did not object to the prayers sought and that the 1<sup>st</sup> Administrator ought to be permitted to ventilate all his grievances.

9. In opposition to the said application, on 2<sup>nd</sup> September 2020, the 3<sup>rd</sup> Administrator (Beneficiary) filed Grounds of Opposition dated 31<sup>st</sup> August 2020. She contended that the application had been filed by a law firm that was not properly on record. She added that the application

was fatally defective and not meritorious. She further stated that no basis had been demonstrated to warrant the court exercise its discretion to grant leave and that the delay in bringing the said application was inordinate.

## **LEGAL ANALYSIS**

10. The Appellant submitted that despite the Notice of Appeal having been struck out for the reason that it was filed without leave pursuant to Section 50(2) of the Law of Succession Act, he was still desirous of appealing and the interest of Justice dictates that all applications and appeals be disposed of before a confirmation of Grant can be enforced/effectuated(sic).

11. The 3<sup>rd</sup> Administrator averred that there had been inordinate delay in filing the present application as the same was brought three (3) years after delivery of the decision intended to be appealed against. They argued further that the 1<sup>st</sup> Administrator's application for leave to appeal out of time to the court of appeal was brought in late being three years after the said Ruling. He added that the delay was inordinate and no cogent explanation had been afforded.

12. She also contended that this court lacks the statutory jurisdiction to grant leave to appeal out of time, which she stated was a preserve of the Court of Appeal under Rule 4 of the Court of Appeal Rules.

13. She asserted that in the event the 1<sup>st</sup> Administrator was not seeking leave to appeal out of time but just leave to appeal in a succession matter, then no sufficient grounds had been laid down to grant the same.

14. She pointed out that leave to appeal in succession matters was not expressly automatic and that an applicant had to demonstrate a *prima facie* case. In this regard, she relied on the case of **Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Others [2014]eKLR** where the court held that leave to appeal will normally be granted where *prima facie*, it appears that there are grounds which merit serious judicial consideration.

15. She argued that the 1<sup>st</sup> Administrator had not made out a *prima facie* case, neither in his supporting affidavit nor in his Written Submissions. She added that no draft memorandum of appeal had been annexed to establish if his intended appeal raised any points for consideration. She was emphatic that the application was just designed to delay the beneficiaries from obtaining what was rightfully theirs. He urged the court to dismiss the same with costs.

16. In his application the 1<sup>st</sup> Administrator sought for leave to file appeal out of time, to the Court of Appeal, whereas in his submissions, it appeared to this court he was applying for leave to appeal to the Court of Appeal pursuant to Section 50(2) of the Law of Succession Act. He was therefore not clear to the court of the prayers he was seeking. He, however, indicated that he had previously filed a Notice of Appeal which was dismissed for lack of leave to the Court of Appeal.

17. This court therefore had due regard to Article 159 (2)(d) of the Constitution of Kenya 2010 to resist the temptation of strictly adhering to technicalities and comprehended the 1<sup>st</sup> Administrator's application herein as necessarily including a prayer for leave to appeal to the Court of Appeal if one is needed.

18. Notably, Section 95 of the Civil Procedure Act Cap 21 (Laws of Kenya) states as follows:

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

19. Section 7 of the Appellate Jurisdiction Act, Cap 9 provides that:-

**“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.”**

20. Having said so, it is trite law that the powers of the court in deciding an application for extension of time to file an appeal are not automatic but are discretionary. The parameters for the exercise of a court's discretion have been concisely laid out in the case of **Mwangi vs Kenya Airways Ltd [2003] eKLR** where the Court of Appeal expressed itself thus:-

**“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 or not 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 application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”**

21. The decision that the 1<sup>st</sup> Administrator desires to appeal from was delivered on 20<sup>th</sup> December 2017. His instant application was filed on 26<sup>th</sup> August 2020. The delay was approximately two and a half (2 ½) years. This court noted that the 1<sup>st</sup> Administrator gave the reason for delay as lack of communication with his previous Advocates. Whereas this was not a very good reason for not having appealed the aforesaid decision, this court nonetheless found the same to have been excusable.

22. Indeed, it is not uncommon for parties to take long periods of time before making a decision of how to proceed and/or to instruct their advocates accordingly. This is common when parties have lost their cases or where there are many conflicting interests. This court noted

from the Certificate of Confirmation of Grant that there were several beneficiaries, some who may have been satisfied with the aforesaid decision and others who were dissatisfied with the same which could have stalled the administration of the deceased's estate.

23. Having said so, this court recognised that when there had been inordinate delay, there was a possibility of parties failing to get a fair trial because memories fade with time. This implies that courts will frown upon indolence in the preparation and prosecution of cases. In this regard, expedition of conduct of cases must therefore be encouraged.

24. While statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense. Notably, the courts have always bear in mind the need to balance between expedition and the deprivation of a right to be heard thereof.

25. Whether the 1<sup>st</sup> Administrator had established a *prima facie* case herein or not was not the preserve of this court. Failure to demonstrate overwhelming chances of success of appeal, or the converse, is not the main factor at this stage as that is strictly in the purview of the appellate court.

26. Taking the facts of this case into consideration, this court took the firm view that whereas the delay in filing the present application was inordinate and excusable, this court was not persuaded that any prejudice had been occasioned to the 3<sup>rd</sup> Administrator. If the same had been occasioned, then she did not demonstrate the same. Notably, in an appellate court, hearing of witnesses would not be necessary. There was therefore no possibility of memories of witnesses fading as their evidence was already on record, which is something that would have prejudiced the 3<sup>rd</sup> Administrator herein.

## **II. SUMMONS FOR RENDERING ACCOUNTS**

27. In view of the aforesaid determination, this court found and held that it would be prudent to keep the 3<sup>rd</sup> Administrator's (Beneficiary's) Summons for Rendering Accounts dated 9<sup>th</sup> September 2020 and filed on 14<sup>th</sup> September 2020 in abeyance as parties ventilate their issues at the Court of Appeal.

## **DISPOSITION**

28. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> Administrator's Notice of Motion application dated 26<sup>th</sup> August 2020 was merited and the same be and is allowed in the following terms:-

**a. The 1<sup>st</sup> Administrator be and is hereby granted leave to appeal against the ruling delivered by this Court on 20<sup>th</sup> December 2021.**

**b. The 1<sup>st</sup> Administrator be and is hereby directed to file his Notice of Appeal within seven (7) days from today.**

**c. In default of Paragraph 28(b) hereinabove, the 3<sup>rd</sup> Administrator is at liberty to seek such further orders to protect her interests.**

29. Costs of the application will be in the cause.

30. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF FEBRUARY 2022**

**J. KAMAU**

**JUDGE**