REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 23 OF 2018

(FORMERLY MERU HIGH COURT SUCCESSION CAUSE NO. 220 OF 1993)

IN THE MATTER OF THE ESTATE OF JOEL THAARA RURIA (DECEASED)

DANSTAN MUTEMBEI JOEL.....APPLICANT/INTENDED APPELLANT

-VERSUS-

JOYCE MUTHONI.....1ST RESPONDENT

FAITH KAGUTHI.....2ND RESPONDENT

BETH IGOJI.....3RD RESPONDENT

R U L I N G

1. Before this court is the Notice of Motion application dated 23rd September 2021 which was brought under Certificate of Urgency. The Applicant/Intended Appellant seeks leave from this court to appeal to the Court of Appeal against the judgment delivered on 21st July 2021.

2. The application is premised on the following grounds:

> **a. THAT** the Applicant/Intended Appellant is greatly aggrieved by the judgment delivered in this Honourable Court on 21st July 2021 and prays for another opinion from the Court of Appeal.
>
> **b. THAT** there is no automatic right of appeal from the decisions of the High Court to the Court of Appeal on probate and administration matters, and hence leave is mandatory before the appeal is filed.
>
> **c. THAT** the Applicant/Intended Appellant has an arguable appeal as more so demonstrated on the Draft Memorandum of Appeal, and it is in the interest of justice that the Applicant/Intended Appellant be granted leave by this honourable court to appeal against this honourable court's judgment that was delivered on 21st July 2021.
>
> **d. THAT** the Applicant undertakes to expeditiously prosecute the intended appeal in a timely manner, so as not to prejudice the Respondents.
>
> **e. THAT** unless the orders sought are granted, the Applicant/Intended Appellant stands to suffer irreparable damage.

3. The application is supported by the annexed affidavit sworn by the Applicant/Intended Appellant herein on 23rd September 2021. In the said affidavit, the Applicant/Intended Appellant avers the intended appeal is arguable and has overwhelming chances and probability of success as the impugned judgment allegedly ignored the bequeaths of the deceased. The Applicant/Intended Appellant further avers that it is in the interest of justice that *status quo* be maintained on the deceased estate, being land parcel no. L.R. Mwimbi/Chogoria/199, so as to restrain the Respondents who do not reside on the deceased's estate from assuming occupation pursuant to the impugned judgment.

4. From the record, there is a Replying Affidavit that was sworn on 1st October 2021 and filed on 5th October 2021 by the 1st Respondent on behalf of all the Respondents. I note that the parties are in dispute on whether or not the said Replying Affidavit is in response to the present application. For reasons that shall be given hereunder, it is my view that this court should accept the said affidavit as a response to the present application. That said, it follows that the Respondents are opposed to the application. It is their contention that the application is made in bad

faith and is only meant to stop and prevent the Respondents from enjoying fruits of their successful litigation.

5. The application was canvassed by way of written submissions. The Applicant/Intended Appellant filed his written submissions on 15th November 2021 whereas the Respondents filed their written submissions on 10th December 2021.

Applicant's Submissions

6. It is the Applicant's submission that he is entitled under the Constitution to seeks redress in the appellate court as he is aggrieved by the decision that was rendered by this court and that leave should be granted before he can appeal the said decision. The Applicant further submitted that the application should be allowed as unopposed as there was no response to the application from the Respondents.

Respondents' Submissions

7. On the other hand, it was the Respondents' submission that the grounds raised by the Applicant in his draft Memorandum of Appeal do not raise weighty issues to be considered by the Court of Appeal. The Respondents allege that the present application is only a delay tactic by the Applicant and should therefore be disallowed.

Issues for determination

8. Having considered the application, the affidavits in support and opposing the application as well as the rival submissions filed by the counsels of the parties, it is my view that the main issues for determination are:

a. Whether the instant application is opposed;

b. Whether the instant application is merited.

Analysis

A. Whether the instant application is opposed

9. It is the Applicant's contention that the application is unopposed. On the other hand, the Respondents contend that they opposed the application vide the Replying Affidavit sworn on 1st October 2021. I note that the Respondents deponed at paragraph 3 of the said affidavit that the same was sworn in response to an earlier application by the Applicant that was dated 2nd September 2021. In their submissions, the Respondents admits to having made an error in referring the application dated 2nd September 2021. They termed it as a typographical error and urged this court to apply to apply the provisions of Article 159 of the Constitution to cure the alleged technicality.

10. The Constitution under **Article 159** on judicial authority has urged courts to do justice without undue regard to procedural technicality. **Article 159(2)(d)** states as follows:

> **"Justice shall be administered without undue regard to procedural technicalities."**

11. In this case, the Respondents have acknowledged the existence of the typing error in paragraph 3 of the Affidavit sworn on 1st October 2021. I have read through the impugned affidavit and in my view, the same answers the issues raised in the present application. In any event, the court record shows that on 20th September 2012 when the application dated 2nd September 2021 came up for hearing, counsel for Responded indicated that they were not opposing the earlier application dated 2nd September 2021. Having considered Article **159(2)(d)** *(supra)* I opine that the error of quoting a wrong application in an affidavit in response to the present application is excusable in the interest of doing substantive justice in this matter. It is my view that the said error is not prejudicial to the Applicant's case. What is in issue is the replying affidavit and whether it can be taken as a valid response in opposing the application. R**ule 63 of the Probate and Administration Rules** provides for **Civil Procedure Rules** which shall apply so far as relevant to proceedings under the Rules. Under the **Rule, Order XVII of** the **Civil Procedure Rules** is applicable to proceedings under the Rules. **Order XVIII** in which is now **Order 19 in the Civil Procedure Rules 2010** deals with affidavits. **Order 19 Rule 7** deals with irregularities in form of affidavit. It provides:

> ***" The court may receive any affidavit sworn for the purpose of being used in any suit not withstanding any defect by misdecription of the parties or otherwise in the title or any other irregularity in the form thereof or on any technicality"***

This provision gives the court discretion to receive any affidavit not withstanding any defect or irregularity. An affidavit will therefore not be rejected for want of form. The respondent has submitted that the affidavit was sworn in response to the application under consideration. The error is minor irregularity which this court will overlook in favour of doing substantive justice.

12. As such, it is my view that this court should not be fettered by procedural technicalities and will therefore allow the affidavit sworn on 1st October 2021 as a response to the present application. Having found that, I now proceed to analyse the merits of the application.

B. Whether the instant application is merited

13. The application is expressed to have been brought under the provisions of **Rules 5(2)(b), 39(b), 47(1)** of the **Court of Appeal Rules (2010), Section 47** of the **Law of Succession Act, Rule 73** of the **Probate and Administration Rules, Article 159 (2)(a)(b)(d) and (e)** of

the **Constitution of Kenya (2010)** and all other enabling provisions of the law.

14. The Court of Appeal in the case of **Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another [2014 eKLR** made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction:

> **"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. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."**

15. As held in **Rhoda Wairimu Karanja** *(supra)*, this court can be prompted to grant the leave sought by the Applicant herein where circumstances require such as when weighty issues arise requiring further serious judicial consideration and interrogations. If this court declines to grant the leave sought by the Applicant, then he will be at liberty to seek for the same in the appellate court. In **John Mwita Murimi & 2 Others v. Mwikabe Chacha Mwita & Another [2019] eKLR**, the Court of Appeal re-affirmed this position by holding as follows:

> **"…Under the Law of Succession Act, there is no express automatic right of Appeal 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…" (sic)**

16. The intended appeal arises from the decision of this court as to the mode of distribution of the deceased's estate. The beneficiary who is aggrieved has a right to appeal. I have perused the draft Memorandum of Appeal and noted that it has raised substantive points of law for consideration by the Court of Appeal. The respondents will not suffer any prejudice. In view of the age of the matter, I opine that it is in the interest of all the parties that the dispute is brought to an end expeditiously. Furthermore, it is not in dispute that the 1st Respondent has been in occupation of 0.5 Acres of the deceased's estate while the 2nd and 3rd Respondents herein are not in current occupation of the deceased's estate. As such, it is my view that the Respondents will not suffer any prejudice if the application is granted and *status quo* maintained. **Section 47** of the **Law of Succession Act** which empowers this court to make such orders as may be just and expedient. I opine that the applicant should be given an opportunity to persue the appeal.

Section 3A of the Appellate Jurisdiction Act provides that:-

> ***"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.***
> ***(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***
> ***(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court."***

Further **Article 164(3) (a)** provides that:-

> ***"3) The Court of Appeal has jurisdiction to hear appeals from—***
> ***(a) the High Court."***

These provisions donates jurisdiction to the Court of Appeal to entertain appeals from decisions of the High Court. This includes Probate and Administration disputes determined by the High Court. Since the applicant has demonstrated that he has substantive points of law to raise on appeal, I should exercise discretion and allow him to appeal.

CONCLUSION:

1) The application has merits and is allowed.

2) The applicant is granted leave to appeal against the Judgment of this court dated 21/7/2021.

3) The intended appeal be filed within 14 days.

4) Costs to abide the outcome of the appeal.

Dated, signed and delivered at Chuka this 17th day of February 2022.

L.W. GITARI

JUDGE