



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION NO. 411 OF 2011**

**IN THE ESTATE OF:**

**BENJAMIN OKUMU ODUKI.....DECEASED**

**BETWEEN**

**JOSEPH NYERERE OKUMU.....PETITIONER/ RESPONDENT**

**AND**

**JOSEPH PETER ODUKI.....OBJECTOR/APPLICANT**

**RULING**

1. Joseph Peter Oduki, the objector/applicant herein moved the court by way of Chamber summons under sections 47 & 50 of the Law of Succession Act, Rules 67 & 73 of the Probate and Administration Rules, Order 50 Rule 6 of the Civil Procedure Rules, section 7 of the Appellate Jurisdiction Act and Article 159 of the Constitution of Kenya. He is seeking the following orders:

- a) That this court be pleased to extend the time to file an application for leave to appeal against its ruling and orders dated 23<sup>rd</sup> May 2016 out of time up to the time of filing of the application herein and the application herein be deemed duly filed within time.
- b) That this court be pleased to give leave for the applicant to give Notice of Appeal and thereafter file an appeal against its ruling dated 23<sup>rd</sup> May 2016.
- c) That this court be pleased to extend time within which to file Notice of appeal and appeal itself.
- d) That costs be provided for.

2. The application is premised on the following grounds:

- a) That after he was dissatisfied with the ruling delivered on 23<sup>rd</sup> May 2016, he filed an appeal in the Court of Appeal at Kisumu.

3. The application was opposed on ground that:

- a) That the application is unmerited, vexatious and an abuse of the due process of the court.
- b) That the appeal has been overtaken by events.

4. This matter proceeded by way of written submissions as agreed by both parties.

5. The applicant herein filed his appeal in the Court of appeal at Kisumu on 27<sup>th</sup> May 2016. This was four days after the impugned ruling. He however had not sought the leave of the court as is required by law. This was the mistake of his advocate. In **Phillip Chemwolo & Another vs. Augustine Kubede [1982-88] KLR 103 at 1040 Apaloo J.A** as he then was stated:

**Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.**

6. Section 7 of the Appellate Jurisdiction Act 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:**

**Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.**

7. I am persuaded to believe that the applicant has demonstrated that he moved to court with speed albeit use of wrong procedure. His application cannot therefore be termed as frivolous or an abuse of the court. I will therefore allow the application. Leave is therefore granted and the applicant to take the necessary steps within 14 days.

8. Costs shall be in the cause.

**DELIVERED and SIGNED at BUSIA this 29<sup>th</sup> day of January, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**