REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS APPLICATION NO. 7 OF 2020

IN THEMATTER OF THE ESTATE OF JOHN MWANGI NJOROGE (DECEASED)

RULING

1. **Priscillah Magiri Mwangi** and **Veronicah Nyambura Maina** (hereafter the 1st and 2nd Applicants respectively) have by their application dated 16th January 2020 sought leave to appeal out of time from the judgment of the Lower Court delivered on 19th December, 2018 in **Thika CM's Succession Cause No. 539 of 2014 In the matter of the estate of John Mwangi Njoroge (deceased)** as consolidated with **Succession Cause No. 521 of 2010 In the matter of the Estate of Julia Wairimu Njoroge,** and an order of injunction to restrain the Respondents **Esther Muthoni Kahiro**, **Tabitha Wanjiru Ngugi**, **Hannah Wanjiru Gitau** and **Eunice Nyambura Muchiiri** from surveying, subdividing, disposing or in any way dealing adversely with the land parcel known as **CHANIA/KANYONI/ 1220** (hereafter the suit property) pending the determination of the application. The latter prayer, like prayers 3 to 4 of the motion are spent.

2. The application is expressed to be brought under Order 50 Rule 6, Order 42 Rule 6(1) and (6), and Order 51 Rule 1 of the Civil Procedure Rules (CPR) as well as Sections 63 and 95 of the Civil Procedure Act. From the lengthy grounds on the face of the motion and supporting affidavit of **Pricillah Magiri Mwangi** the court discerns the grounds of the motion to be as follows.

3. That the Applicants are beneficiaries of the estates which were the subject matter of the Lower Court judgment ; that the Applicants were aware of and involved in the Lower Court suit and were represented by an advocate except at the delivery of judgment; that the Applicants allegedly learned about the delivery of the judgment in mid-June 2019 and applied for stay of execution in the lower court; that the lower court directed them to move the High Court; and that the Respondents have proceeded to survey the suit property allegedly leaving out the Applicants from the process. It is asserted that the Applicants had routinely sought information on the outcome of the succession cause but had been informed that the judgment had not been delivered and will therefore be gravely prejudiced if the application is not allowed.

4. The replying affidavit filed in opposition to the motion was sworn by **Esther Muthoni Kahiro** on her own behalf as the administrator of the estate and on behalf of the other Respondents. She deposed that the Applicants and Respondents are beneficiaries in the succession cause in the lower court and were involved from inception to the confirmation of the grant after lengthy litigation; that judgment was delivered on 20/11/2018 distributing the portion of the suit property previously held by **Julia Wairimu Njoroge** to her five daughters, while the 2nd Applicant, who like the 1st Applicant are apparently daughters- in- law, retained her portion thereof measuring 0.65 acres. She states that no beneficiary was thereby disinherited and that the Applicants failed to follow up on the progress of their cause and the delay of one year is inordinate and unexplained; that their appeal has no chances of success and will only delay the conclusion of the administration of the estate and delay the beneficiaries' receipt of their due shares.

5. Although the court directed on 13th July, 2020 that the motion be canvassed by way of written submissions, none of the parties complied and the court will determine the application on the basis of the respective affidavits on record. The motion is expressed to be brought under various provisions of the Civil Procedure Act and the Civil Procedure Rules, majority of which are not applicable to succession causes, under Rule 63 of the Probate and Administration Rules. However, Order 50 of the Civil Procedure Rules is applied to succession causes by the said Rules and Rule 6 thereof provides that:

> **"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or 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."**

6. The above provision is not dissimilar to Section 95 of the Civil Procedure Act and is indeed in similar terms to Rule 4 of the Court of Appeal Rules which states that:

> **"The court may, on such terms as it thinks just, by order extend the time limited by these rules, or by any decisions of the court or of a superior court, for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and reference in these Rules to any such time shall be construe as a reference to that time as extended".**

7. In **Liberato Kivanga Manga V. Prime Bank Limited (2021) eKLR** the Court of Appeal (**Mohammed JA**) while dealing with an application under the above rule cited her earlier decisions in **Andrew Kiplagat Chemaringo V. Paul Kipkorir Kibet [2018] eKLR** where she stated:

> **"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained.**
>
> **A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There should be valid and clear reasons upon which discretions can be favorably exercisable."**

8. Reference was also made to the case of **Fakir Mohamed V. Joseph Mugambi & 2 Others [2005] eKLR** where the Court of Appeal stated:

> **"The exercise of this court's discretion … is unfettered. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration the competence of compliance with time limits, the resources of the parties, whether the matter rises issues of public importance are all relevant but not exhaustive factors."**

See also **Leo Sila Mutiso V. Hellen Wangari Mwangi [1999] 2EA 231** where the above principles were enunciated by the Court of Appeal, and **Niazsons (K) Ltd V. China Road and Bridge Corporation (Kenya) [2002] eKLR** where the same Court reiterated that the power to enlarge time for appealing is discretionary and that the discretion must be exercised judicially considering the length of delay, the explanation for it, and chances (possibly) of appeal succeeding and degree of prejudice to the respondent as reiterated in **Mwangi V. Kenya Airways Ltd [2003] KLR 486.**

9. The delay in the instant case is a year and a month. It is in ordinate. There is no dispute that the Applicants and Respondents had been involved in lengthy litigation and hearing preceding the judgment of the lower court delivered on 20th November 2018. The Applicants' explanation is that they had followed up with their counsel and been informed that the judgment had not been delivered. The paragraph containing this deposition (no. 19) is vague as to dates of alleged visits to the advocate's office. There is no evidence exhibited in support of the deposition. Besides, a year is a long time, and if their lawyer failed them, nothing stopped the Applicants from approaching the court earlier than June 2019 to confirm the position for themselves.

10. It seems that after the hearing closed, they went into slumber from which they were only roused by the survey process in June 2019 and then rushed to the lower court in a bid to stop the process. The Applicants' explanation defies belief. In any event, disputes before the court belong to parties and not their advocates. It is no longer fashionable for parties to claim that their advocate failed in his duties hence exposing them to default. The duty to follow up with and to progress a case lies ultimately with the party concerned. The dispute relating to the subject estates appears to have started way back in 2001 as **Succession Cause No. 52 of 2001** concerning the estate of one **Njoroge Mwaniki,** the Respondents' father, according to the Applicants' evidence in the trial as narrated in the copy of judgment attached to the replying affidavit, and continued after the death of **Julia Wairimu Njoroge** , the Respondents' mother who had been appointed in the said cause together with her son **John Mwangi Njoroge** as administrators.

11. After the death of **Julia Wairimu Njoroge** a cause in respect of her estate was filed in 2010. It was **Succession Cause No. 521 of 2010**.In the meantime, **John Mwangi Njoroge** who was the other administrator in **Succession Cause No. 52 of 2001** had also died and a fresh **Succession Cause No. 539 of 2014** filed. The two causes i.e. Succession Cause No. 521 of 2010 relating to the estate of Julia Wairimu Njoroge and the Succession Cause No. 539 of 2014 relating to her son John Mwangi Njoroge were then consolidated in 2015 and concluded in 2019. Litigation must come to an end. The longer this dispute remains pending, the more complicated it becomes as beneficiaries pass on. It is also time for the surviving beneficiaries to receive their share of the estate of their parents and any further delay will be prejudicial to the beneficiaries and result in unwarranted dissipation of the court's limited time resource.

12. Besides, looking at the draft memorandum of appeal and the matters emphasized in the Applicants' affidavit, it seems that the Applicants' chief grouse is that the Respondents who are married daughters of Julia Wairimu Njoroge received shares to the estate of their parents. The Law of Succession Act does not distinguish between the male and female child of a deceased intestate as in this case. In addition, the judgment of the lower court indicates, contrary to the Applicants' assertions, that they both received their share of the estate. Claims therefore that the Applicants were disinherited appear a false exaggeration, intended to provoke the sympathy of the court.

13. For all the foregoing reasons, the court finds no merit in the application dated 16th January, 2020 and will dismiss it. In view of the nature of the litigation parties will bear own costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021.

C. MEOLI

JUDGE

In the presence of:

N/A for the Applicants

Ms Muritu h/b for Mr Muthomi for the Respondents

Kevin:Court Assistant