



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 9 OF 2019**

**IN THE MATTER OF THE ESTATE OF MOSES CHESONDIN YATOR (DECEASED)**

**SAMUEL KIPKOSGEI YATOR) ALICE ADHIAMBO ) .....PETITIONERS**

**VERSUS**

**ESTHER NANDUTU.....1<sup>ST</sup> OBJECTOR**

**EDWIN KIPCHUMBA CHESONDIN.....2<sup>ND</sup> OBJECTOR**

**ESTHER NJERI MUNGAI.....3<sup>RD</sup> OBJECTOR**

**RULING**

On **11<sup>th</sup> December, 2020** Chemitei J made a Ruling in which he made an order removing the applicant, **Esther Nandutu** as a co-administrator in respect of the estate of the deceased - **Moses Chesondin Yator**. At the material part of the Ruling, the Learned Judge had this to say:-

**“25. For the above reasons, the application to manage and run the estate is denied. No evidence has been tendered that the deceased supported the applicant. Mere Mpesa transaction is not sufficient especially for a person who claims to have stayed with the deceased for the last 16 years.**

**26. The Newspaper reports that she was the deceased’s wife as well as the records by the police shall remain their opinions unless subjected to full trial and produced on oath. Obviously the deceased died while in the company of the applicant but that does not *prima facie* mean that she was the wife unless it’s subjected to strict proof.**

**27. The fact that the applicant was a member of the Kitale Club was not rebutted. Mr. Shiundu in his pleadings at the Children Court indicated that he was a member of the club and she allowed the applicant and her children to enjoy the facility courtesy of his membership.**

**28. The said pleadings at the Children Court indicated that the applicant had her home and that Mr. Shiundu had been chased away by the applicant. It was claimed that she had her home at Welcome area a fact which she did not deny. Even so, the fact that she told the court on oath that they were going to the deceased’s home during the criminal trial earlier mentioned clearly showed that she had a place of aboard”.**

The applicant is aggrieved by this decision. She wishes to appeal against the decision to the Court of Appeal. As a first step, she has made an application before this court seeking two orders; firstly, that she be granted extension of time to file appeal out of time and secondly, she wishes to have the proceedings before this court stayed pending the hearing and determination of the intended appeal.

The application has been vehemently opposed by the respondents. They contend that the applicant has not placed any cogent reason before the court as to why she delayed to lodge an appeal before the Court of Appeal in time. Secondly, they argued that the applicant had not established proper grounds for this court to exercise its discretion in her favour by staying the proceedings before this court pending the hearing of the intended appeal.

The parties filed written submissions in support of their respective opposing position. This court has carefully considered the said written submissions. As regard the first issue, i.e. whether the applicant should be granted extension of time to appeal out of time, it was contended by the respondents that the delay of **seven (7) months** between the time the ruling was rendered by the court, and the time the applicant filed the application, was so inordinate that it amounts to an abuse of the due process of the court. The respondents argued that the applicant had placed no cogent reasons for her delay in lodging the notice of her intention to appeal to the Court of Appeal in time. On her part, the applicant explained that the reason why she did not lodge the Notice of Appeal in time was because she was under a misapprehension that

she would still participate in the proceedings as an objector; she had misinterpreted the court's ruling whose actual effect was to completely exclude her as a dependant or beneficiary of the estate of the deceased. It is for that reason that she insists she should be given a chance to ventilate her appeal to the higher court.

That this court has jurisdiction to entertain the application for extension of time to file an appeal before the Court of Appeal is without doubt. **Section 7** of the **Appellant Jurisdiction Act** grants the High Court jurisdiction to extend time for an aggrieved party to appeal against its decision to the Court of Appeal.

In *Re Estate of the late Batholomew Wafula Lule (Deceased) [2010 eKLR*, Riechi J cited with approval the Court of Appeal decision of *Mwangi V Kenya Airways Ltd [2003] KLR* where the court listed some of the factors to be considered in determining whether or not to grant an application seeking extension of time to file appeal out of time to include, inter alia, the period of delay, the reason for the delay, the degree of prejudice which could be suffered by the respondents if the request for extension of time is granted and finally the effect, if any, on the administration of justice or public interest if any is involved.

In the present application, the applicant's reason for delay in lodging the Notice of Appeal in time was due essentially to her misapprehension of the effect of the decision of this court. Despite the respondents' objections, this court is persuaded that the applicant has given a cogent reason for her failure to lodge the appeal in time. It was apparent to this court that the applicant laboured under a misconception that the court had not made a positive determination in respect of her request to be considered as a beneficiary of the estate of the deceased. This court is of the considered view that the applicant should be granted an opportunity to exercise her undoubted right of appeal to the appellate court. The respondents will not be prejudiced because as at the time the application was argued before the court, the proceedings were still at the stage that it was when the court rendered its ruling on **11<sup>th</sup> December, 2020**.

Furthermore, the question whether the applicant is a beneficiary of the estate of the deceased is a fundamental one that this court forms the view that the applicant is entitled to seek a second opinion in relation to her circumstances before the Court of Appeal. That being the case, this court finds merit with the applicant's first prayer and hereby allows the same. The applicant is granted extension of time to lodge a Notice of Appeal out of time. The same shall be filed and served within **seven (7) days** of the date of this ruling.

As regards the second prayer i.e. the applicant's plea for stay of proceedings pending the hearing and determination of the intended appeal, this court holds that the same is prematurely before this court. The applicant can only make such an application if she establishes that she, in fact, has a pending appeal before the Court of Appeal. As it were, before the applicant lodges a notice of her intention to file such an appeal, this court cannot assume jurisdiction as granted under **Order 42 Rule 6 of the Civil Procedure Rules**. That being the case, this court declines the invitation by the applicant to make a ruling in that respect until and unless a valid Notice of Appeal has been lodged. For the avoidance of doubt, the applicant shall be at liberty to file such application upon filing and serving the Notice of appeal. This being a family dispute, there shall be no orders as to costs.

**26/7/2021**

Coram: Before L. Kimaru, Judge

Court Assistant - Kirong

Barongo holding brief for Wanyonyi for the Applicant

N/A for the Respondents

**ORDER**

Ruling read and delivered in court.

**L. KIMARU**

**JUDGE**