



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 386 OF 2018

IN THE MATTER OF THE ESTATE OF GURDIP KAUR SAGOO

RULING

1. The facts of this case relating to the estate of Gurdip Kaur Sagoo are captured in this Court's ruling of 21.5.21. It is unnecessary to restate the same. In that ruling, the Court upheld the will of the deceased and declined to grant a summons for reasonable provision dated 6.12.19 by Harvinder Kaur Dadhiala (Harvinder), a daughter of the deceased.
2. Being aggrieved by the said ruling, Harvinder filed a notice of appeal dated 28.5.21, which was amended on 31.5.21. Harvinder also filed an application dated 2.6.21 seeking stay of further proceedings and in particular the hearing and determination of the application for confirmation of the grant of probate dated 7.10.19, pending the hearing and determination of the Applicant's intended appeal to the Court of Appeal against the said ruling.
3. Mohamed Munir Chaudhri, the executor of the estate of the deceased, Avtar Kaur Sagoo and Jaswinder Kaur Sagoo filed Civil Application No. E309 of 2021 in the Court of Appeal seeking that the amended notice of appeal and record of appeal filed by Harvinder be struck out for want of leave to appeal.
4. Harvinder contended that she has an arguable appeal as disclosed in the exhibited draft memorandum of appeal. If stay of proceedings is not granted, the present Application and intended appeal will be rendered nugatory as she will be excluded as a beneficiary of the estate of the deceased. Harvinder further contended that confirmation of the grant of probate will defeat the intent and purpose of sections 30 and 72(a) of the Law of Succession Act. The confirmation of grant will further deny her the right to property and the right to have her proprietary right and interest determined.
5. In response, Mohamed, filed a notice of preliminary objection (PO) dated 21.6.21. The objection is that the appeal filed by Harvinder upon which the present application is predicated, is fatally and incurably defective for want of leave to appeal. In his grounds of opposition dated 19.7.21, contended that the issues in the present application are *sub judice* being directly and substantially in issue in an application dated 21.6.21 before the Court of Appeal. It is Mohamed's contention that Harvinder has ran to this Court seeking leave to appeal which she says in her Application is not mandatory requirement. He further stated that rather than responding to the application in the Court of appeal, Harvinder has filed the present application with a view to stealing a match and pulling the rug from under his feet. To Mohamed therefore, should the orders sought herein be granted, the Court will usurp the jurisdiction of the appellate Court to determine the issues raised in the application for striking out the appeal. He urged that in the interest of justice, the Applications ought to be heard in the order in which they were filed.
6. Harvinder filed another application dated 30.6.21 seeking extension of time to apply for leave to appeal the ruling of 21.5.21. She also sought leave to appeal against the said ruling. By her own averment, the application was filed after her omission to seek leave was challenged in the Court of Appeal by Mohamed's application seeking that the appeal be struck out for want of leave to appeal. Harvinder further averred that the Law of Succession Act and Probate and Administration rules do not provide for leave to appeal against an adjudication that conclusively determines the rights of the parties with regard to all or any matters in controversy in the suit. She further averred that her advocate advised her that there is a split in judicial opinion as to whether leave to appeal is required in succession matters to appeal against a ruling that is a final determination on the issues before the Court. Additionally, Harvinder stated that the Application was made timeously and that no prejudice will be occasioned to the Respondents should be the orders sought be granted.
7. Mohamed filed grounds of Opposition dated 19.7.21 and a replying affidavit sworn on 27th July, 2021, opposing the Havinder's application. The gist of the opposition to the application is that the same is an abuse of the Court process and is *subjudice*, being directly and substantially in the application in the Court of Appeal.
8. The Applications were canvassed by way of written submissions which by and large restate the parties' averments in their respective affidavits. Due to the conceptual similarities, the 2 applications will be considered together.
9. The issue that this Court must determine is whether this Court has jurisdiction to entertain an application to extend time to file leave to

appeal and to grant leave to appeal after a notice of appeal has been filed in the Court of Appeal.

10. The Court notes that there was no delay by Harvinder in filing the notice of appeal. The ruling was delivered on 21.5.21 and the notice of appeal and the amendment thereof were filed on 28.5.21 and 31.5.21 respectively, both within the period as stipulated in Rule 75(2) of the Court of Appeal Rules.

11. Harvinder, being aggrieved by the ruling of 21.5.21, moved to the Court of Appeal expeditiously and filed a notice of appeal. However, she did not at the time the ruling was delivered seek leave to appeal. An order made by the High Court under the Law of Succession Act is not appealable to the Court of Appeal as of right. Leave must be sought and obtained. Rule 39 of the Court of Appeal Rules provides:

“ 39. In civil matters-

(a) where an appeal lies with the leave of the superior court application for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;

(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused within fourteen days of such refusal.

12. Harvinder did not seek leave to appeal and it is only after her failure to do so was challenged in the Court of Appeal, that she has now come to this Court seeking extension of time to seek leave. She also seeks leave to appeal. She submitted that this Court will fail in its duty to hear and determine the application for leave when it is specifically mandated to do so under Section 7 of the Appellate Jurisdiction Act which provides:

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:

13. The High Court has the discretion to extend time for filing notice of appeal from its judgement, making an application for leave to appeal or a certificate that a case is fit for appeal. This discretion to extend time may be exercised even when such time has already expired.

14. To buttress her submissions, Harvinder cited the case of Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Job Kilach [2003] eKLR. In that case, the applicant sought stay in the Court of Appeal, of orders of the superior Court, under Rule 5(2)(b) of the Court of Appeal Rules. This which was challenged, on the ground that leave to appeal had not been sought before filing the notice of appeal. The Court stated:

In either case, it is not required that before one files a notice of appeal, one must have obtained the leave or the certificate. One can file the notice of appeal and thereafter obtain the leave or the certificate as the case may be...In either case, it is not required We are satisfied that the obtaining leave is not a condition precedent to the filing of a notice of appeal.

15. The Court further observed:

Mr Nowrojee did not show us any authority from this Court or from anywhere else where it has been decided that the obtaining of leave or a certificate is a condition precedent to the filing of a notice of appeal. We are not ourselves aware of any such authority and we would be surprised if there were to be one for such a decision would be clearly contrary to the plain meaning of the words in rule 74(4) of the rules.

16. Although the Court did state that it was not aware of any authority where it was decided that leave to appeal is a condition precedent, it would appear that 3 years earlier, the Court of Appeal had expressed a different view. In the case of Trimbora Agricultural Engineering Limited v David Njoroge Kabaiko & another [2000] eKLR. Shah, JA stated:

The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

17. The Court of Appeal stated that Section 7 of the Act was intended to be used before the filing of an appeal, and it is trite law that an appeal is instituted by the notice of appeal. According to Bosire, Ag. JA (as he then was) the filing of a notice of appeal removes the matter from the jurisdiction of this Court. The learned Judge further stated that Section 7 presupposes that an intended appellant has not taken any steps in pursuance of the appeal.

18. In the Trimborn case, (supra), Shah, JA went on to say:

I said in the case of Gabriel Kigi and others vs Kimotho Mwaura & another Civil Application No Nai 197 of 1997 (unreported):

“But I must revert to section 7 of the Act. That section in my view gives discretionary powers to the High Court to allow extension of time to file a notice of appeal when there is as yet nothing before this Court. It is in this particular aspect that I agree with Bosire Ag JA in the Robinson & others vs Muthami application (supra)”

The situation here is that there is a defective notice of appeal still on record. It has not been struck out pursuant to an application made in that behalf. So long as that notice of appeal remains, the High Court has no jurisdiction to extend time to lodge a fresh notice of appeal.

19. What I understand the Court of Appeal to be saying is that the discretion of this Court under Section 7 of the Act only applies where there is nothing before the Court of Appeal; that extension of time may only be granted by this Court when no step has been taken in the Court of Appeal. The Court also found that as long as the defective notice of appeal remained on record, the High Court lacked jurisdiction to extend time to file a fresh notice of appeal. It would appear from the above authorities, that the filing of a notice of appeal ousts the jurisdiction of this Court.

20. The High Court has followed this reasoning. In the case of Cosmas Mutiso Muema v Kenya Road Transporters Limited & another [2014] eKLR, Kasango, J. found the filing of a notice of appeal removed an appellant from the ambit of the High Court. The learned Judge stated:

It is Rule 74 of those Rules, as stated before, that limits the period within which a Notice of Appeal should be filed. That Notice should be filed within fourteen (14) days of the date of the decision being appealed from. If the Notice is filed out of the period provided by that Rule it is only the Court of Appeal which can extend the time of filing the Notice. The Plaintiff in my view was right to say that once the Defendant filed the Notice of Appeal out of its time, it removed itself from the ambits of the High Court. The filing of that Notice outstayed (sic) the jurisdiction of the High Court. That is the specific position of the law, and that being so the overriding principle in the Civil Procedure Act cannot be applicable.

21. Joel Ngugi, J. is of a similar view and in the case of Sammy Kuria Ndung’u v Samuel Mbugua Ikumbu [2021] eKLR the learned Judge stated:

Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court. This is not a mere formalistic fetish which can be cured by an appeal to Article 159(2)(d) of the Constitution which admonishes Courts to eschew undue regard to technicalities in dispensing justice. It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system. For example, a party who brings an application in the High Court in such circumstances and whose application is declined on its merits might approach the Court of Appeal with the same application hence getting two bites at the cherry. This is because in such a situation, the Court of Appeal would not be exercising its appellate powers over a decision of the High Court but an original jurisdiction. Even where a party whose such application is denied at the High Court chooses not to pursue a similar application at the Court of Appeal, he is still left with a comatose Notice of Appeal at the Court of Appeal. This often leads to increased numbers of inactive files which have to be cleaned up frequently.

22. The jurisdiction of this Court Section 7 of the Appellate Jurisdiction Act to extend time for Harvinder to apply for leave to appeal could only have been exercised before her taking any action at the Court of Appeal. The jurisdiction dissipated once she filed the notice of appeal. Put differently, Harvinder ought to have first sought leave to appeal before filing the notice of appeal. As it is now, the matter is extant before this Court and before the Court of Appeal. This is what Joel Ngugi, J. referred to as ***the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts.***

23. The Court is aware that there has been a conflict of opinion with regard to requirement for leave to appeal to the Court of Appeal from a decision of the High Court, in succession matters. Indeed, in the case of Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others [2013] eKLR, Otieno-Odek, JA, found that leave to appeal from the High Court to the Court of Appeal in succession matters was not required. On the other hand, In Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR, Musinga, Ouko and Kairu, JJA found that such leave was necessary and stated:

So, what is our decision in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this Court.

24. In light of this apparent decisional conflict, Harvinder ought on the advice of her counsel, to seek leave to appeal to the Court of Appeal out of an abundance of caution.

25. Duly guided by the cited decisions of the Court of Appeal which are binding on this Court, and being persuaded by the decisions of the

High Court, I find that the matter is out of the jurisdiction of this Court. I am thus constrained to hold that the application dated 30.6.21 lacks merit and the same is hereby dismissed. It follows as a consequence that the Application dated 2.6.21 seeking stay of proceedings pending the hearing and determination of the intended appeal suffers the same fate, and is hereby dismissed. The circumstances of this case do not call for an award of costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF DECEMBER 2021

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M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**