



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 485 OF 2004**

**IN THE MATTER OF THE ESTATE OF THE LATE M'IKIUGU M'MUKINDIA (DECEASED)**

**STANLEY NDEREBA M'IKIUGU.....PETITIONER**

**VERSUS**

**GEOFFREY RIUNGU M'IKIUGU.....OBJECTOR**

**R U L I N G**

1. By a Ruling made on 17/10/2007, Lenaola J. (as then was) distributed the four properties then constituting the estate of the deceased amongst the beneficiaries of the deceased as follows: -

**a) Abothuguchi/Katheri/382**

**Geoffrey Riungu M'Ikiugu**

**Jackson Kiambi M'Ikiugu - Equally**

**b) Ontulili/Ontulili/I/Katheri/757**

**Geoffrey Riungu M'Ikiugu**

**c) Ontulili/Ontulili/I/Katheri/756**

**Joseph Gitonga M'Ikiugu**

**d) Abothuguchi/Katheri/2002 (sic)**

**Martha M'Ikiugu (deceased wife)**

**Justus Kairigo M'Ikiugu**

**Stanley Ndereba M'Ikiugu**

**Silas Kaimenyi M'Ikiugu**

**Onesmus Mutuma M'Ikiugu - 1 acre each**

2. Subsequently, various applications were made culminating in the Summons dated 11/11/2018 for confirmation of grant that was protested to. By a Judgment made on 24/7/2019, Sitati J. determined the said Protest and confirmed the grant herein as follows: -

**a) Abothuguchi/Katheri/382**

**Geoffrey Riungu M'Ikiugu**

**Jackson Kiambi M'Ikiugu - Equally**

**b) Abothuguchi/Katheri/202**

**Stanley Ndereba M'Ikiugu**

**Geoffrey Riungu M'Ikiugu**

**Silas Kaimenyi M'Ikiugu - Equally**

**c) Ontulili/Ontulili/Block 1/757**

**Geoffrey Riungu M'Ikiugu - Whole**

3. Pursuant thereto, the Certificate of Grant was issued to **Justus Kairigo M'Ikiugu** on 19/9/2020.

4. On 3/10/2019, the petitioner lodged in this Court a Summons dated 2/10/2019 seeking leave to appeal out of time to the Court of appeal against the said Judgment. This is a ruling on that application.

5. The grounds for the application were set out in the body of the Summons and the supporting affidavit of **Stanley Ndereba M'Ikiugu** sworn on 2/10/2019. These were that; the said judgment had given 1 acre out of **Abothuguchi/Katheri/202** to the objector on the basis of a Will by a testator who had no capacity to will out the said property; that the objector will get a lion's share in the estate; that the petitioner was deeply aggrieved by the Judgment; that there is no automatic right of appeal and that the petitioner only knew of the Judgment recently.

6. The objector opposed the application vide his replying affidavit sworn on 1/11/2019. He contended that; there are no reasons that had been advanced for the delay in preferring the alleged appeal; that the petitioner intended to waste the Court's time with the application and that no draft memorandum of appeal had been annexed to the application to gauge the chances of the appeal succeeding.

7. The parties filed their respective submissions which the Court has carefully considered. It was submitted for the petitioner that; the reason for the delay in filing the appeal was because the petitioner was not aware of the Judgment. That the delay was for only 2 months and 8 days which is not inordinate. That the appeal has good chances of succeeding and that the objector will suffer no prejudice if the order sought is granted. The cases of **LSG Lufthansa Service Europa/Africa GmbH & Anor v. Eliab Muturi Mwangi [2019] Eklr, Kinyunjuri Muguta v. Wotuku Muguta [2018] Eklr & In re Estate of M'KenyaNjagi alias M'Kenya Njage (Deceased) [2018 Eklr** were relied on in support of those submissions.

8. On behalf of the respondent, it was submitted that no reasonable grounds had been advanced why the appeal was not filed in time. That the applicant had not demonstrated that the appeal has any chances of succeeding and that the orders sought were discretionally. The cases of **Leo Sila Mutiso v. Rose Hellen Wangari CA No. 255 of 1997 (UR)** and **Njuguna v. Magichu & 73 [2003] KLR 507** were relied on in support of those submissions.

9. This is an application for leave to file an appeal to the Court of appeal out of time. The principles applicable were laid out in the case **Leo Sila Mutiso v. Rose Hellen Wangari CA No. 255 of 1997 (UR)**. The decision whether to grant or not the extension sought is discretionally. However, the said discretion has to be exercised judiciously and not capricious. In this regard, in exercising the said the court has to consider certain matters. These are; the length of time, the reason for the delay, possibly the chances of the appeal succeeding and the degree of prejudice to be suffered by the opposite party if the application is granted.

10. On the length of time, the time lapse must be reasonable. What will be reasonable will vary from case to case. In the present case, the impugned Judgment was delivered in the presence of the advocates for all the parties on 24/7/2019. The present application was made on 3/10/2019. There was a delay of 2 months and 8 days. That in my view was inordinate. This Cause had been in the Court corridors for 15 years by the time the Judgment was being delivered. It behoved anyone aggrieved by the outcome thereof to forthwith seek respite before the higher court. This the applicant did not. In this regard, he was bound to give a good explanation for the delay.

11. As to the reason for the delay, the applicant stated in paragraph 8 of the supporting affidavit thus: -

***"8. That the reason I have delayed to file this application is that I was not aware that the judgment was delivered and knew about the same recently".***

12. From the foregoing, it is clear that the applicant was not being forthright with the Court. He failed to explain to the Court when this 'recently' was. The Court cannot gauge the period the applicant took from the date he knew of the outcome of the judgment and the making of the present application. Any party who wishes the Court to exercise its discretion in his favour must at all times be honest and candid with the Court. He must disclose all that is necessary for the Court to exercise its discretion properly.

13. In the present case, the applicant did not state when he discovered the delivery of the judgment. It is not known why it took two months to lodge the present application; whether the delay is meant to delay the administration of the estate or the delay is a genuine mistake. Every litigant who has a matter in court must at all times be vigilant in having the same prosecuted.

14. A litigant who leaves everything at the hands of his advocate and does not make any follow up is deemed to have no interest in the litigation. Cases are brought to court to be prosecuted, and expeditiously for that matter. That is a constitutional imperative. In the present case, an explanation on the date of discovery lacking, this Court has no otherwise but to assume that the applicant may have known of the outcome earlier but for reasons known to him failed to take appropriate steps to lodge his appeal.

15. The third aspect to consider is the possibility of whether the appeal will succeed. It is not in the province of this Court to determine the merit of an appeal. That is the preserve of the Court of Appeal. However, an applicant should at least inform the Court of first instance the issues which he intends to raise before the Court of Appeal for the Court to gauge whether there are arguable issues that require to be escalated to the higher Court. This may take a form of a draft memorandum of appeal or points/grounds in the application or supporting affidavit.

16. From the supporting affidavit, the only grounds raised by the applicant are; firstly, that the Court gave the objector part of **Abothuguchi/Katheri/202** on the basis of a Will whose testator had no property of her own to will and secondly, that the objector is getting a lion's share in the estate.

17. On the issue of the Will, the said will was produced in evidence at the hearing of the Protest. The same was not challenged or denied in any way by any party including the applicant. It was made by **Martha M'Ikiugu**, the widow of the deceased and mother to the combatants in this matter. It was made on 8/11/2007. In paragraphs 2 and 3 of the said Will, the testator stated: -

***"2. That vide MERU HCC Succession No. 485 of 2004 gave/awarded the testator herein one (1) acre in LR No. ABOTHUGUCHI/KATHERI/202.***

***3. The above one (1) acre of ABOTHUGUCHI/KATHERI/202 is therefore the property of the testator".***

18. As already observed at the beginning of this ruling, Lenaola J (as he then was) had by his ruling of 17/10/2007 distributed to the testator, 1 acre in **Abothuguchi/Katheri/202**. No doubt, as the widow of the testator, the widow of the deceased, the testator had an interest in the estate which the court ascertained to be 1 acre in **Abothuguchi/Katheri/202**. That part of the ruling was never appealed against and it has to-date remained unchallenged. In this regard, it cannot be argued that the widow of the deceased had no interest that she could will.

19. The contention that the issue of the Will should have been dealt with in the succession cause for the testator's estate and not in this estate may be a plausible argument. However, in a situation like the present case where the succession cause has taken 15 years to conclude, surely, by dint of **Article 159 of the Constitution**, the Court was entitled to summarily determine the matter as it did. That goes to cutting down on costs as well as save time for the parties, provided no prejudice is suffered by any party.

20. In the present case, the applicant has not shown that he suffered any prejudice because the Court determined the interest of the testator in this matter instead of waiting for a different cause to be lodged. To my mind, that issue is unarguable.

21. As to the issue that the objector will get a lion's share in the estate of the deceased, that position arises from two incontestable facts: -

a) 1 acre in **Abothuguchi/Katheri/202** belonging to **Martha M'Ikiugu** was bequeathed to the objector by **Martha M'Ikiugu** herself.

b) **Abothuguchi/Katheri/382 (3 acres)** was awarded to the objector vide a judgment of made against the deceased on 21/10/1998 in the **Meru CMCC No. 457 of 1992**. That judgment decreed that the property belonged to the objector. In this regard, it did not even form part of the estate of the deceased.

22. For the foregoing reasons, it is clear that the applicant has not demonstrated that there is any arguable appeal that he intends the Court of Appeal to investigate against the impugned Judgment. It will be only to subject that Court to an exercise in futility.

23. As regards the prejudice that the objector might suffer if the orders sought are granted, it is clear that this case has been in the court corridors for over 16 years now. Litigation must come to an end at some stage. The parties have been in the corridors of justice for now far too long. I find that the objector will be vexed in having an unnecessary litigation hovering over his head like the sword of Damocles for no good reason at all. That is an eventuality that should be discouraged at this stage.

24. In view of the foregoing, I find that the application dated 2/10/2019 lacks merit and is hereby dismissed. This being a family matter, I will make no order as to costs.

**DATED AND DELIVERED AT MERU THIS 28TH DAY OF MAY, 2020.**

**A. MABEYA**

**JUDGE**