



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**SUCCESSION CAUSE NO 77 OF 2017**

**IN THE MATTER OF THE ESTATE OF WANJIKU KARUNGURU (DECEASED)**

**JUDY WAMBUI KIRONYO.....APPLICANT**

**VERSUS**

**GRACE WANGUI NJOROGE.....1ST RESPONDENT**

**HANNAH NJERI KAMAU.....2ND RESPONDENT**

**MARY WANJIRU NG'ANG'A.....3RD RESPONDENT**

**RULING**

1. The Applicant, **Judy Wambui Kironyo** was aggrieved by the decision of **Kariuki J.** (as he then was) delivered on 6<sup>th</sup> February 2015 disallowing her application to set aside the consent orders recorded in this cause on 24<sup>th</sup> June 2009. On 16<sup>th</sup> February 2015, she filed a notice of appeal in the Court of Appeal. She subsequently filed an application dated 19<sup>th</sup> March 2015 seeking leave to appeal the decision and stay of execution, which application was allowed by **Musyoka J.** by his ruling of 3<sup>rd</sup> May 2017. The Applicant was required to file her appeal in 30 days, also the period granted for the order to stay execution. By the said ruling, the Judge transferred the cause to the High Court of Kenya at Kiambu. Correspondence on record shows that the file was dispatched from the High Court at Nairobi on 8<sup>th</sup> May 2017 and received at the High Court in Kiambu on 11<sup>th</sup> May 2017.

2. However, pursuant to requests by the Applicant's advocates for proceedings, the file was returned for the purpose of typing of proceedings to the High Court at Nairobi *vide* the Kiambu Deputy Registrar's letter of 3<sup>rd</sup> April 2018 and was received on 4<sup>th</sup> April 2018 at Nairobi. It was not until 14<sup>th</sup> June 2018 that the Deputy Registrar Family Division, Nairobi sent back the file with typed proceedings, to the High Court of Kenya at Kiambu. The file was received at Kiambu on 20<sup>th</sup> June 2018. On 11<sup>th</sup> July 2018 the Applicant lodged her present application seeking that this court be pleased to extend the leave to appeal granted on 5<sup>th</sup> May 2017 to enable the Applicant to lodge her appeal, and that the order to stay execution be extended. There is an obvious typo in the latter prayer as it refers to the judgment delivered on 5<sup>th</sup> May 2017 rather than the ruling delivered on 6<sup>th</sup> February 2015 which is the subject of the intended appeal.

3. The Applicant swore the supporting affidavit in which deposed that she is one of the Administrators of the estate herein; that the deceased distributed her landed assets before her death; and that the beneficiaries herein took and have had had possession of their respective shares. She contended that by the consent recorded on 24<sup>th</sup> June, 2009 the land was to be shared equally between herself, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, which she protested. She restated the history of the proceedings and asserted that the intended appeal has good prospects of succeeding and that if stay of execution is denied, the Respondents may deal with the suit property in a manner to defeat her interest.

4. **Benson Ndumu Kimani** the 1<sup>st</sup> Respondent's Advocate, swore the replying affidavit in opposition to the summons. He deposed that the Applicant should have been ready with all her documents before seeking leave to appeal and this subsequent application for extension of leave is an abuse of the court process. He pointed out the fact that more than a year had lapsed since leave was first granted.

5. **Mary Wanjiru Ng'ang'a** the 3<sup>rd</sup> Respondent by her replying affidavit dated 25<sup>th</sup> September, 2018 denied the Applicant's averments in the supporting affidavit. She contended that the Applicant was present during the recording of the consent which provided that the parcel no. **LR Kiambaa/Kihara/1640** would be divided equally between the Applicant and the two Respondents. She contended that the Applicant has failed to demonstrate that she will suffer substantial loss if stay is not granted and that her appeal will therefore be rendered nugatory having high chances of success.

6. In her further affidavit filed on 15<sup>th</sup> January, 2019, the Applicant deposed that the replying affidavit by the 1<sup>st</sup> Respondent should be struck out for being sworn by her advocate. She denied the allegations by the Respondents in their respective replying affidavits.

7. The application was canvassed by way of written submissions by the Applicants while the Respondents chose to rely on their replying affidavits the format of which I will comment on in due course. In her submissions, the Applicant submits that the court has jurisdiction to hear the instant application. The case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others (2014) eKLR** was relied upon for the principles considered by the court in an application for extension of time. The court was urged to strike out the 1<sup>st</sup> Respondent's replying affidavit for being irregularly sworn by the advocate.

8. The court has considered the material canvassed in respect of the summons which is expressed to be brought under Section 7 of the Appellate Jurisdiction Act, Rules 49, 63 and 73 of the Probate and Administration Rules, as well as Section 47 of the Law of Succession Act.

9. There is no dispute, that there has been delay in bringing the present application, all in all, a period of about a year and a month since the orders of **Musyoka J.** of 8<sup>th</sup> May 2017 lapsed. In the exercise of its discretion to extend time to appeal or for the performance of other act, the court is enjoined to apply the settled principles.

10. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

**“(T)he underlying principles a court should consider in exercise of such discretion include;**

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7. ....”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

11. In her affidavit and submissions, the Applicant has given reasons for the delay in bringing the present application, which reasons are supported by the correspondence on record. Although leave to appeal was granted on 8<sup>th</sup> May 2017 it was not until June 2019 that the proceedings became available and the present application was filed in the following month. There is no substance in the 1<sup>st</sup> Respondent's contention that the Applicant ought to have waited to get the certified proceedings before seeking leave before **Musyoka J.** And while it is true that the Respondents have been adversely affected by the delay, the delay is not of the Applicant's making. In my view, all the parties have suffered some prejudice due to the administrative delay occasioned by the court. Thus, I have no difficulty in finding that the first prayer in the application ought to be granted, and time extended by 30 days from the date of this ruling.

12. Concerning the second prayer Rule 49 of the Probate and Administration Rules provides that:

**“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported, if necessary, by affidavit.”**

13. Evidently Rule 63 of the Probate and Administration Rules does not apply the provisions of Order 42 Rule 6 of the Civil Procedure Rules to succession causes. The parties herein, especially the 3<sup>rd</sup> Respondent appeared to advert to the latter in their arguments regarding stay. In this connection, the court noted the employment of legal argumentation in the parties' affidavit that is wholly unacceptable and offends the provisions Order 19 Rule 3 of the Civil Procedure Rules.

14. The Applicant's second prayer is seeking an extension of the stay orders given by **Musyoka J.** “pending the lodging, hearing and determination of the intended appeal”. Rule 5(2) of the Court of Appeal Rules provides for the granting of an order for stay of execution or an injunction **“in any civil proceedings where notice of appeal has been lodged in accordance with rule 75”** of the Court of Appeal Rules. In this case, the notice of appeal was lodged on 16<sup>th</sup> February 2015. It is not clear to the court whether, by virtue of Rules 82 and 83 of the Court of Appeal Rules, there still exists an appeal before the Court of Appeal. The existence of an appeal before the Court of Appeal is a condition precedent to the granting of a stay of execution order (see **Githunguri v Jimba Credit Corporation Ltd (No. 2) [1988] e KLR**).

15. In the case of **George Gathuru Karanja v George Gathuru Thuo & 2 Others [2019] e KLR**, the Court of Appeal in dealing with an application to stay execution of the orders of the High Court in a succession cause, stated that the jurisdiction is discretionary and is intended for the preservation of the subject matter of appeal where an appeal has been filed or is intended, and that the jurisdiction arises where the Applicant has lodged Notice of Appeal a stated in **Safaricom Ltd v Ocean View Beach Ltd and 2 Others Civil Application No.327 of**

2009 (UR).

16. In setting out the applicable principles, the Court of Appeal further stated in **George Gathuru Karanja's** case above that:

**“As a matter of both law and practice, the applicant is obligated to satisfy the twin principles enshrined in this provision in order to earn a relief under the said rule. These are, first, that the appeal or the intended appeal is arguable and second, that if the stay sought is not granted, the appeal/intended appeal as the case may be, will be rendered nugatory. See the Githunguri case (supra). By arguable is not meant an appeal or intended appeal which must succeed but one which raises a bona fide issue worthy of consideration by the Court. See Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers' Union, Civil Application No. Nai 72 of 2001(UR).**

17. The Court continued to clarify that:

**“An arguable appeal need not raise a multiplicity or any number of such points. A single arguable point is sufficient to earn an applicant such a relief. See Damji Premji Mandavia versus Sara Lee Household & Body Care (K) Limited Civil Application No. Nai.345 of 2005 (UR); Kenya Railways versus Ederman Properties Ltd, Civil Appeal No. Nai 176 of 2012 and Ahmed Musa Isamel versus Kumba ole Ntamorua & 4 others, Civil Appeal No. Nai 256 of 2013.**

**As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others, C.A. No. 31 of 2012 where in this Court stated inter alia thus:**

**“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”**

**Both limbs must be established before a party can earn a relief under Rule 5 (2)b) of the Court of appeal Rules, 2010. See Republic v Kenya Anti-Corruption Commission and 2 Others v 2009 KLR 31...”**

18. This court, having looked at the material canvassed would have no hesitation in finding that the Applicant, despite her failure to annex a draft memorandum of appeal, has demonstrated that she may have an arguable appeal. However, her claim that without stay her appeal will be rendered nugatory appears speculative at best. There is no evidence that the Respondents intend to dispose of the subject matter, beyond bald allegations.

19. Under the disputed consent order both the Applicant and the Respondents benefited from designated three assets of the estate, and the Applicant's grievance relates to the manner in which one of these assets was shared. If the intended appeal were to resolve in the Applicant's favour, the transmissions to the Respondents can be reversed, or the Respondents called upon to compensate the Applicants by way of damages. See **Stanley Kang'ethe Kinyanjui v Tony Ketter and 5 Others [2012] e KLR**.

20. For all the foregoing reasons I am not satisfied that there is justification for extending the stay of execution order as sought by the Applicant. The application is granted in terms of prayer (3) only, and as earlier stated, time for filing appeal is extended by 30 days from the date of this ruling. Parties will bear own costs in view of the nature of the dispute.

**SIGNED ON THIS 12<sup>TH</sup> DAY OF JUNE 2020 AND DELIVERED VIA eMAIL TO THE PARTIES ON 12<sup>TH</sup> DAY OF JUNE 2020**

**C. MEOLI**

**JUDGE**