



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC.SUCCESSION CAUSE NO. 46 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE FREDRICK MARANGU RAGWA (DECEASED)

ROBERT KINYUA MARANGU.....APPLICANT

VERSUS

NAZARENA KANUGU MARANGU.....PETITIONER/RESPONDENT

R U L I N G

1. Before this court is an application by way of summons dated 1st July 2020 brought by **ROBERT KINYUA MARANGU** (Applicant) under **Rule 49** and **73** of **Probate and Administration Act Rules & Article 159** of the **Constitution of Kenya 2010** asking for the following reliefs namely:-

i) Spent

ii) That this court be pleased to grant leave to the Applicant to appeal against the ruling delivered by this Honourable Court on 27th April 2018.

iii) Costs of this application.

2. The Applicant has listed the following grounds for his application namely:-

a) That the ruling in this cause was delivered on 27th April 2020 via zoom.

b) That during the period of delivery of the ruling, the Applicant could not access court because the courts had been closed temporarily.

c) That the Applicant felt aggrieved by the ruling of this court.

d) That he now wishes the appeal against the said ruling.

e) That at the time the ruling was delivered, the Applicant was in Mombasa.

f) That due to the lockdown the Applicant could not appeal on time.

g) That the reasons for delay in filing the appeal on time is reasonable and not inordinate.

h) That it is fair in the interest of justice to be granted the prayers sought in this application.

3. The Applicant has supported the above grounds with an affidavit sworn on 1st July 2020 where he has reiterated the grounds listed above adding that his application has been made in good faith. He further adds that he could not be assisted by his former counsel due to lack of funds on his part. He states that he now wishes to be given a chance to champion his interests in the estate.

4. In his oral submissions the Applicant blamed his former advocates for letting him down and maintained that his woes were due to the lockdown which restricted his travel from the coast to this court.

5. The Respondent has opposed this appeal via a Replying Affidavit sworn on 13th July 2020. The Respondent has accused the Applicant for falsehoods and abusing court process.

6. According to the Respondent all the parties and their advocates were present in court on 3rd March 2020 when the date for Judgment was given and that on 27th April 2020 both advocates filed disclaimer waiving their rights to be present in court when the ruling was to be delivered electronically.

7. The Respondent has faulted the Applicant for not stating what he did after learning about the outcome of the ruling. She further avers that the Applicant's counsel received the ruling and the Applicant could have instructed him to file Notice of Appeal if he so denied.

8. The Respondent has pointed out that whereas the Applicant complains of the lockdown and travel restrictions, he filed his application on 1st July 2020 before the restrictions were lifted on 6th July 2020. The Respondent contends that the Applicant is an opportunist trying to use the current unfortunate situation to hoodwink this court to grant the orders sought. She avers that she will be prejudiced by the orders sought.

9. In her oral submissions, the Respondent through her counsel Mr. Murithi, added that the Applicant had not shown basis for this court to exercise its discretion in his favour. She submitted that for leave to be granted the Applicant should demonstrate sufficient grounds which in her view is lacking in this Application. She faulted the Applicant for not filing a draft Memorandum of Appeal or give grounds for his intended appeal.

10. This court has considered this application and the grounds raised by the Applicant. I have also considered the opposition made by the Respondent. It is an undeniable fact that this country and indeed the whole world is currently reeling from the pressure brought about the **Covid 19** virus. Many human activities including the administration of justice have been affected and many mitigating measures have been taken by governments all over the world to mitigate the effects of the disease.

11. The Applicant in this Application avers that he was affected by the lockdown which had been ordered by the Government of Kenya as a mitigating measure against **Covid 19**. The reasons advanced by the Applicant on the face of it appears cogent or well founded but a deeper look shows that the Respondent is correct in her opposition to the prayers sought. My view is based on two reasons;

(i) In the first place, the Applicant even if he was to succeed in his pursuit for leave to file Notice of Appeal out of time due to reasons related to **Covid 19**, he has not sought the crucial leave to appeal against the ruling of this court delivered on 27th April 2020. This is because under **Section 50 of Law of Succession Act**, there is no automatic right to appeal and a party aggrieved by the decision of the High Court must first seek leave of the court to appeal. In seeking such leave a party must show sufficient cause to escalate his grievance to the appellate court.

12. In this instance the Applicant has not sought for leave to appeal his application is simply to be allowed to appeal out of time perhaps under the false impression that his right to appeal to the Court of Appeal is automatic which is not the case. In the case of *Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another [202014] eKLR* the Court of Appeal observed as follows;

“In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.

We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.

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.”

(i) Secondly, the Applicant has not explained how it was possible for him to file this application on 1st July 2020 when the travel restrictions or lockdown was still in force in Mombasa, Nairobi and Mandera. He says he resides in Kilifi and I could have perhaps given him the benefit of doubt but he has not given any answer to the question posed by the Respondent and the allegations made that he is being opportunistic rather than being truthful and honest in his approach in this application.

13. In view of the above two reasons this court finds no merit in the summons dated 1st July 2020. The same is disallowed with costs to the Respondent

Dated and signed by;

HON. JUSTICE R. K. LIMO.

SIGNED AND DATED 14TH DAY OF SEPTEMBER

Dated, signed and delivered in the open court on 28TH day of SEPTEMBER 2020.

By:

HON. LADY JUSTICE L.W. GITARI