REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 653 OF 2008

IN THE ESTATE OF THE LATE KINGATI MUKOLYA (DECEASED)

ESTHER KALUNDA KIETI)

WILLIAM MUTUKU KINGATI) .....PETITIONERS

MUTINDA KINGATI)

VERSUS

NZIOKA MUKOLYA)

JOSEPH KIMUYA) .....PROTESTORS/APPLICANTS

GREGORY KILONZI)

AND

HARRISON WAMBUA KINGATI .....INTERESTED PARTY

RULING

1. The Protestors/Applicants filed an application dated 24/02/2020 expressed to be brought under section 47 and 74 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeking the following reliefs:

> ***1) (spent)***
>
> ***2) That this Honourable court be pleased to extend the time within which the Applicants may lodge a Notice of Appeal.***
>
> ***3) That this Honourable court be pleased to extend the time within which the Applicants may file their appeal to the Court of Appeal.***
>
> ***4) That the annexed Notice of Appeal be deemed as duly filed upon payment of the requisite fees.***
>
> ***5) The court do stay the ruling delivered on 21/01/2020 only to the extent that the distribution of WAMUNYU/KAMBITI/133 do await the outcome of the intended appeal.***
>
> ***The costs of the application be in the cause.***

2. The application is supported by the affidavits of the Protestors/Applicants and grounds on the face thereof. The Applicant's gravamen is that they are aggrieved by this court's ruling dated 21/01/2020 and that they together with their Advocate were not present during the delivery of the ruling so as to lodge the requisite Notice of Appeal in time. It is further the Applicants case that they reside far away from the court and their Advocates and hence the delay. It is the contention of the Applicants that the application has been brought without undue delay and that they have an arguable appeal which has high chances of success. It was finally contended that the Applicants will be prejudiced if the stay order is not granted as the contested property will be dealt with adversely thereby rendering the intended appeal nugatory.

3. The Petitioners opposed the application. The first Petitioner herein filed a replying affidavit sworn on 18/03/2020 in which she raised several objections *inter alia*: *that the Applicants had neither testified in the hearing of the protest nor filed any written statements and thus are busy bodies; that the purported appeal is an afterthought as the Applicants ought to have been present in court or through their Advocate during the delivery of the ruling and to lodge the notice of appeal in time; that the application is meant to frustrate the Petitioners from benefitting from the estate of their late father.*

4. The interested party herein **Harrison Wambua Kingati** opposed the application vide his replying affidavit sworn on 9/03/2020 where he averred that the Applicants neither filed witness statements nor affidavits in support of the Protest and also did not testify in the proceedings. He further averred that the Applicants are out to frustrate the Petitioners and Interested Party from proceeding with the confirmation of the grant. It was finally averred that the ruling date had been fixed in the presence of all Advocates and thus the absence of the Applicants and their Advocate was their own undoing as they failed to lodge the Notice of Appeal in time.

5. The parties agreed to dispose the application by way of written submissions.

Applicants submissions:

It was submitted that the delay to approach the court was not inordinate as the reasons therefor have been sufficiently explained and that the intended appeal is arguable. Learned counsel Mr. Muumbi submitted that the reasons furnished by the Applicants in the supporting affidavit and grounds merits the delay to be excusable by this Honourable Court. Counsel further added that the intended appeal is arguable and that the Applicants stand to suffer prejudice if the leave sought is not granted. Learned counsel sought reliance in section 47 of the Law of Succession Act and in the case of **Hafswa Omar Abdalla Taib & 2 Others –vs- Swaleh Abdalla Taib [2015] eKLR** and urged this court to grant the Applicants leave to appeal to the Court of Appeal since such leave is not automatic from the High Court relating to succession matters.

Petitioners submissions

Mr. Mutua Makau learned counsel for the petitioners first submitted that the Applicants have not sought leave of this court to lodge appeal against the decision of this court since there is no automatic right of appeal to the Court of Appeal in succession matters. Reliance was placed in the case of **Rhoda Wairimu Karanja & Another –vs- Mary Wangui Karanja & Another [2014] eKLR**. According to learned counsel, the Applicants in their application have only sought for extension of time to lodge a notice of appeal to the Court of Appeal but not leave to file appeal to the Court of Appeal and the Applicants counsel's purported submissions introducing the issue of leave should be disregarded as was held in the case of **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR.**

It was also submitted that the Applicants have not given sufficient reasons for the delay in lodging the notice of Appeal in time so as to warrant this court to extend time to file appeal out of time. Reliance was placed in the case of **Mwangi –vs- Kenya Airways Ltd [2003] eKLR.** Learned counsel pointed out that the ruling herein was reserved on the 9/10/2019 in the presence of the Applicants Advocate and thus the Applicants have not given any explanation as to why they did not attend court for the ruling yet they had been aware about the same. On the arguability of the appeal, learned counsel submitted that there is no appeal in existence and that the Applicants have not attached any Memorandum of Appeal for the court's perusal so as to consider whether the appeal has any chances of success. As regards stay of execution pending the intended appeal, counsel submitted that the Applicants have not established that they will suffer any prejudice if the application is not allowed. It was the counsel's view that it is the petitioners who stand to suffer prejudice as the matter has been in court since 2008.

Finally, it is was submitted that this court does not have jurisdiction to grant an application to extend time within which the Applicants can file their appeal to the court of appeal since such power rests with the Court of Appeal where the appeal is to be entertained. Counsel thus sought for the dismissal of the application with costs.

Interested party's submissions.

Mr. Uvyu learned counsel for the interested party submitted that the Applicants have not given sufficient reasons for the delay in filing the appeal and that they failed to show what substantial loss they stand to suffer if the orders sought are not granted. Counsel contended that it is the interested party who stands to be prejudiced if the application is allowed since the interested party is a beneficiary of the estate who has been kept away from getting his due rights for about 11 years owing to the Applicants protest which was determined on 21/01/2020.

6. I have considered the application together with the rival affidavits. I have also considered the submissions of learned counsels as well as the authorities cited. It is not in dispute that this court vide its ruling dated 21/01/2020 dismissed the Applicants protest and confirmed the grant in terms proposed by the Petitioners. It is also not in dispute that under the law of Succession Act there is no express automatic right of appeal to the Court of Appeal. It is also not in dispute that the Applicants are yet to seek the requisite leave to appeal and to file the requisite notice of appeal to the Court of Appeal. That being the position, I find the only issue for determination is whether or not the Applicants have presented sufficient reasons to warrant the orders being sought.

7. The Applicants gravamen is that they were late in filing the requisite notice of appeal to the Court of Appeal and now seek principally two prayers namely that time be extended to enable them lodge their appeal to the Court of Appeal and that there be a an order of stay of the ruling dated 21/01/2020 with respect to land parcel **Wamunyu/Kambiti/133** pending the outcome of the intended appeal. It was the Applicants case that they together with their Advocates were not present during the delivery of the ruling as they lived far off from the court and could not communicate with each other on the instructions regarding the lodging of the Notice of Appeal in time. The Applicants also contend that their intended appeal is arguable and that the same will be rendered nugatory if an order of stay of execution is not granted pending the determination of the intended appeal.

As regards the issue of extension of time to lodge appeal out of time, it should be noted that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis and while not a right it must be

exercised judiciously and only after a party seeking the exercise of discretion places before the court sufficient material to persuade it that the discretion should be exercised on its behalf and in their favour. The Court of Appeal in the case of **Mwangi –vs- Kenya Airways Ltd [2003] KLR** listed the factors which aid the courts in exercising the discretion whether to extend time to file an appeal out of time and which include *inter alia*; *the period of delay; the arguability of the appeal; the degree of prejudice which could be suffered by the Respondent if the extension is granted; the importance of compliance with time limits to the particular litigation or issue and the effect if any on the administration of justice or public interest if any is involved*.

The discretion to extend time is unfettered and the onus is upon the Applicants to explain the reasons for the delay in lodging the Notice of Appeal in time so as to enable this court to exercise the desired discretion. The Applicants have claimed that they were not aware that the ruling had been delivered on the 21/01/2020. However, a perusal of the court record reveals that the Applicants counsel was present in court on the 9/10/2019 when the ruling date was fixed. It was therefore quite obvious that the parties were expected to be present in court on the date of the ruling and if not possible the counsel could send a representative or in the least ensure to visit the registry as soon as is practically possible and to appraise themselves of the outcome of the ruling. The Applicants claim that they lived far from the court is not convincing because it is common knowledge that majority of litigants do hail from far distances from the court. It is noted that the Applicants had been attending court from their far places during the hearing of the protest without any complaints. It is ironical that their places have now turned to be far from the court. If such an excuse were to be accepted then no case would be brought to finality as parties would be using the excuse of distance from court to seek for indulgences. I am not satisfied by the explanation offered by the Applicants. This was clearly a case of inaction on the part of the Applicants and their Advocate and which is not an excusable mistake. In the case of **Bains Construction Company Ltd –vs- John Mzare Ogawe [2011] eKLR** the court held as follows-

> "***It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences."***

It is also noted that the Applicants counsel has not filed an affidavit explaining the circumstances leading to the failure to file the appeal in time and which leaves no doubt that there was some form of inaction. The Applicants themselves could as well have taken steps to follow up on the outcome of their case but not to sit on their laurels and expect that things would work out by themselves. I am guided by the decision of the Court of Appeal in **Ronald D. O Raballa –vs- Judicial Service Commission and Another [2018] eKLR** citing with approval the case of **Habo Agencies Ltd –vs- Wifred Odhiambo Musingo [2015] eKLR** as follows:-

> "***It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

The learned Judges of the Court of Appeal further held that it would not matter whether the party was schooled in legal procedures or was a functional illiterate.

Even though this court might have had some latitude in considering the Applicants request for extension of time to lodge appeal to the Court of Appeal, it is quite clear that this court does not have jurisdiction to grant extension of time to file an appeal to the Court of Appeal as the same is solely vested in the Court of Appeal as provided for in Rule 74 of the Court of Appeal Rules. This court having delivered the ruling dated 21/01/2020 the Applicants were thereafter to proceed to the Court of Appeal for redress if need be. It is the Court of Appeal which is now the appellate court that is seized with the requisite jurisdiction to entertain application for extension of time to lodge an appeal before it. The Applicants ought to have filed the present application before the said court for consideration. Hence the application as presented is not meritous and is for dismissal.

8. A perusal of the prayers sought in the Applicants application clearly shows that there is no prayer for leave of this court to appeal to the Court of Appeal. The matter being a succession cause and in which there is no automatic right of appeal, the Applicants ought to have sought for leave to lodge appeal to the Court of Appeal. The Court of Appeal in the case of **Rhoda Wairimu Karanja & Another –vs- Mary Wangui Karanja & Another [2014] eKLR** held as follows:-

> "***We think we have said enough to demonstrate that under the Law of Succession Act there is no express automatic right 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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."***

It would appear that the learned counsel for the Applicants has sought to raise the issue of leave through his submissions. This has been strongly opposed by counsel for the Petitioners who contended that the said submissions should not be taken as evidence or pleadings. The Applicants submissions has raised the issue of leave yet the same is not one of the prayers sought in the application. This is definitely irregular and contrary to the rules of pleadings and evidence. Such a key prayer ought to have been duly pleaded in the application so as to enable the adverse party to adequately respond thereto. As this was not done, I find the same to be an ambush against the Respondents and which should not be permitted at all by this court. I am guided by the Court of Appeal decision in the case of **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** when it held as follows:-

> "***Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a cause only militates against the law and we are unable to countenance it. Submissions, are generally parties "****marketing language****", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions based only to evidence presented."***

Learned counsel for the Applicants in his submissions conformed that indeed leave must be sought from the high court in order to lodge appeal to the Court of Appeal and in fact quoted the above case. However, the said counsel did not explain why the same was not included in the application as one of the prayers sought. The purported attempt to introduce it via submissions was improper and thus cannot be countenanced by this court. The failure to seek for leave to appeal by the Applicants militated against their application and made it to be fatal.

9. As regards the Applicants prayer for an order of stay of the ruling dated 21/01/2020, it was incumbent upon the Applicants to demonstrate the substantial loss they stand to suffer if the order of stay is not granted. The Applicants vide their affidavits deposed that they stand to be prejudiced if the orders sought are not granted because the contested property will be dealt with in an adverse manner rendering the intended appeal an academic exercise. The Applicants in my view did not present credible evidence of substantial loss they stand to suffer if the orders sought do not go their way. It is instructive to note that during the hearing of the protest it transpired that the Applicants do not reside on the suit land as they relocated to other places many years ago after they purportedly sold parts of the deceased's land to third parties. It would appear that the pressure emanates from the third parties who failed to convince this court during the hearing of the protest that they are creditors of the estate. As the objectors do no not reside on the suit land I find that they do not suffer any substantial loss if an order of stay is not granted. As they have not been in possession of the suit land for many years and which is registered in names of deceased, they do not stand to suffer any substantial loss. In the premises, there is hardly any immediate loss to be suffered even as they canvass the intended appeal. The arguability of the intended appeal will be left to the Appellate court to determine. Suffice here to add that at this stage no appeal has been lodged and further the Applicants have not even annexed a draft copy of a Memorandum of Appeal as a sign that they are really serious in pursuing an appeal. The Applicants have also not said anything on whether the Respondents are likely to be prejudiced if an order of stay is granted and which clearly shows that the Applicants are only concerned about themselves and nobody else. It is noted that the cause was filed in 2008 and it would be in the interest of all parties concerned that the same be brought to conclusion. I am not satisfied that the Applicants have demonstrated that they stand to suffer substantial loss if the order of stay is not grated.

10. In the result it is my finding that the Applicants application dated 24/02/2020 lacks merit. The same is ordered dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 24th day of September,2020.

D. K. Kemei

Judge