



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 2'A' OF 209

(FORMERLY SUCCESSION CAUSE NO. 148 OF 1999)

IN THE MATTER OF THE ESTATE OF THE LATE RIARA NGICHURI-(DECEASED)

E.M NKIRIA M'RIARA.....1ST APPLICANT

JANE CIAMBOGO M'RIARA.....2ND APPLICANT

VERSUS

BILDAD MUKAI RIARA.....RESPONDENT

AND

CHARLES NYAGA MUKAI.....1ST RESPONDENT

HUMPHREY MUTEMBEI.....2ND RESPONDENT

AYUB NJERU ISAAC.....3RD RESPONDENT

FAITH KAWIRA MUTUA.....4TH RESPONDENT

NJERU M'MURATHI.....5TH INTERESTED PARTY

RULING

1. **E. M NKIRIA M'RIARA, JANE CIAMBOGO M'RIARA and NYAGA M'RIARA** the Applicants herein have moved this court by summons dated 14th June 2020 brought under **Section 47 Law of Succession Act & Rules 49 and 73 of the Probate and Administration Rules** for the following orders namely;

(i) That this court do extend time for the Applicant to file a Notice of Appeal and to apply for leave to appeal to the Court of Appeal against the ruling of this court delivered on 5th May 2020.

(ii) That the Applicant be granted leave to prefer an appeal to the Court of Appeal against the ruling delivered in this matter on 5th May 2020.

(iii) That costs of this application be proved.

The Applicants have listed the following grounds as forming the basis for this application;

(i) That this court delivered its ruling on 5th May 2020 and dismissed the Applicants application for revocation of grant.

(ii) That the Applicants were dissatisfied with the said ruling and intend to challenge the same at the Court of Appeal

(iii) *That there is no automatic right of appeal and hence the necessity of this application.*

(iv) *That the Applicants intend to raise weighty issues on appeal.*

(v) *That this application has been instituted promptly and without unreasonable delay.*

(vi) *That this application has been made in the interest of fairness.*

(vii) *That the delay in bringing this application has been occasioned by factors that are excusable.*

3. The Applicants have supported the above grounds through an affidavit sworn on 15th June 2020 by E.M Nkiria M'Riria. The deponent who has sworn the affidavit on behalf of the other 2 applicants avers that they intend to appeal against the decision of this court because they have been disinherited in the estate.

4. The Applicants have exhibited a draft memorandum of appeal claiming that the issues raised therein are.

5. The 1st Applicant avers that she is sickly, frail and aged 86 years old and that have caused delay in bringing this application. He has also cited **Covid 19** Pandemic and financial constraints as other factors that caused the delay.

6. In their written submissions through learned counsel Basilio Gitonga, Murithi & Associates, the Applicant contend that **Rule 75 (2)** of the Court of Appeal Rules required them to file a Notice of Appeal against the decision of this court 14 days from the date of the ruling which was on 5th May 2020. They further state that **Rule 39(1)** of the said Rules required them to apply for leave to appeal 14 days from the date of the ruling to be appealed from.

7. The Applicants aver that they lodged this application on 15th June 2020 which is 26 days after the period provided for filing the Notice of Appeal. They submit that the delay is not inordinate and that given the prevailing the circumstances brought about by **Covid 19** virus, the delay is excusable. They have relied on the following decisions to buttress their contentions;

(a) *Re Estate of Chepokakai Chepkitim (deceased) [2016] eKLR*

(b) *John Mbuu Muthomi -vs- Ruth Muthoni Kariuki [2017] eKLR*

8. The Applicants have further submitted that one of factors for determination for this court in exercising its discretion to grant leave to appeal is whether the Applicant has established a *prima facie* question to be determined at the appellate court. They submit that they have raised ten grounds in their draft memorandum of appeal and in their view, they have met the threshold and have relied on the following decisions to fortify their contention;

(a) *Re Estate of Sylevester E.M. Ochanji (deceased) [2018] eKLR*

(b) *Cecilia Kiajia Mbatia & Another -vs- Evangeline Tirindi Josphat & Another [2018] eKLR.*

9. Bildad Mukai Riara, the Respondent herein has opposed this Application through a Replying Affidavit sworn on 7th July 2020. The Respondent contends that this Application lacks in merit and has pointed out that a Notice of Appeal is a one page document which can be filed without typed proceedings.

In his view this application lacks in merit because no explanation has been given for the delay in filing the Notice of Appeal. He faults the Applicants for launching this application as an afterthought and cause delay considering that this matter has been in court since 1999.

10. The Respondent has contested the claim by the Applicant that the decision of this court has disinherited him arguing that the substantive decision was made by **Justice Kasanga Mulwa** on 17th February 2003. The Respondent contends that the Applicant should have been against that decision in 2003.

11. The Respondent avers that the Applicant has never resided or lived on L.R. Magumoni/Thuita/394 the talk of being disinherited and that no evidence were adduced to that effect during the hearing of the Summons for Revocation of Grant.

12. The Respondent contends that the grounds of Appeal exhibited in his view stands no chance of success and that the Applicant has failed to explain the reasons for the delay in filing the Notice of Appeal.

13. In their written submissions the Respondent and interested parties have submitted that the Applicant has the burden of proof in the allegation that the decision of this court has disinherited him. They have contended that the Applicant is being dishonest as he has never lived on L.R No. Magumoni/Thuita/394.

14. The Respondent and Interested Party further faults the Applicants for laches asking why he did not appeal in 2003 when the cause was decided on merit. They aver that the Application for leave to appeal is being brought out of time as well and have relied on the decision in the case of **Thabitha Wanjiru -vs- Jotham Kililio & 2 Others [2017] eKLR** to buttress their contention.

15. The Respondent further submits that the Applicants are peddling falsehoods and that the application for leave is based on false pretenses which would cause prejudice to the Respondent and the Interested Parties.

16. The Respondent avers that the Applicants failed to prove their cause during Summons for Revocation of Grant and that the intended appeal is not arguable terming it as usual complaints of a sour loser.

17. The Respondent further submits that age and sickness can only be relevant if one is alleging senility or insanity which he contends is not the case here. The Respondent claims that the 3rd Applicant Nyaga M'Riara abandoned the application midstream and that the same shows that this application is vexatious as it is meant to address a decision made by court 19 years ago.

Analysis and Determination:

18. This court has considered this application and the grounds advanced. I have also considered the opposition made and the submissions. This application is two pronged. It is seeking extension of time to file notice of appeal and leave to appeal against the ruling of this court delivered on 5th May 2020.

19. The two reliefs sought by the Applicant are discretionary in nature which means for them to be granted, the Applicant must show sufficient cause.

(a) Enlargement of time

20. For an Applicant to show a sufficient cause for extension of time to do an act that should be done within a presented time, he or she must show that there is a good reason to explain to delay and more importantly there is substance in what he/she wants to pursue. **Rule 67 of Probate & Administration Rules** provides for enlargement of time. The Rule states as follows;

“ where any period is fixed or granted by these rules or by an order of the court for doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

21. There is no dispute that a party who wishes to appeal to the Court of Appeal is required by the Rules of that Court (**Rule 75(2) Court of Appeal Rules**) to file Notice of Appeal within 14 days from the date of the decision on which the intended appeal is based. The Applicants and more particularly the 1st Applicant has stated that she was unable to lodge the Notice of Appeal on time due to her age and the circumstances brought about by the **Covid 19**. This court finds that that reason is well grounded given the current situation in this Country and nature of the Corona Virus that is said to afflict the aged much more viciously than the young people.

22. The second threshold to be considered by a court in the exercise of discretion to enlarge time is the substance or the basis for the extension of time. The Respondent and the Interested Parties have faulted the Applicants for laches and being vexatious while I find the criticism on laches legitimate, I am not persuaded that the Applicant have been vexatious in his matter. It is true that the Summons for Revocation of Grant dated 15th December 2010 was filed way back in 2011 and part of the reason why the Applicants failed to persuade this court to revoke the issue on 7th January 2000 was the delay in bringing the summons to revoke the grant and delay in prosecuting the same. The Applicants failed to give satisfactory explanation to this court. The Applicants have faulted this court and have expressed the desire to escalate their grievance to the Court of Appeal.

23. This court has perused through the draft memorandum of appeal and I am sure that the Applicants have *prima facie* shown that the reason why they are asking for extension of time is not frivolous or vexatious. In my view they have shown good reasons for extension or enlargement of time. The length of delay in bringing this application in my view is not inordinate and is also a factor to be considered in enlargement of time.

24. On the question of leave to appeal against the decision made by this court, again this is a discretionary matter and an Applicant must show sufficient cause to persuade a court to grant such leave. Again I have looked at the draft Memorandum of Appeal and I am persuaded that the Applicants have demonstrated that their intended appeal is not frivolous. I am satisfied that the grounds raised merit and judicial consideration by the Court of Appeal.

25. I have also considered the prejudice likely to be caused to the Respondent and indeed the Interested Parties if I was to allow this application and I have noted that contrary to the Respondent's assertions, there is very little prejudice if all given that they have strongly stated that the Applicants have never lived in the estate. This means that there will be no interference with their occupation and the enjoyment of their respective rights pending the hearing and determination of the appeal.

In the end this court for the aforesaid reasons finds merit in the application dated 14th June 2020. The same is allowed under the following terms;

(a) The Applicants are hereby granted 14 days leave from the date of this ruling to file a Notice of Appeal out of time.

(b) The Applicants are also granted leave to file an appeal against the ruling of this court delivered on 5th May 2020. That leave must be filed within 30 days from the date of this ruling because the proceedings have been typed and ready for collection.

(c) Costs shall abide by the outcome of the intended appeal.

Dated and signed by;

HON. JUSTICE R. K. LIMO

SIGNDATE 14TH SEPTEMBER 2020

Dated, signed and delivered in the open court on 22ND day of SEPTEMBER 2020 .

By:

HON. LADY JUSTICE L.W GITARI