REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 158 OF 2000

IN THE MATTER OF THE ESTATE OF KISIGWA ASUGA ASUGA (DECEASED)

RULING

1. The application, that I am tasked with determining, is a summons dated 8th June 2015, which seeks that an inhibition order issues to restrain dealings on N. Maragoli/Kisatiru/1861, that the firm of Messrs. Omondi Abande & Company, Advocates be granted leave to come on record in the place of the firm of Messrs. Shitsama & Company, Advocates, and that leave be granted to appeal against a ruling that was delivered on 22nd November 2018.

2. The grounds upon which leave is sought are set out on the face of the application, as well as in the affidavit sworn in support of the application, by Recho Kavayi Kisigwa, the applicant herein, on 6th July 2020. Essentially, the applicant evinces an intention to appeal against the dismissal of prayer 3, in the application dated 9th February 2017, through the impugned ruling. She states that she instructed her advocates to lodge an appeal, whereupon the said lawyers requested the court to supply them with certified copies of the typed proceedings and ruling, which she collected on 18th January 2019. She filed a notice of appeal on 10th December 2018. She explains that the delay in lodging the instant application was occasioned by the late provision of the certified copies of proceedings and ruling. She also explains that she had been ailing over the period, and that her problems were compounded by the onset of the Covid-19 pandemic. She states that the respondent, Albert Imbuga Kisigwa, the administrator of the estate, was in the process of disposing off N. Maragoli/Kisatiru/1861, notwithstanding the fact that the applicant lived inside the said parcel of land. She avers that the delay in getting the certified copies of the proceedings and ruling was inadvertent and excusable.

3. The applicant has attached several documents to her affidavit in support of her case. There is a copy of a letter dated 10th December 2018, from the firm of Messrs. Shitsama & Company, Advocates, asking for certified copies of the proceedings and ruling. There is a copy of a notice of appeal, dated 10th December 2018. There is a letter dated 2nd July 2020, from the County Government of Kisumu, Department of Health & Sanitation, indicating that the applicant had been under treatment and management for hypertension and diabetes mellitus. A letter from Messrs. Omondi Abande & Company, Advocates, dated 22nd June 2020, warns the Principal of Keveye Girls High School not to enter into any dealings with respect to N. Maragoli/Kisatiru/1861. Finally, there is copy of a draft memorandum of appeal, dated 6th July 2020.

4. Upon being served, the respondent, who I shall refer to hereafter as the administrator, filed a replying affidavit, sworn on 13th July 2020. He avers that he has no objection to the applicant changing advocates, but points out that the move to change advocates was a strategy to delay the matter. He accuses the applicant of being vexatious and out to abuse the court process and waste the court's time. He states that she had previously filed an application for revocation of grant, dated 30th July 2012, complaining that she had been disinherited. The said application was heard *viva voce*, and was eventually dismissed. She was also said to have had filed an application, dated 9th February 2017, which sought rectification of a certificate of confirmation of grant with respect to errors in her name, which was granted; and swapping of titles, being N. Maragoli/Kisatiru/1861 and 1863, which was dismissed. He states that the decision by the court was clear that the applicant was seeking orders against an administrator who had discharged his administration, and titles had been issued to the beneficiaries. He states that he was not the registered owner of N. Maragoli/Kisatiru/1861, and, therefore, what the applicant was seeking was contrary to the tenets of equity, since she was seeking orders touching on a property whose owner was not party to the dispute. He states that the inhibition order was being sought against him, yet he did not hold title to N. Maragoli/Kisatiru/1861. He asserts that a party cannot be condemned unheard. He states that the applicant is seeking refuge in illness and the current Covid-19 situation, to obtain leave to appeal. He says that she has been indolent, and was hopping from advocate to another. He states that the applicant's advocates had filed a notice of appeal and requested for proceedings and thereafter went to sleep. He argues that there was no proof that the proceedings were ever paid for, and that there was delay in the typing of the proceedings. He says that, according to the applicant's affidavit, the proceedings were supplied on 18th January 2019, yet the instant application was not filed until one and half years later. It is argued that the issue of illness is an afterthought, since the document to support it was not signed, did not have an inpatient or outpatient number and was, therefore, not an authentic document. He avers that the applicant had filed an application for leave to file appeal out of time, at the Court of Appeal, in Kisumu CA Misc. Application No. 101 of 2019, which application was still pending. He avers that the application in Kisumu CA Miscellaneous Application No. 101 of 2019 did not refer to illness, but blamed advocates for delay in moving the court. He further avers that the Covid-19 situation is so recent that it cannot be a basis for grant of the leave sought. He avers further that the allegation that N. Maragoli/Kisatiru/1861 was being sold was not supported by any evidence. It is averred that the inhibition sought can only be issued by the Environment and Land Court.

5. He has attached to his affidavit a ruling that Mwita J. delivered on 15th November 2016, declining to revoke the grant herein. He has also

attached a copy of the ruling by Njagi J., delivered on 22nd November 2018, which sparked this application. A certificate of official search in respect of N. Maragoli/Kisatiru/1861, is also attached, as proof that the said property is registered in the name of Ezina Alivitsa Agufa, since 16th February 2012. A copy of the Motion, dated 18th July 2019, in Kisumu CA Civil Application No. 101 of 2019 is attached as proof that there is a pending application at the Court of Appeal seeking similar orders, but founded on reasons different from those advanced in the instant application.

6. In response to that reply, the applicant swore an affidavit, on 12th August 2020. She reiterates that the prayers in her application, dated 9th February 2017, the subject of the impugned ruling, had been misconstrued by the administrator, since she had never sought the swapping of titles, but for correction of names, in respect of errors made by the administrator. She asserts that her appeal raises substantial questions of law. She argues that the administrator had not been discharged, since he had created a mess by hatching a plan to have her evicted from her portion of the estate. She avers that the administrator, being her brother-in-law, must be aware that she has been ailing for a while, battling diabetes. On Covid-19, she avers that the same was a matter that the court could take judicial notice of. On the Kisumu matter, she states that she withdrew the application in Kisumu CA Civil Application No. 101 of 2019.

7. Directions were taken on 14th July 2020, that the application dated 6th July 2020, be disposed of by way of written submissions. Both sides have filed written submissions.

8. In her written submissions, the applicant cites the decision in *In re Estate of Cecilia Wanjiru Kibiche (Deceased)* [2018] eKLR, where the court stated the criteria for exercise of discretion to grant leave to appeal. The factors listed include period of delay, reason for delay, arguability of the appeal and the degree of prejudice which could be suffered by the respondent should extension be granted. On delay, the applicant concedes that the application is coming one year and eight months down the line. She cites her perennial medical condition, the process of obtaining certified typed proceedings, time spent prosecuting the application at the Court of Appeal at Kisumu and the onset of Covid-19 pandemic, as the reasons for the delay. She avers that the delay should be viewed against the prejudice that she is likely to suffer should she be denied the leave to appeal. She asserts to have an arguable appeal as demonstrated by her memorandum of appeal.

9. On his part, the administrator submits that the applicant has been hopping from one court to the next, from the Court of Appeal to the High Court. He cites the decision in *In re Estate of Chege Muikiria (Deceased)* [2020] eKLR, to make the point that a prolonged delay, like that of two years and three months in that case, was inordinate, to demonstrate what should be considered to determine whether a delay was inordinate or not. *Annah Mwihaki Wairuru vs. Hannah Wanja Wairuru* [2017] eKLR, was cited to demonstrate that even where there was an arguable appeal with chances of success, an applicant should not be allowed to abuse the principle of fair hearing. In that case 207 days were found to have been inordinate.

10. The record before me indicates that Njagi J. delivered the ruling of 22nd November 2018, in the presence of Ms. Ashitsa, for the applicant. Thereafter, the applicant, through the firm of Messrs. Shitsama & Company, Advocates, lodged a notice of appeal in court on 10th December 2018, of even date. Prior to that, she had lodged a request for proceedings, through a handwritten letter, on 30th November 2018, bearing an even date. She followed up the handwritten request with a typed one, dated 10th December 2018, and lodged in court on even date.

11. The principal order sought in the application dated 6th July 2020, is for leave to appeal. There are also secondary prayers.

12. From various decisions of the Court of Appeal, such as *Rhoda Wairimu Karanja vs. Mary Wangui Karanja & another* [2014] eKLR, it now well settled that since the provisions of the Law of Succession Act and the Probate and Administration Rules do not provide for an express automatic right of appeal, from decisions of the High Court, in succession matters, to the Court of Appeal, and since the Court of Appeal does have jurisdiction to entertain such appeals, it follows that such appeals lie at the Court of Appeal with leave of the High Court. Let it be pointed out, that *Rhoda Wairimu Karanja vs. Mary Wangui Karanja & another* (supra) is not about leave to appeal out of time, but rather leave to appeal a decision of the High Court, in succession matters at the Court of Appeal, since the Law of Succession Act, and the Rules made under it, do not provide for an express right of appeal from decisions of the High Court to the Court of Appeal. The applicant herein would be justified to apply for such leave in the circumstances.

13. I note, in this case, that leave to appeal is being sought way out of the time allowed in law, and the applicant has not sought, once leave to appeal is granted, extension of time to file the appeal. Grant of leave to appeal would be academic unless time is extended to file the appeal.

14. Let us assume for argument sake, that the applicant had obtained leave to appeal, and time ran out, and she is now seeking extension of time to appeal, what would be the criteria for the court to grant such extension. The decision cited, In *re Estate of Cecilia Wanjiru Kibiche (Deceased)*, is to the point with respect to what the court considers: the period of delay, the reason for the delay, the arguabIlity of the appeal and the degree of prejudice likely to be suffered by the other side.

15. According to Rule 75(2) of the Court of Appeal Rules, a notice of appeal should be lodged at the High Court, within fourteen days of date of the decision against which it is desired to appeal. The fourteen days would then be reckoned in terms of Rule 3 of the Court of Appeal Rules. Section 66 of the Civil Procedure Act, Cap 21, Laws of Kenya, provides for rights of appeal from decrees of the High Court to the Court of Appeal. However, the said Act does not have any provision on filing of notices of intention to file such appeals. The Civil Procedure Rules, which prescribes the procedures for civil proceedings, has a provision, at Order 42 rule 6(4), on notices of appeal, with respect to appeals to the Court of Appeal, which reads as follows:

> *"For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."*

16. It would appear that the applicant attempted to comply with Rule 75(1) of the Court of Appeal Rules, 2010, by lodging the envisaged notice of appeal herein on 10th December 2018. The fourteen days, when reckoned in accordance with Rule 3 of the Court of Appeal Rules,

expired on 6th December 2018. That meant that the notice of appeal filed on 10th December 2018 was lodged out of time. It cannot, therefore, be argued that the applicant had lodged an appeal at the Court of Appeal in terms of Order 42 rule 6(4) of the Civil Procedure Rules. In any event, the decision challenged, being that of a probate court, meant that leave of court to appeal was a prerequisite, and the filing of a notice of appeal in time would not have cured the applicant's predicament.

17. The applicant applied for certified copies of the proceedings in good time, on 30th November 2018, some eight days after the ruling was delivered. She cites delay in the provision of the certified typed proceedings, which she avers to have collected on 18th January 2019. Yet, she has not exhibited a certificate of delay from the court, to support the contention that there was a delay in obtaining the certified typed proceedings. Obtaining the certified proceedings in 18th January 2019, was still good time, and an application filed then would not have been adjudged inordinate. However, after getting the certified typed proceedings on 18th January 2019, the applicant did not take any action, in terms of seeking leave to appeal, until 7th July 2020.

18. She has sought to explain that the delay, between 18th January 2019 and 7th July 2020, was occasioned by her advocates who let her down, by failing to obtain certified typed proceedings. That does not sound convincing. She collected the proceedings herself on 18th January 2019, one would wonder why she did not move to court in January 2019, why wait till 7th July 2020. She explains that part of the problem was that she moved to the Court of Appeal directly, without first seeking leave from the High Court. That may be so, but it is still not a good reason for failing to do what the law has prescribed be done. It is still not a good explanation for the delay.

19. She has also said that she is ailing, and has produced a document to support her case. Looking at that document, I do not see any evidence that she had been hospitalized over the period between 18th January 2019 and 7th July 2020, so as to make it difficult for her to move the court appropriately. It is not clear whether the document emanated from a qualified medical practitioner. Moreover, the document is not even signed by the person who is alleged to have made it. I doubt whether a document of that nature should be given any credence. She also cited the onset of Covid-19 pandemic as her other reason for the delay. To me, this is more of an excuse than a reason. The Covid-19 pandemic only became an issue in Kenya as from March 2020, why did she not act between January 2019 and March 2020? Overall, I am not persuaded that the delay has been explained at all, both in terms of the length of one year and eight months, and the reasons for it.

20. On the chances of the appeal succeeding, I note that the ruling the subject of these proceedings emanated from an application for amendment of a certificate of confirmation of grant. The grant herein was confirmed on 28th February 2007, on the basis of a summons for confirmation of grant, dated 9th September 2005. The deceased had only one property, being N. Maragoli/Kisatiru/924. The said property, N. Maragoli/Kisatiru/924, was to be shared equally amongst six named individuals, that is to say the administrator herein, the applicant, and four others. N. Maragoli/Kisatiru/1861 and 1863, which were the subject of the application dated 9th February 2017 and the impugned ruling, did not exist then. The confirmation orders did not relate to them at all, and the two were not allocated, in those proceedings, to anyone. The two were the product of the confirmation process. There could possibly have been no basis to amend the certificate of confirmation of grant to introduce into it properties that did not exist as at the time the grant was being confirmed on 28th February 2007. I would, therefore, sympathize with the argument by the administrator, that there could be jurisdictional issues with regard to what the applicant was seeking from the court, through her application, dated 9th February 2017, since the titles the subject of her application, did not exist before the confirmation of the grant, and were created by the confirmation process itself, during transmission of the estate in keeping with the provisions of sections 60 to 63 of the Land Registration Act, No. 3 of 2012, and sections 49 to 54 of the Land Act, No. 6 of 2012. Transmission of property is not a succession issue; it is not governed by the Law of Succession Act. Indeed, the word "transmission'' does not appear at all in the Law of Succession Act, nor in the Probate and Administration Rules. It is process under land legislation, and, therefore, it is a land, as opposed to succession, issue. Any recourse, with regard to it, should not be sought at the probate court, but at the courts vested with jurisdiction to deal with land questions. The High Court has no jurisdiction over land questions, by dint of Articles 162(2) and 165(5) of the Constitution, and the Environment and Land Court Act, No. 19 of 2011, the Land Registration Act and the Land Act. In view of what I have said above, I am not persuaded that the applicant has any arguable appeal, if she were to be allowed to file one.

21. Would the administrator suffer prejudice if leave to appeal and extension of time to file appeal out of time was allowed? I believe so. The applicant does not have an arguable appeal, and grant of leave to appeal and extension of time to file appeal would have the administrator dragged to the appellate court to defend a worthless appeal. The documents on record indicate that the certificate of confirmation of grant was implemented, and N. Maragoli/Kisatiru/924 was subdivided, as per the confirmation orders. The applicant has no problem with the said confirmation orders. N. Maragoli/Kisatiru/1861 and 1863 are some of the resultant subdivisions from N. Maragoli/Kisatiru/924. N. Maragoli/Kisatiru/1861 was transmitted to the name of Ezina Alivitsa Agufa and N. Maragoli/Kisatiru/1863 to the name of the applicant. The administrator is not the registered proprietor of N. Maragoli/Kisatiru/1861. The proprietor of that property was not brought into the application dated 9th February 2017. That means that the administrator is being forced to litigate over property which does not belong to him, and which does not vest in him as administrator, since he has since discharged his duty as such, following the transmission of the property to the registered proprietor, Ezina Alivitsa Agufa. The applicant should, ideally, be litigating with Ezina Alivitsa Agufa, in a suit properly initiated at the Environment and Land Court. The dispute presented by the applicant is not a confirmation or succession issue, but a transmission or land issue, which ought to be between the two proprietors of the two parcels of land in question.

22. The applicant has argued that the trial court misunderstood her application, since she did not seek the swapping of the two properties, that is to say N. Maragoli/Kisatiru/1861 and 1863. Her argument is that N. Maragoli/Kisatiru/1861 was registered in the name of Ezina Alivitsa Agufa by error. I have closely perused her papers, with respect to the application dated 9th February 2017 and the instant application, and I have not come across anything that demonstrates any error with regard to registration of Ezina Alivitsa Agufa as proprietor of N. Maragoli/Kisatiru/1861, and if there was any error, then it had nothing to do with the probate process, since N. Maragoli/Kisatiru/1861 did not exist until after the grant was confirmed. N. Maragoli/Kisatiru/1861 was registered in the name of Ezina Alivitsa Agufa, during transmission, while N. Maragoli/Kisatiru/1863 was registered in the name of the applicant. In the confirmation orders, the court merely ordered equal distribution of N. Maragoli/Kisatiru/924, without indicating who was to get which of the resultant subdivisions, for the said subdivisions did not exist then, and were not before the court. I understand the applicant to say that N. Maragoli/Kisatiru/1861 should have been registered in her name, while N. Maragoli/Kisatiru/1863 should have been registered in the name of Ezina Alivitsa Agufa. Her application, dated 9th February 2017, sought to have an exchange, along those lines, effected through amendment of the certificate of confirmation of grant, which, ultimately, amounts to a swap of the two properties.

23. I believe that I have said enough to dispose of the application dated 6th July 2020. The prayer for leave to file appeal lacks merit, and it is hereby disallowed. The other prayers are secondary, and, with the disallowance of the primary prayer, they are no longer tenable, and they are hereby, accordingly, disallowed. The entire application is hereby dismissed. This being a family matter, I order that each party bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF October, 2020

W. MUSYOKA

JUDGE