



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1572 OF 2006**

**IN THE MATTER OF THE ESTATE OF S K W – (DECEASED)**

**AMK.....APPLICANT**

**AND**

**HNK.....1<sup>ST</sup> RESPONDENT**

**SMK.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased SMK died intestate on 18<sup>th</sup> May 2004. On 13<sup>th</sup> July 2006 the widow HNK (1<sup>st</sup> respondent) and son SMK (2<sup>nd</sup> respondent) petitioned this court for the grant of letters of administration intestate. The other children indicated were SNK and RWK. The grant was issued on 16<sup>th</sup> October 2006. The deceased's estate comprised LR No. Kakuzi/Kirimiri Block [particulars withheld]; Loc 3/[particulars withheld (matrimonial home)]; Loc. [particulars withheld]; Loc. [particulars withheld]; Plot No. [particulars withheld F.C.S. Ltd; Karura/Njiru/Kasarani/Plot No. [particulars withheld]; Ruiru/Mugutha Block [particulars withheld]; Ruiru/Mugutha Block [particulars withheld]; motor cycle Reg. No. [particulars withheld, and NSSF dues.
2. The grant was confirmed on 13<sup>th</sup> November 2007. The estate was ordered to be registered in the joint names of the respondents to hold in trust for the three children of the deceased.
3. On 31<sup>st</sup> March 2009 the applicant AMK filed an application to revoke the grant issued and confirmed to the respondents. Her case was that she was a widow to the deceased with whom she had four children, two of whom were alive. She stated that the information was well known to the respondents who had, however, fraudulently and without notice to her or her children petitioned and got a grant and obtained the property to her exclusion. She sought that this disinheritance be corrected by the grant being revoked.
4. The respondents opposed the petition. Their case was that the applicant was married to the deceased upto 31<sup>st</sup> December 1997 when she was caught in an affair with another man. That led to their separation and eventually she remarried another man. Her relationship with the deceased got them two children who had since died. The other two children did not belong to the deceased.
5. The application was heard orally by Justice M.W. Muigai who dismissed it on 24<sup>th</sup> October 2018. The court found that, although the applicant was at one time married to the deceased and they got two children (who had since died), she was kicked out of the marriage when she committed adultery. She had subsequently got into another marriage. The applicant had disputed this version of being kicked out of the marriage, or that she had remarried. Her case was that she was up to the death of the deceased his wife.
6. The applicant filed the present application dated 28<sup>th</sup> February 2019 seeking leave to file an appeal against the decision out of time. In the meantime, she sought the stay of execution of the matter. Her case was that following the close of the hearing of her application on 5<sup>th</sup> March 2018 the court indicated that judgment would be delivered on 27<sup>th</sup> April 2018. Come that day, the judgment was not delivered. The advocates were asked to keep checking. Her advocates checked severally, and wrote to the court three times asking for the judgment to be delivered. There was no response. It was only on 1<sup>st</sup> February 2019 that her advocates received a letter from the respondents' advocates informing them that the judgment had been delivered on 24<sup>th</sup> October 2018. They enclosed a copy of the judgment. Prior to this, she and her advocates had no notice of the judgement or its delivery. She stated that although the judgment indicated that her advocates were present at delivery, that was not true as they had no notice of the same. These facts, she said, explained her failure to file the appeal on time. Hence the application. She annexed a draft Memorandum of Appeal.

7. The respondent filed a response to oppose the application. Their case was that the intended appeal had no merits. They asked that the right of appeal on the part of the applicant should be weighed against the fact that they had a judgment which they were entitled to execute.

8. The averments of the applicant that the judgment was not delivered on due date and that when it was eventually delivered neither she nor her advocates were notified were not addressed by the replying affidavit. I find that the averments were not challenged. It follows that the applicant did not know that the judgment had been delivered, and therefore she could not have known that she had lost to be able to appeal on time, or at all.

9. The decision whether or not to extend time to appeal is essentially discretionary (**Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi Civil Application No. NAI. 255 of 1997**). The discretion can only be exercised to a deserving party. The court should consider the length of the delay; the party has to reasonably explain the delay; the application should have been brought without undue delay; the court has to consider whether any prejudice will be suffered by the respondents if extension is granted; and whether such prejudice cannot be compensated by the payment of costs. All the time, the court has to consider the substantial justice of the case in question.

10. I have found that the applicant was unaware of the decision and therefore could not appeal. Secondly, immediately she became aware of the decision she brought the instant application. I consequently allow her application for extension of time to appeal. I allow her 14 days to file and serve the appeal.

11. As for stay of execution, the judgment dismissed her application to revoke the grant. It was a negative result that cannot be executed, save for execution for costs.

12. Nevertheless, under **section 47** of the **Law of Succession Act (Cap 160)** and **rule 73** of the **Probate and Administration Rules**, I direct that the certificate of confirmation issued herein shall not be executed for 90 days to allow the applicant to move the Court of Appeal for appropriate orders of stay.

13. Given the facts of the case, I ask that each side should bear own costs on the application.

**DATED and DELIVERED electronically at NAIROBI this 27<sup>TH</sup> OCTOBER 2020**

**A.O. MUCHELULE**

**JUDGE**