



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 236 OF 2014

IN THE MATTER OF THE ESTATE OF JAPHET KIRUKI M'MBUI – DECEASED

CHARLES MUKUNU KIRUKI.....PETITIONER/APPLICANT

VERSUS

CELINA NAYI KIRUKI.....RESPONDENT

RULING

1. Before me is summons dated 3/7/2020 expressed to be brought under Article 25, 48 and 159 of the Constitution of Kenya, 2010, rules 49 and 73 of the Probate and Administration Rules, section 47 of the Law of Succession Act, and section 7 of the Appellate Jurisdiction Act. The application seeks inter alia:

- a) Leave to file appeal out of time; and**
- b) Stay of execution of decree pending appeal.**

2. The application is premised upon grounds set out in the application and the supporting affidavit and the submissions filed herein. The major arguments include:

- a) That the judgment herein was delivered on 28/5/2020; the applicant only learnt of it on 24/6/2020;*
- b) That he is aggrieved by the said Judgment and intends to prefer an appeal as the court ordered inequitable distribution of the estate which favoured the Respondent.*
- c) That leave to appeal in Succession Cause is necessary.*
- d) That he will suffer substantial loss unless stay is granted as the estate will be distributed and properties transferred before the appeal is heard. Thus, his appeal will be rendered nugatory.*
- e) No prejudice will be suffered by the other beneficiaries.*
- f) That it is in the interest of justice that the application is granted.*

3. The Respondent filed a replying affidavit in opposition to the application. His main arguments are: 1) that judgment herein was transmitted to emails provided by counsels; the manner of delivery of judgment designed due to the COVID-19 situation. 2) That siblings of the applicant got more than Catherine Kawira, Ann Mwai and the Respondent. Notably, the Respondent is the spouse of the deceased. 3) That the applicant has not shown any serious point of complaint 4) That he is merely trying to harass her and deny her right in the estate in her advanced age. 5) That the application as drafted is incompetent as no appeal has been filed; and 6) That she never called the applicant as is alleged. She urged the court to dismiss the application.

Submissions

4. The applicant reiterated the averments in the application and the supporting affidavit. He however cited the case of Nicholas Kiptoo Arap Korir vs IEBC (2014) eKLR in support of his request for leave to file appeal out of time. Based on the said decision he was of the view that, since this application was filed on 3/7/2020 which is about 17 days from the last day for filing of Notice of appeal, the delay is not inordinate. He also argued that he was not aware of the judgment and therefore not expected to have acted as required. He took the view that he should not be made to bear an onerous task of proving the negative. The Respondent should have provided proof of delivery of the judgment by providing at least proof of transmission of the judgment to his counsel's email address. He cited the Supreme Court of Uganda

in **J. K. Patel vs Spear Motors Ltd SCCA No. 4 of 1991** where it was held that:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant.”

He also cited the case of **Sheikh Ali Senyonga & 7 others vs Sheikh Hussein Rajab and 6 others SCCA No. 9 of 1990** on proof of a negative.

5. In sum, the applicant could not see any prejudice being suffered by the Respondent if the application is allowed for the Respondent will have right to be heard in the appeal. According to him, refusal of leave to appeal is tantamount to denying him the right of access to justice, yet, he has an arguable appeal. He cited **John Mwita Murimi & Another (2019) eKLR and Re Estate of Mbiyu Koinange (2015) eKLR**. He also prayed for stay of extension on the basis of the decision in the case of **Hannah Ngina & 2 others vs Francis Kamen Theiru (2014) eKLR**.

6. The Respondent augmented her standpoint in the submission and emphasized that cases do not belong to counsels but to litigants who must be diligent to find out the status of their cases in court. The applicant is aware that this is COVID-19 era and ought to have known the special rules of procedure in court. She cites the case of **Pyramid Hauliers Ltd vs. James Omingo & 3 others (2019) eKLR** to demonstrate the practice by courts of not heaping blame on legal counsel especially where the client has not shown the steps he took to progress his matter.

7. According to the Respondent, the period of delay, reasons for the delay, the potency of the appeal, the degree of prejudice to the Respondent, importance of compliance and effect on the administration of justice are essential consideration in determining whether to grant leave to appeal. To her, the applicant was aware of the judgment except he chose to mislead the court. His appeal is not arguable.

ANALYSIS AND DETERMINATION

[8] I should determine whether to grant leave to file appeal albeit out of time. Some commentators argue that the requirement of leave before filing an appeal in the Law of Succession Act should be seen as existing law as at the time of promulgation of the Constitution. As such, it ought to be read with such alterations, adaptations, qualifications and exceptions as to bring it into conformity with the Constitution. See section 7 of the *Sixth Schedule [Article 262.] Transitional and Consequential Provisions* which provides as follows:

7. Existing laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution

[9] On that basis, the proponent of this school of thought argue that the Constitution provides for unfettered right of appeal. Therefore, the aggrieved party in a succession cause should exercise unfettered right of appeal. This argument is not a trifle and should be given much more thought. I am however, aware of the decision of the Court of Appeal in the case of **John Mwita (supra)** that leave is required in succession causes in order to file an appeal from a decision of the High Court exercising original jurisdiction in a succession cause.

[10] Be that as it may, of value now is to determine whether the delay herein is inordinate? The judgment herein was delivered on 28th of May 2020 and the application for leave was filed on 3rd July 2020. There was a delay of about 35 days. The applicant claims that he was not aware of the judgment and that he tried to get information thereof from his counsels in vain; according to him his counsels abused him and handed phone on him. These claims are unsubstantiated as it was in public domain that courts were operating through technology based applications due to COVID-19 pandemic. Nonetheless, I do not think the delay herein was contumelious or inordinate as to be inexcusable. Accordingly, I grant them leave to file notice of appeal within 7 days of today.

Stay of execution

[13] The applicant stated that once the estate is distributed to the beneficiaries, it becomes unavailable for further claims like his. The respondent has argued that the applicant already has some land given to him as gift *inter vivos* and is merely trying to deny her benefit in the estate especially in her twilight years in old age. Not that I do not appreciate the concerns by the respondent who is the widow of the deceased. But, I am impelled also to prevent substantial loss from occurring upon the applicant should his appeal succeed, yet, the estate is distributed. In balancing these interests, I will issue orders which do not exacerbate her situation or blow away the respondent's right of appeal. She is the widow of the deceased and should eke livelihood from the estate. I am happy to note that the applicant claims that stay of execution should and will not prejudice the respondents. Accordingly, I will order stay of execution my judgment except the orders in respect of tea on the estate property and receipt of proceed of sale thereof from KTDA, and occupation of the estate property. For the avoidance of doubt, Celina Nyai will continue to live in her matrimonial home and continue to receive all proceeds of all tea plucked from the estate and sold to KTDA for her upkeep and payment of estate debts stated in the judgment.

Dated, signed and delivered at Narok through Teams Application this 23rd day of November 2020

F. GIKONYO

JUDGE