

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.168 OF 2013

EMMANUEL LEKAKENY KAYO.....PETITIONER/RESPONDENT

VERSUS

NENKOKO NONKIPA KETERE.....APPLICANT

RULING

1. By a chamber summons dated the 3/7/2020 the Petitioner/Applicant is seeking leave to appeal to the Court of Appeal pursuant to section 50(2) of the LSA Cap160 against the Ruling dated 25/6/2020.
2. In his grounds the applicant avers that he was not granted a leave to appeal in terms of section 50(2) of the LSA and that is mandatory he seeks leave of this court to appeal and that it is in the interest of justice that the application be allowed. The said grounds are what is averred on the applicant's supporting affidavit filed on the 10/7/2020.
3. The application was opposed Nenkoko Keteere filed an affidavit dated 17/8/2020. I have considered its contents. She opposes the application on ground that the applicant's lawyer present when the Ruling was read and should have sought leave to appeal orally as the applicant lawyer was quite aware of the period within which to file their appeal. Whatever even if leave is granted the time to lodge the appeal has lapsed hence the orders would be in vain.
4. That it took the applicant 45 days to seek the said leave, that the period of 45 days has not been explained. That the intended appeal has no chances of success and that the instant application was brought under the wrong provisions of law, that the provisions cited are not contained and/or provided for under the Probate and administration rules and therefore it should be struck out with costs. That the application has been brought to disentitle her from the fruits of the Ruling.
5. Counsel canvassed the application by way of oral submissions. I have considered the affidavits filed and the oral submissions. Counsel for the applicant claims that they had no instructions to appeal and that the applicant seeks to challenge the court's Ruling.
6. A party has a right to appeal from a decision of the court. The Ruling that is to be challenged was delivered on the 25/6/2020. The instant application was filed on the 3/7/2020 about 3 days from the 25/6/2020. The delay was not 45 days. The delay was not inordinate. The practice in matters filed under LSA is that leave to appeal should be sought at the time the decision is made. No such leave was sought, should I therefore deny the applicant a chance to appeal on the basis of his counsels failure to seek leave. Justice requires that a party should be allowed to move to the appellate court if he/she is dissatisfied.
7. I therefore grant the applicant leave to appeal against decision dated 25/6/2020 on having powers of the law. I will not penalize the applicant for citing the wrong provisions of the law, the applicant seeks to rely on Article 159 (2) (b) I agree with his counsel's submissions that it would be in the interest of justice to allow the applicant to move to the Court of Appeal. Applicant to file appeal within 30 days. No order as to costs.

Dated, signed and delivered at KISII this 15th day of December, 2020.

R.E. OUGO

JUDGE

In the presence of;

Mr. Ochwangi For the Respondent

Applicant Absent

Ms Rael Court Assistant