



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 21 OF 2018

SAMWEL OTIENO OLOLO.....APPELLANT

VS

LILY KAVUMBI.....RESPONDENT

AND

IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH OLOLO SEWE (DECEASED)

(Appeal arising from the Ruling delivered on 6th June 2018 by Hon T.M.Olando SRM Siaya Principal Magistrate's Court in Siaya PM Succession Cause No 55 of 2015)

JUDGMENT

1. This appeal arises from the Ruling of Hon T.M.Olando SRM Siaya Principal Magistrate's Court in Siaya PM Succession Cause No 55 of 2015. The Ruling was delivered on 6th June 2018 revoking the grant issued to the appellant herein as well as the Certificate of Confirmation of grant issued to him by the lower Court.
2. What strikes this court is that the ruling which is being challenged was made on 6th June 2018 allowing the summons for revocation of the grant. On the other hand, the appeal was filed on 9th August 2018 which was over 2 months after the ruling.
3. The ruling and proceedings were very brief. However, the appellant herein applied for copies of the Replying affidavit and application for revocation of grant on 25th July 2018 stating that he needed the same for appeal purposes. Earlier on 18th June 2018 he had paid Kshs 150/= being certification charges for the proceedings and ruling which were duly certified together.
4. The question is why was the appeal filed after two months and what effect does that have on the appeal herein which was argued quite vigorously.
5. Section 40 of the Law of Succession Act Cap 160 Laws of Kenya stipulates that an appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.
6. The Law of Succession Act does not stipulate the period within which an appeal from the Resident Magistrate's court shall lie to the High Court.
7. Therefore, Rule 63 of the Probate and Administration Rules made under Cap 160 Laws of Kenya comes into play. The Rule stipulates that:

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure Rules)-

(1) save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely, Orders 5,10,11,15,18,25,44 and 49(Cap 21 Sub Leg.) shall apply so far as relevant to proceedings under these rules...

8. Order 49 of the old Civil Procedure Rules cited in Rule 63 of the Probate and Administration Rules is now Order 50 of the 2010 Civil Procedure Rules and it concerns computation of time. Therefore albeit the Probate and Administration Rules and section 40 of the Law of Succession Act do not provide the time within which an appeal shall be filed to the High Court, in my humble view, legislation could not have been enacted to give the right of appeal without stipulating the time within which such an appeal could be filed and therefore the provisions of section 79G of the Civil Procedure Act comes into operation to fill the lacunae.

9. Under section 79G of the Civil Procedure Act, appeals from the subordinate courts to the High Court shall be filed within 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. There is then the proviso to the said section that allows an appeal to be admitted out of time with leave of court and on application by the party appealing, providing sufficient cause for not filing the appeal in time.

10. Regrettably, this court observes that this appeal was lodged after 60 days of the date of the impugned Ruling.

11. In my humble view, the appeal was filed out of time without leave of court and by computation of time this was 2 months after the ruling by Hon T.M. Olando SRM. No leave was sought by the appellant to enlarge time within which the appeal should have been filed. Accordingly, this court has no jurisdiction to hear and determine the appeal herein as it is fatally incompetent. Filing of an appeal out of time without leave of court to extend such time is not a mere procedural technicality contemplated in Article 159 of the Constitution and neither can such a party invoke Article 48 of the Constitution on access to justice.

12. Alluding to an appeal filed out of time, the Court of Appeal in **Gichuki Kingara &co Advocates vs Al Jala Enterprises Ltd &oth2 Civil Appl No. NAI 211 of 2012 (UR)** stated:

“the applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time bound provision. The Rule is mandatory and an application brought outside the thirty days period properly qualifies to be seen as an afterthought.”

13. In the instant case, albeit the appeal was filed out of time, the same could have been cured by the proviso to section 79G of the Civil Procedure Act by applying to enlarge time and to have the appeal which was filed out of time validated. There was no such application made to this court or order cited enlarging time for filing of the appeal herein. On the above ground alone, this court is entitled to strike out the appeal herein as being incompetent, a non-starter and an afterthought.

14. Accordingly, I would not belabor delving into the merits and or demerits of this appeal which was filed out of time without leave of the court to validate the appeal. In the end, this appeal is hereby ordered struck out with no order as to costs as the respondent did not raise the issue of competence of the appeal. Nonetheless, the court is deemed to know the law and the fact that a party has not raised such a serious issue which touches on jurisdiction of the court does not deprive the court of jurisdiction to determine such issue on its own motion.

15. ***This appeal is hereby struck out with no orders as to costs.***

Orders accordingly

Dated, Signed and Delivered in open Court at Siaya this 23rd Day of January, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Ochieng Nyamogo Advocate for the Appellant

N/A for Respondent

CA: Brenda