



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
SUCCESSION CAUSE NO. 458 B OF 2003
IN THE MATTER OF ESTATE OF MUNIU MUCHAI (DECEASED)

RULING

1. The application before court is dated 11th December 2018 and seeks for two orders; extension of orders for leave to appeal and stay, both had been granted on 5th May 2017.
2. The application is predicated on grounds that appeals from this Court to Court of Appeal lie with leave of the court and such leave when granted is only exercised once proceedings giving rise to the judgment being appealed from are received.
3. In the supporting affidavit the applicant reiterates the grounds in support of the application and in addition states that one Nixon Muhaha a clerk in his lawyer's firm did obtain a copy of the typed proceedings from the judge's secretary.
4. Further he states that he is still desirous of exercising his constitutional right of appeal.
5. The application is opposed by way of a replying affidavit by the Respondent Hannah Njoki Muchai dated 14th January 2019.
6. In the reply the 2nd Respondent decries delays caused by the applicant which has interfered with complete distribution of the estate though the court made a determination concluding distribution of the remaining assets in a judgment delivered by this court on 27th July 2016.
7. Further she states that upon an application seeking leave to lodge an appeal against the said judgment an order of stay of execution and leave to appeal were granted on condition on 7th of May, 2017, which conditions have not been met.
8. The 2nd Respondent also contends that the orders sought to be extended cannot be extended as they lapsed on 3rd of November 2017; further that the application is an afterthought and was only filed when the 2nd Respondent filed an application dated 27th November 2018 seeking for confirmation of the grant.
9. Further the 2nd Respondent contends that the court ought to balance interest and rights of both parties in exercising discretion.
10. No doubt Articles 48 and 50 of the Constitution 2010 underscores right of access to justice and to fair hearing for each person, so that the courts have held many a time that litigants should not be denied the avenue to ventilate their cases and within reasonable time. I believe that it is with the above in mind that the court granted leave to the applicant to appeal within 45 days and stay of execution for the same period.
11. Having stated the above, it is worth considering that every right has a corresponding obligation and both side in a dispute have rights, including the right of a successful litigant to enjoy fruits of a judgment, which rights

the court has to balance in exercising its authority and discretion; all are equal before the law;

12. In determining the matter I will briefly consider the history of this case. The deceased herein Muniu Muchai died on the 12th of April 1999 (precisely 20 years ago today).

13. He left behind 2 widows and 9 children. This court was petitioned for a grant of representation on 3rd of March 2003 by some beneficiaries. Another petition for grant of probate with a will was filed by John Muniu on 22nd April 2003. Later, as a compromise, administrators were appointed, and based on the two existing Wills the parties agreed to partial distribution and further distribution of two items that were in dispute i.e. Thika Barclays Bank account No. 3812588 and land Parcel No. Block/11/654 Thika Municipality be determined by court.

14. The hearing to determine distribution of the remainder of the estate commenced on 24th of January 2011 before Kimaru J, hearing stopped, in the meantime applications were filed and heard by several other judges until the 7th of October 2013 when hearing resumed before Musyoka J who delivered his judgment on the 27th of May 2016.

15. Thereafter an application dated 10th June 2016 was filed seeking for leave to appeal against the judgment and stay of execution.

16. In its ruling of 3rd May 2017, the court granted the prayers sought for a period of 6 months from the date of the ruling; 5th May 2017 meaning that the same would lapse by 5th of November, 2017 if the appeal will not have been lodged.

17. For now, issues for consideration herein are:

i. Whether there are orders in place, i.e. for leave to appeal, and stay of execution?

ii. If so whether the court ought to extend the same in the circumstance of this case?

18. In **Shah vs Mbogo & Another (1907) E.A.** the court stated

inter alia:

“The exercise of discretion is intended so as to be exercised to avoid an injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

In **Bagayo vs Christian Children Finding (2004) 2 KLR 73** Ringera J (as he then was) stated:

“In exercising discretion, the court’s primary concern should be to do justice to the parties.”

The judge went ahead to consider the following:

- a. The length of the delay in lodging the notice and record of Appeal.
- b. Where applicable, the delay in lodging the application and extension of time as well as the explanation thereof.
- c. Whether or not intended appeal is arguable.
- d. The likely prejudice to the Respondent.
- e. ..
- f. Generally, the requirements of the interest of justice
- g. And for the person seeking for favorable exercise of discretion to place such material as well as adequate information.

19. From the facts of the case the herein orders being sought to be extended lapsed 1½ years ago. Secondly even if the orders exist the extension is being sought inordinately late; 1½ years later.

20. I do agree with the respondent's counsel that for now there exists no order available for extension as the same lapsed. Further the explanation given for the delay in seeking the same cannot hold, if indeed the delay in filing the record was due to delayed proceeding by court the Deputy Registrar ought to have given a certificate of delay and indeed certified the proceedings.

21. The application in my view is an afterthought and is also prejudicial to other beneficiaries of the estate and against the interest of justice. The applicant has been indolent, coupled with the fact that he has failed to comply with other existing orders and he is not worthy of this court's discretion.

22. Application declined. Costs to the respondents in any event.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF MARCH 2019.

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ALI-ARONI

JUDGE

In the presence of:

.....Advocates for Applicants

..... Advocates for Respondent