



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 398 OF 2015**

**(FORMERLY MERU SUCCESSION CAUSE NO. 275 OF 2014)**

**IN THE MATTER OF THE ESTATE OF ERASTUS MURIUNGI NGARUTHI (DECEASED)**

**RULING**

1. JANET MWARI ERASTUS MURIUNGI vide motion dated 18<sup>th</sup> August 2015 sought for this court's leave to appeal and at the same time sought for extension of time to file an appeal against the decision in this cause delivered by Honourable Justice Makau on 23<sup>rd</sup> April 2015. The applicant has moved this court under **Section 7** of the Appellate Jurisdiction Act.

2. The grounds for the motion as listed on the face of the said application are as follows namely:-

*a) That the court when delivering judgment did not supply parties and their counsels copies of the judgment.*

*b) That the judgment contains fundamental errors of fact law and procedure which has occasioned great failure of justice to the applicant herein.*

*c) In her Supporting Affidavit sworn on 17<sup>th</sup> August, 2015 the applicant has deposed that she is the widow to the deceased and was the original petitioner for letters of administration in Chuka Principal Magistrate's Court Succession Cause No.79 of 2011. She has expressed her dissatisfaction with the decision of this court sitting in Meru on the application dated 3<sup>rd</sup> June 2014 or which she faulted for seeking prayers for transfer, inhibition and revocation in the same application in her view, the court in determining the said application never considered all important facts in the matter and never gave proper directions.*

4. The applicant through learned counsel argued before me that inhibition as a remedy was not available to the respondents in a probate and administration cause and that this court ought not to have granted it. He also faulted the court for transfer of this cause from Meru High court to this court contending that the transfer was against the dictates of the law given that the property comprising the estate is situated in Meru County which is outside geographical and administrative jurisdiction of this court. Mr Kioga also contended that an application for revocation of grant cannot be done through a miscellaneous cause and that on that basis the applicant should be granted leave to appeal against the said decision. He reiterated the fact that the said decision was delivered in his absence and without notice.

5. Gerald Kinoti Ngaruthi and Francis Riungu Ngaruthi the respondents herein have opposed this application through a Replying Affidavit sworn by Gerald Kinoti Ngaruthi on 10<sup>th</sup> September, 2015.

6. The respondents contends that this application is aimed at delaying this cause. They have contested the applicant's contention that the judgment delivered on 23<sup>rd</sup> April 2015 was delivered their absence deposing that the applicant was duly represented when the decision was made and further that copies of judgment was readily given to counsels after the delivery of the said judgment. They have faulted the applicant's counsel for not doing a follow up to obtain a copy of the judgment like their counsel reportedly did.

7. The respondents also contend that the applicant did not need a copy of the judgment to lodge an appeal and have accused her for indolence. The respondents have argued that appeal lies to the Court of Appeal from a decision from this court with leave and in their view that leave must either be sought at informally at the time the decision is delivered or formally within 14 days after delivery of the said decision. They have cited **Rule 39 (a)** of the Court of Appeal Rules to buttress their view and faulted this application because it was filed on 19<sup>th</sup> August, 2015 which was approximately four months late and have urged this court not to allow it on that ground.

8. The respondents have contended that leave to appeal and extension of time is a discretionary leave which can only be granted for sufficient reason. In their view the applicant have not advanced any and have pointed out the fact that no letter requesting for typed copy of judgment has been exhibited in the application to justify the reason that she was waiting to be supplied with the copy of typed judgment to take the next step.

9. The applicant has also been faulted for not demonstrating that she has an arguable appeal and contested the reason advanced that this

court lacked powers to issue inhibitory orders. The respondent have submitted that this court has powers under **Section 47 of Law of Succession Act** to issue preservative orders on an estate of deceased persons. They have further submitted that contrary to the applicant's assertion, they had sought for inhibition in their application and that the court was acting within its power to grant it.

10. The respondents have also responded to the applicant on the question of transfer of this cause from Chuka Subordinate Court to Meru High Court then back to this court. In their view this has power to transfer a matter from one jurisdiction to another concurrent jurisdiction and they have further contended that the issue of transfer was substantively dealt through a ruling delivered by this court on 1<sup>st</sup> September, 2016 and a further ruling on 20<sup>th</sup> July 2017. The respondents have cited the decision in **RE ESTATE OF RONALD AUSTING WHITTIGHAM (DCD) [2015] eKLR** in urging this court to find that the applicant have not met the threshold to be granted leave to appeal against the decision of this court sitting in Meru.

11. This court has considered this application and the grounds raised by the applicant. I have also considered the opposition made and submissions by both counsels. This application presents basically two issues of determination namely:-

(i) Whether the applicant has raised sufficient reasons to be granted leave to appeal and

(ii) Whether leave for extension of time pursuant to Rule 39(a) of the Court of Appeal Rule apply in this court.

12. I will begin with the first issue for determination. The applicant's main ground in this application is that the judgment delivered by honourable **Justice J. A Makau** was delivered in her absence and that of her lawyer and that the said decision contains fundamental errors of fact law and procedure so much that it has occasioned great failure of justice to the applicant herein. This court find these claims serious enough to warrant more interrogation and I took my time at the hearing of this application to try and really understand these fundamental errors were and how it had occasioned great injustice to the applicant. The applicant's learned counsel who is fairly senior in his practice and age was clearly at pains to explain his client's case. In the first place he stated that the judgment was delivered in his absence and without notice but the record shows that he was duly represented as one Kaimenyi held his brief on 23<sup>rd</sup> April 2015 when the decision was delivered by honourable **Justice J.A Makau**. Furthermore assuming that the advocate holding brief somehow inadvertently forgot to brief him about the outcome (which sometimes happens) living him in darkness about the decision until much later there was nothing easier than to ask the said advocate to swear an affidavit affirming such misfortune. The applicant's counsel did not deny giving instructions to said Kaimenyi to hold his brief when the said decision was delivered and could not give answers to the question posed by this court as to why no such affidavit had been sworn and filed.

13. Secondly the first respondent in his Replying Affidavit deposed that the said decision was delivered with the full knowledge of the applicant who was duly represented and that a copy of the typed judgment was issued after the delivery of the same. The applicant has not contested this fact in the Replying Affidavit neither has she contested the fact that she has been indolent in this application. This application was filed on 19<sup>th</sup> August, 2015 and a certificate of urgency on the said application was placed on the file on 10<sup>th</sup> September 2015 but it took intervention of this court two years later for the applicant to canvass her application. The reasons given that somehow the application went missing from the file is not supported by facts because all along this application has been on the record with the applicant's counsel not taking necessary steps to prosecute it. The reasons given by the applicant for not asking for leave to appear on time does not hold any water whichever way one looks at this application. The decision was delivered in the presence of an advocate holding brief for applicant's counsel. The record shows that its date for the said decision (23<sup>rd</sup> April, 2015) was given in open court on 9<sup>th</sup> March 2015 in presence of both counsels after the court had heard all the parties on the application dated 3<sup>rd</sup> June 2014. The reason that the ruling was delivered without notice is contrary to what is captured in the record of proceedings in this file. The applicant's counsel was fully aware of the date of the ruling that complains perhaps why he sent one Mr. Kaimenyi to hold his brief which he did. The other issue which the applicant may have inadvertently overlooked is the fact that one really does not need a typed copy of a ruling or a judgment to either file a notice of appeal or apply for leave to appeal. When a party is aggrieved by a decision of this court all he requires is the date of that decision. After launching the notice of appeal or application for leave to appeal, where the rules prescribe for such leave a party would then chase for typed and certified copy of proceedings and the decision for purposes preparing the record and filing it in the Court of Appeal.

14. The applicant's other grievance is that the application dated 3<sup>rd</sup> June 2014 the subject of the ruling by honourable **Justice Makau** was vide miscellaneous application rather than the succession cause and that the application sought for a number of prayers including inhibition and revocation of grant. I have looked at the proceedings in this file and particularly the grounds of objections dated 8<sup>th</sup> September, 2014 filed by the applicant herein. The applicant raised procedural issues which were dealt with by honourable Justice Makau in his ruling. I am unable by law to make comments on a decision made by another court with concurrent jurisdiction but I am at the same time unable to comprehend how those procedural issues could have caused or occasioned the applicant such great injustice to warrant this court exercising its discretion in granting leave to appeal particularly going by the dictates of **Article 159 (d)** of the constitution.

15. I am also not persuaded that this court cannot issue inhibition as a remedy in probate and administration matters. **Section 47** of the **Law of Succession Act** (Cap 160 Laws of Kenya) provides as follows:-

***"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient."***

In any considered view, this court has powers in probate and administration matters to issue any preservative order including inhibition where it is necessary for the ends of justice. Furthermore looking at the inherent powers of this court under **Rule 73** Probate and Administration rules this court's powers cannot be limited or affected when making such orders as may be necessary to meet the ends of justice and prevent abuse of the process of the court such as a party disposing off the estate or part thereof to render any eventual decision nugatory. So inhibition as a remedy is and was available to the respondents and contrary to the applicant's assertion the same was one of the prayers (prayer 2) in their application dated 3<sup>rd</sup> June 2014.

16. On the grievance about the transfer of this cause from Meru High Court to this court, the position of this court is that the issue was

substantively canvassed before this court and court rendered decisions both vide a ruling dated and delivered on 1<sup>st</sup> September, 2016 and my ruling dated and delivered on 20<sup>th</sup> July, 2017. There is already a notice of appeal dated 8<sup>th</sup> September, 2016 filed in this court and therefore the applicant has a chance to ventilate her grievances at the Court Appeal regarding transfer of this cause from Meru to this court. Granting leave to ventilate the same issue in the Court of Appeal in my view would serve any useful purpose other than protracting and causing further unnecessary delays in the conclusion of this matter.

17. On appointment of administrators of the estate in this case, the applicant contends that a court cannot appoint an administrator on its own motion but a look at the provisions of **Section 66 of Law of Succession Act** clearly shows that a court has a discretion in order of preference as provided under the law, on who to appoint or grant letters of administration in situation where a deceased dies intestate. A court can therefore on its own motion grant letters of administration to any deserving person. An aggrieved party can only apply revocation of such grant if he/she has good reasons or grounds provided under **Section 76 of the Law of Succession Act**. The applicant herein has not demonstrated or stated any prejudice suffered by the appointment of administrators in this cause. It is therefore presumptuous to find basis in this application as presented.

18. Going to the second issue for determination in this application, the respondents have contended that this application is bad in law because it was made out of time by virtue of **Rule 39 (a) of the Court of Appeal Rules**. The applicant contends that Court of Appeal Rules do not apply in this court. Provisions of **Rule 39 of the Court of Appeal Rules** provide as follows:-

*"Application for leave to appeal in civil matters -*

*where an appeal lies on certification by the superior court that the case is fit for such leave may be made informally at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within 14 days of such decision."*

This is the superior court referred to in the above rules which also provides that where such leave is refused, a party has a right to appeal to the Court of Appeal within 14 days of such refusal. **Section 7 of the Appellate Jurisdiction Act** grants this court powers to extend time for giving notice of appeal or for applying for leave to contention that court of appeal rules do not apply in this court is certainly not true as observed in the above express provisions both in the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and the subsidiary legislation as contained in the Court of Appeal Rules.

19. It is not in dispute that in probate matters appeals from this court to the Court of Appeal lies with leave. That is the basis upon which this application has been brought. The provisions of **Section 50 of the Law of Succession Act** suggest that while from the subordinate court and Kadhi's court lie with this court, an appeal from a decision of this court to the Court of Appeal only lie with leave. Such leave is discretionary as alluded by both counsels in this application which means that this court must be satisfied that the intended appeal involves serious questions of law or involves special circumstances. In this regard this court fully agrees with the holding in the cited decision in ***Re Estate of Ronald Austine Whittingham (deceased)* [2015]eKLR**. This court finds that the applicant has not met the threshold for this court to exercise its discretion in her favour. In the first place there is no demonstration by the applicant that she has serious grievances worthy to be canvassed in the Court of Appeal. Secondly and more importantly her application is way of time because it was supposed to be made 14 days after the decision sought to be appealed against was delivered. The decision was delivered on 23<sup>rd</sup> April 2015 and by computation of prescribed time the application for leave ought to have been filed by the 7<sup>th</sup> May 2015. This application was filed on 19<sup>th</sup> August, 2015 which was more than 3 months late and crucially the applicant did not seek for extension of time to apply for the requisite leave. She has sought only for extension of time to file notice of appeal. In my view the omission to seek for extension for prescribed time completed under **Rule 39 (a) of the Court of Appeal Rules** is fatal to this application as it renders it fatally defective.

20. It is true that under **Article 48** of the constitution a court should uphold a party's right to access justice including the Court of Appeal if that is the necessary forum to seek for the same but care must be exercised to forestall situations where a party can abuse such rights to delay or delay the very course of justice. In situations such as obtains in this cause where due to applicant's indolence, delay has been occasioned to the detriment of the ends of justice this court cannot exercise its discretion in granting orders that are likely to cause delays. I find no merit in doing so.

In the end this court for the reasons given finds no merit in the Notice of Motion dated 18<sup>th</sup> August, 2015. The same is liable to be dismissed. This court also finds that the said motion is fatally defective for being made out of time and without leave. It is liable to be struck out and since the said application can suffer only one fate the same is struck out. The costs shall be in the main cause.

**Dated and delivered at Chuka this 24<sup>th</sup> day of January, 2018.**

**R. K. LIMO**

**JUDGE**