



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 512 OF 2008

In the Matter of the Estate of Josphat Mutea M'Árithi (Deceased)

CECILIA KIAJIA MBAT 1ST APPLICANT

ANDREW RIUNGU 2ND APPLICANT

Versus

EVANGELINE TIRINDI JOSPHAT RESPONDENT

MAURICE BUNDI GITONGA INTERESTED PARTY

RULING

Power to extend time

[1] I have been asked, in a Notice of Motion dated 6th December 2017, to grant the Applicants leave to file notice of appeal out of time. Contra arguments have arisen that this court may or may not have the power to extend time. On the one hand, Mr. Kirimi urged that, section 7 of the Appellate Jurisdiction Act confers jurisdiction upon this court to grant leave to appeal out of time. Therefore, Nyamu's objection is misguided. On the other hand, Mr. Nyamu argued that this court has no jurisdiction to grant leave to appeal to the court of appeal; instead, it is the Court of Appeal which should grant the leave under rule 4 of the Court of Appeal Rules. He stated that the rules have been made by the Rules Committee pursuant to the power donated under section 5(1) of the Appellate Jurisdiction Act. He stated that this is not a procedural technicality to be dealt with under article 159 of the Constitution. He also attacked the notice filed herein without leave; he termed it an act in futility. In any case, he argued, the applicants ignored all previous notices to attend court. as such, they are indolent suitors who should not be given any further opportunity.

DETERMINATION

[2] This is yet another area of law where it seems a dichotomy in opinion could be existing. However, my legal guts takes me to what Githinji JA stated in the case of **KAA & ANO vs. TIMONTHY NDUI CA [2014] eKLR**.that:-

“The application....for extension of time to lodge appeal out of time, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal ...”

[3] I believe I am properly grounded on this postulation on section 7 of the Appellate Jurisdiction Act as it expressly donates the power to extend time of filing notice of appeal upon the High Court. Doubtless,

the power stems from a substantive statutory provision. Section 7 thereof provides as follows:-

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

Accordingly, this court has power to enlarge time for filing of notice of appeal.

[4] But, this being a succession cause, permission of the court to file appeal is required. What is the threshold therefore? See the decision of the Court of Appeal in the case of **Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja and Salome Njeri Karanja**, CA Civil App. NAI 69 of 2004 that:-

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes. So, what is our determination in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.”

[5] Reading from the above case, leave to appeal will normally be granted where, *prima facie*, it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. Without determining the prospects of the intended appeal, these questions matters are relevant. Isn’t the applicants claiming trust or beneficial ownership in the suit land? Could such claims be entertained in these proceedings where the grant has been duly confirmed? In the circumstances, shouldn’t the applicants file a separate suit in ELC to prove their claim of trust or beneficial ownership of the suit land? Shouldn’t this court only give effect to a judgment in favour of the Applicants by ELC on the claim of trust or beneficial ownership of the suit land? If they are holders of such judgment, the applicants will have unhindered entry into these proceedings. See what Musyoka J in the Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR stated that:

“...If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

[6] There could be doubt on the potency of any journey to the appellate court. Nonetheless, the eagle-eye of the Court of Appeal is needed in determining whether, in the circumstances of this case, there is any serious matter requiring serious judicial consideration by the said Court. Accordingly, albeit reluctantly, I grant the applicants leave to file notice of appeal in 30 days of today. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of February 2018

F. GIKONYO

JUDGE

In the presence of :

M/s. Nyamu advocate for Mr. Karimi for Applicant

M/s. Nyaga advocate for Respondents

F. GIKONYO

JUDGE