REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 20 OF 2017 (*FORMERLY*

***NAIROBI-FAMILY DIVISION SUCCESSION CAUSE NO. 452 OF 2012*)**

IN THE MATTER OF THE ESTATE OF MUTHONI MBUA (DECEASED)

JOHN MBUA MUTHONI

PETER WANGARURO NDICHU...APPLICANTS/ADMINISTRATORS

VERSUS

RUTH MUTHONI KARIUKI.....RESPONDENT

RULING

1. Before me are two Applications. One is dated 14/06/2017 brought by the Administrators to the estate of the Deceased – John Mbua Muthoni and Peter Wangaruro Ndichu (hereinafter "Administrators"). It seeks two substantive orders as follows:

> a. That the cautions registered against five titles namely Githunguri/Kiaria/971; Githunguri/Kiaria/723; Githunguri/Kiaria/T.47; Githunguri/Kiaria/T.35 and Githunguri/Kiaria/T.38 (hereinafter "Suit Properties") at the Kiambu Lands Office by the Respondent – Ruth Muthoni Kariuki (hereinafter, "Respondent").
>
> b. That the Respondent and "accomplices" (that is the word inappropriately used in the Application), Hannah W. Ndegwa be ordered to surrender the 5 original title deeds to the Administrator's advocates forthwith and in default, the Kiambu District Land Registrar be ordered to dispense with the production of the 5 original title deeds which are in the custody of "an uncooperative third party" for purposes of registering forms RL 19 and RL 7 and issuance of new title deeds per the Certificate of Grant issued on 13/02/2013.

2. The second Application is by the Respondent, Ruth Muthoni Kariuki. It is dated 01/08/2017. In the main, it seeks two orders:

> a. That the Court be pleased to "stay the execution/giving effect of the decision of the Honourable Mr. Justice W. Musyoka delivered on 20/01/2017 pending the hearing and determination of the intended appeal to the Court of Appeal."
>
> b. That time be enlarged for the Respondent to file her appeal out of time.

3. The brief facts of the case are as follows. The two Administrators filed for Letters of Administration on 06/03/2012. A grant of letters of administration intestate was made on 11/07/2013 and confirmed on 05/02/2013. A certificate of confirmation of grant was duly issued.

4. Subsequently, the Respondent took out Summons for Revocation of the Grant dated 21/06/2013. Her claim in the Summons for Revocation was that she is a niece of the Deceased and that the Deceased had been registered as the owner of at least some of the Suit Properties as a trustee for herself and her sisters including the Respondent's mother. The Respondent, then, brought the Summons for Revocation on behalf of her deceased's mother's estate.

5. After hearing the Application, in a ruling dated 20/01/2017, the Learned Justice W. Musyoka dismissed the Summons for Revocation finding no evidence on which to make a declaration of trust as the Respondent sought. The Learned Judge found no proof that the Suit Properties were held in trust.

6. Justice Musyoka then directed that the Cause be transferred to this Court since the entire estate comprises of assets situated within Kiambu County.

7. The Respondent is aggrieved by that decision by Justice Musyoka. However, she was late in filing the appeal hence the present Application.

8. The Application for extension of time is primarily predicated on section 7 of the Appellate Jurisdiction Act. It provides as follows:

> *S. 7: <u>Power of High Court to extend time</u>*
>
> *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.*

9. The Administrators do not contest that the Court has jurisdiction to extend time but they argue that the Court should not do so on merit. The Administrators argue that the Respondent is guilty of laches – having been aware that the Ruling was given on 20/01/2017 and having failed to do anything about it until 14/07/2017. Secondly, the Administrators argue that the intended appeal is entirely without any merit at all. In any event, the Administrators argue, the Appeal has been overtaken by events since the Respondent has now filed a matter at the Environment and Land Court over the same subject matter.

10. Both parties have gone into a lot of detail about the controversy in question. On my part, seeing as it is that I am not sitting either on review of the decision of Musyoka J. or on its appeal, my task is to simply correctly identify the correct standard to be applied in determining whether to exercise the discretion donated to this Court by section 7 of the Appellate Jurisdiction Act to extend the time required to file a Notice of Appeal.

11. Before I delve into that question I should point out that the Respondent did not seek leave of the Court to file the Appeal out of time in the first place. Although the issue has become contested post-2010, at least part of the jurisprudence from the Court of Appeal suggests that a party requires leave of the High Court to file an Appeal in the Court of Appeal in succession matters since the right of appeal is not automatically given in the statute. See, for example, ***Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja and Salome Njeri Karanja, CA Civil App. NAI 69 of 2004*** where it was held:

> *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.

12. For the contrary view, however, see, for example, ***Peter Wahome Kimotho vs. Josphine Mwinyeria Mwanu Civil Appeal No. 52 of 2011 at Nyeri***. On my part, taking cue from Article 159 of the Constitution to resist the temptation to fetishize form and technicality, I will comprehend the Respondent's Application herein as necessarily including a prayer for leave to appeal to the Court of Appeal if one is needed. As the Court of Appeal remarked in the ***Peter Wahome Kimotho Case***, there are significant doubts whether such leave is required anyway.

13. I will now turn to the test to be applied to determine whether to grant extension of time. The parties are in agreement about the factors that should be looked at. It is worth noting that the factors which the Court of Appeal looks at in exercising its discretion under Rule 4 of the Court of Appeal Rules are the self-same factors that this Court considers in entertaining an Application under section 7 of the Appellate Jurisdiction Act. The test is also the same one this Court applies in extending time to file an appeal from the subordinate Courts under section 79G of the Civil Procedure Act. The Court of Appeal in ***Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. NAI 332 OF 2004 (unreported)*** stated the test thus:

The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.

14. These are the same factors this Court considers in deciding the merits of Applications under section 7 of the Appellate Jurisdiction Act and section 79G of the Civil Procedure Act. Indeed, our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be exercised judicially and on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

15. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR***. They include the following:

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent is the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.

16. I will now consider the Applicants' application for extension of time against these factors. The Respondent has deponed that she was unaware of the Court's ruling of 20/01/2017 and first became aware of it when she was served with the Administrators' Application dated 14/06/2017. The ruling was attached to the affidavit in support of the Application. The Respondent does not contest that her advocate was in Court when the ruling was delivered but she insists that the advocate who was on record at the time (whom she has since replaced) did not inform her about the ruling.

17. The Administrators argue that a party must be taken to have notice of a judgment or ruling if their advocate was present. Further, they argue that the Respondent was guilty of further laches for not timeously filing her Application soon after learning of the ruling when she was served with the Administrators' Application on 19/06/2017 since she did not file her Application until 17/07/2017.

18. Looking at all the factors in totality, I am unable to agree with the Administrators that the delay in bringing the present Application by the Respondent is inordinate or that it is actuated by bad faith or that it is an afterthought. I say so for the following reasons.

19. First, it is not denied that the Respondent did not have actual notice of the ruling until 19/06/2017 when she was first served with the Administrators' Application. I do not find the time it took the Respondent to file the Application – 28 days – since she became aware of the ruling to be inordinate in any reasonable sense given the nature of the controversy.

20. Second, I am unable to say that the intended appeal is in-arguable, as I will briefly analyse below. Of course, as I state below, all the Applicants have to show at this stage its arguability – not high probability of success. Third, I am acutely aware that the underlying issue in this controversy is the emotive issue of land distribution out of succession. It is in this area where our decisional law is particularly sensitive in applying its policy preference to have matters determined on their merits whenever possible.

21. Fourth, the tardiness in perfecting the appeal in this case can squarely be placed at the doorstep of the Respondent's lawyer. As the Court of Appeal stated in ***Phillip Keipto Chemwolo & another V Augustine Kibende [1986] KLR 495*** where the Court stated that :

> *Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of having his case determined on its merits*.

22. Fifth, I am unable to see any substantial adverse effects granting this order will have on the Administrators other than permitting the Respondent to exercise a preciously cherished right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

23. Consequently, I will grant the Respondent Leave to Appeal against the ruling dated 20/01/2017 as well as Leave to file that Appeal out of time.

24. I will now turn to the Applicants' prayer for a stay of execution.

25. The Respondent has strenuously argued that if a stay is not granted, then her intended appeal will be rendered nugatory. She has also endeavoured to demonstrate that she has met the other three requirements for the grant of stay namely that:

a. The appeal she intends to file is arguable;

b. The application was made without unreasonable delay; and

c. She willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on her.

26. The Respondent's advocate has spent much time in his Written Submissions demonstrating to the Court that the Respondent's intended appeal has high chances of success. The argument is that the High Court did not have jurisdiction to entertain and determine the issue of trust to which was the main issue Justice Musyoka determined in his ruling of 20/01/2017. The Respondent's advocates copiously cited provisions of the Constitution as well as our case law to demonstrate that the question of trust should have been determined by the Environment and Land Court. Counsel for the Respondent argues that this is the singular issue to be taken up on appeal.

27. Counsel for the Administrators does not agree that there is any serious appeal preferable against the ruling of 20/01/2017. In any event, counsel argues that any need for such an appeal has been obviated by the filing by the Respondent of Thika ELC No. 691 of 2017 in which the Respondent is the Plaintiff. Much of the Administrators' submissions and Replying Affidavits are aimed at demonstrating that the claim of an existing trust cannot be established as an evidential matter anyway.

28. Suffice to say that in my view, it does not require laborious analysis to conclude that the proposed appeal is arguable: the proposed appeal aims to persuade the Court of Appeal that the High Court sitting as a succession court does not have jurisdiction to entertain and make declarations over the existence or non-existence of a trust in land for that jurisdiction is reserved for the Environment and Land Court under Article 162(2) of the Constitution. I cannot imagine any objective standard which would find that question to be in-arguable or not fit to merit serious judicial consideration by the Court of Appeal. Consequently, I have already held above that the intended appeal is arguable and deserving of leave to appeal to the Court of Appeal.

29. However, the Administrators' Counsel has raised a serious question on the applicability of stay in the present case. The argument is that a stay can only be issued where there is an executable order. In this case, Mr. Mwara argued, all Justice Musyoka did was to dismiss the Respondent's Summons for Revocation. As such, there is nothing to execute and, therefore, nothing to stay.

30. Mr. Mwara relied on ***Titus Kiema v North Eastern Welfare Society [2016] eKLR*** where the Court stated:

> *I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed? I have been unable to see any such threat….. The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn.*

31. Mr. Mwara also cited the ***AG v James Hoseah Gitau Mwara [2014] eKLR (Court of Appeal No. 121 of 2013)*** where the Court of Appeal remarked that in order for a Court to exercise its discretion to grant stay, it must itself the question whether there is anything capable of being stayed in the ruling or decision sought to be impugned.

32. On his part, Mr. Makumi, Counsel for the Respondent insists that there is an order given by the Court albeit, he argues, without jurisdiction. The effect of the ruling, Mr. Makumi argues, would that, without the cautions placed on them, the Administrators will proceed to waste and alienate the Suit Properties such that they will no longer be available even if the Respondent succeeds on appeal. As such, her appeal would have been rendered nugatory.

33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decision in ***R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR***. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances.

34. I am persuaded that the circumstances here are the same as those in the ***Wananchi Group Case*** which I find to be persuasive. It is in accord with the ***James Hoseah Gitau Mwara Case*** cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be "executed." A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.

35. In this case, the Respondent took out Summons for Revocation of a Grant of Letters of Administration Intestate. The Summons was dismissed in the ruling of 20/01/2017. It is readily obvious that there is no single order coming out that ruling by Justice Musyoka that is capable of execution. As such, no stay of execution of the order coming from the ruling of 20/01/2017 can be issued.

36. For this reason, the Respondent's prayer for stay of execution fails.

37. I will lastly turn to the Administrators' prayers for the removal of cautions. The Administrators' argument is straightforward: They have Letters of Administration which have been confirmed. The confirmation provides for the mode of distribution of the estate of the Deceased. However, that distribution cannot proceed now because the Respondent (and others) have placed cautions over the Suit Properties and the Land Registrar has refused to remove the cautions despite being informed that litigation on the Suit Properties had ended in the Administrators' favour. The Land Registrar has insisted that he requires a Court order in order to remove the cautions.

38. The Respondent has, naturally, opposed the Application – and quite vigorously. As I understand it, Mr. Makumi raised two arguments to oppose the Application. In the first place, Mr. Makumi argued that this Court does not have jurisdiction to order the removal of cautions or caveats by persons claiming beneficial interests in land. In the second place, Mr. Makumi argued that even the Court had such jurisdiction, it should be very slow in ordering the removal of such cautions – and that the circumstances here do not warrant their removal.

39. Mr. Makumi's argument is that the Constitution creates the ELC and clothes it with jurisdiction to deal with all matters related to land – including the removal of cautions.

40. Does the High Court have jurisdiction to hear disputes related to the removal of cautions? Article 165(5) provides that the High Court shall **not** have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).

41. Article 162(2) of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court Act, No. 19 of 2011, which came into effect on 30th August 2011. The object of the Act is stated as follows:

> *An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes.*

42. In Section 13, the ELC Act provides that:

> *13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162 (2)*
>
> *(b) of the Constitution, the Court shall have power to hear and determine disputes:*
>
> > *a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
> >
> > *b) relating to compulsory acquisition of land;*
> >
> > *c) relating to land administration and management;*
> >
> > *d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
> >
> > *e) any other dispute relating to environment and land.*

43. These constitutional and statutory provisions are well known and the recent Supreme Court decision in ***R v Karisa Chengo (Supreme Ct Pet. No. 5 of 2015)*** amplifies them. While the provisions are clear that jurisdiction in land-related matters belong to the ELC, the provisions are less clear what "land-related" means. As I have remarked elsewhere, in all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

44. The specific question is whether an application for the removal of a caution under section 73 of the Land Registration Act should be brought in the High Court or in the ELC. I can say with little fear of contradiction that a straight-up suit to remove a caution under section 73 should, by virtue of the definition of "Court" in section 3 of the Land Registration Act, be filed in the ELC. It would appear to undermine the objectives of the Land Registration Act and Article 162(2) to hold otherwise.

45. However, questions arise when the question of removal of cautions arise tangentially in the course of another litigation. In such a case should the parties be required to go to the ELC to have the cautions removed so that they can benefit from the fruits of their judgment in the other litigation? The answer to that question, in my view, would depend on the circumstances of the litigation. The reason the law provides for a process and due process in the removal of cautions in section 73 of LRA is because there is realization that there are interests which may not be readily registrable that can be protected by the use of cautions. It is therefore, important that the due process rights of an individual who has placed a caution be observed before a caution is removed.

46. In the present case, the Court is aware of the context in which the cautions were placed. While this Court has declared that the claimed trust does not exist, different considerations might be factored in before deciding whether to remove the cautions placed or not. In my view, that would be the proper province of the ELC. In such proceedings, of course, the Administrators would rely on the High Court determination to urge for the removal of the caution while the Respondent would pin her arguments for the preservation of the caution on the intended appeal. It would be for the ELC to make a determination on whether the caution should be removed or not.

47. This situation is not as strange and anomalous as it might, as first, seem. In proceedings against the Government where a party has obtained a favourable judgment which the Government fails to observe, it takes a Judicial Review Application – an entirely different suit – to get new orders or mandamus forcing the Government functionary involved to comply with the judgment of the Court. It would appear that a

process akin to that is contemplated here as a consequence of the exclusive jurisdiction given to ELC by the Constitution and the various statutes.

48. For this reason, I will hold that in the specific circumstances of this case, the Administrators' Application is more appropriately brought before the ELC under section 73 of the Land Registration Act. I will therefore decline to grant the orders sought.

49. The summary of my analysis and holdings above, then, is the following:

a. The Respondent (Ruth Muthoni Kariuki) is hereby granted leave to appeal against the ruling delivered by this Court on 20/01/2017.

b. The Respondent (Ruth Muthoni Kariuki) is hereby granted leave to appeal out of time against the ruling delivered on 20/01/2017. She shall file the Notice of Appeal within seven (7) days of today.

c. The Respondent's prayer for stay of execution against the ruling delivered on 20/01/2017 is hereby declined.

d. The Administrators' Application dated 14/06/2017 is hereby declined.

50. No costs are awarded respecting the Administrators' Application dated 14/06/2017 given the nature of the prayers and the understandable fluidity of jurisprudence on the question. The costs of Respondent's Application dated 01/08/2017 shall abide by the outcome of the appeal.

51. Orders accordingly.

Dated and delivered at Kiambu this 30th day of November, 2017.

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JOEL NGUGI

JUDGE