



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 563 OF 2008

MARY NYAGUTHII.....PETITIONER

-VERSUS-

KENNEDY KAGUNDA.....PROTESTOR

-AND-

EUNICE NJERI MAHIANYU

GRACE THUGURI MACHARIA

ANNAH WAMAITHA NJOROGE.....OBJECTORS

RULING

The petitioner filed a summons dated 22nd January, 2014 seeking enlargement of time so as to file an application for leave to appeal against the judgment delivered by this court on 23rd August, 2013; in the same application she also sought for leave to appeal against the judgment. The application was brought under **rules 67** and **73** of the **Probate and Administration Rules** and was supported by the applicant's own affidavit sworn on 22nd January, 2014.

The applicant deposed that leave to appeal was not made immediately after the judgment was delivered because she was ailing and was undergoing treatment for some time before and after the judgment was delivered. It is for this reason that she could neither seek leave to appeal nor file the appropriate application for such leave within a reasonable time after the delivery of the judgment.

It was the applicant's position that no prejudice would be occasioned to the respondents if the leave sought was granted; she also swore that she is likely to suffer irreparable harm if the orders sought are not granted because the respondent was likely to divide the land in accordance with the judgment of the court which she intended to challenge on appeal.

One of the persons who opposed the applicant's application is one Tabitha Wakonyu Mundia; she swore a replying affidavit on her own behalf and on behalf of Lydia Wangui Mundia opposing the applicant's application. Together with the applicant, the respondent and the objectors, they are both beneficiaries of the estate of the late Eliud Macharia Muriu and which estate was the subject of the judgment which the applicant intends to appeal against.

Both Tabitha Wakonyu Mundia and Lydia Wangui Mundia contended that no explanation had been given for failure to file the notice of appeal within time; they both doubted the applicant's bona fides because in

her own summons for confirmation of grant, she had proposed to be given 1.78 acres of the deceased's land but according to the judgment which she wants to challenge, she was given 2.5 acres of land. According to them the intended appeal stood no chance and therefore they asked this court to reject the application.

Kennedy Kagunda who is named as the respondent in the application filed a replying affidavit of his own; he swore that the applicant together with her advocate were in court when the judgment was delivered and no sufficient reason was given why the leave could not be sought after the delivery of the judgement or soon thereafter. The respondent also deposed that the delay of five months before making the application for leave was inordinate

The parties sought to have the application disposed of by way of written submissions and in the submissions which they subsequently filed, they revisited the depositions made in their respective affidavits to support the positions which they adopted. The applicant reiterated that she was in court on the judgment date but because she was sick she did not understand the judgment and for this reason she did not apply for leave to appeal immediately after the judgment was delivered.

The record shows that the applicant was initially represented by Mr Maina Karingithi who continued appearing for her until 21st January, 2014 when the firm of M/s Waihura and Company Advocates took over from him. This information is contained in the notice of change of advocates which was filed in court on 21st January, 2014 by M/s Waihura and Company Advocates. In its pertinent part the notice says:-

“NOTICE OF CHANGE OF ADVOCATES TAKE NOTICE the petitioner herein has appointed WAIHURA & CO.ADVOCATES ... in place of maina Karingithi & Advocates...”

For avoidance of doubt on representation of the applicant it is clearly indicated in the judgment that the applicant's previous advocate was present in court in that capacity when the judgment was delivered.

When the respondent contested the applicant's allegations that she was not represented yet her own advocate was in court, she responded by filing a further affidavit on which she purported to attach a copy of a document dated 21st August, 2013 which she described as a “notice of withdrawal of advocate” and which was purportedly filed in court on 21st August, 2013. According to her she was acting in person at the material time and that her previous advocate was in court on the date of the judgment only because he was not aware that the applicant had filed what was supposed to be a notice to act in person.

Having perused the purported notice to act in person, I have reasons to doubt its authenticity; first, I have scoured through the entire record and I have neither found its original version nor the receipt for its filing fees. Secondly, it is doubtful that this document could possibly have been filed on 21st August, 2013 when the judgment was delivered on 23rd August, 2013, two days later. The judge must have been with the file preparing the judgment at the time the document is alleged to have been filed.

More baffling is the fact that although the applicant alleged that his previous advocate was not aware of the purported notice to act in person, the document is stamped on its face with the rubber stamp of the same advocate's firm purporting to show that the notice was received in the advocate's office on 21st August, 2013. The argument by the applicant that her counsel was not aware of the notice is obviously untrue and self-defeating.

My reading of the applicant is that she is simply mischievous and dishonest. With this kind of character I cannot believe the factual basis of her application. Even assuming that she was unwell before and after the judgment was delivered, I cannot understand why she should have dismissed her advocate two days before the delivery of the judgment and opted to act in person when circumstances dictated that she needed representation more than ever before if at all she was sick.

I am inclined to agree with the respondent's advocate that the applicant's application is malafides and

thus without any merit. I hereby dismiss it with costs.

Signed, dated and delivered in open court this 26th day of February, 2016

Ngaah Jairus

JDUGE