



**REPUBLIC OF KENYA**

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

**PROBATE AND FAMILY DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 186 OF 2014**

**IN THE MATTER OF THE ESTATE OF NG'ANG'A KAMANU (DECEASED)**

**AND**

**IN THE MATTER OF AN INTENDED APPEAL.**

**EPHANTUS WACHIRA NG'ANG'A**

**(Suing as next friend to NG'ANG'A CHEGE.....APPLICANT/INTENDED APPELLANT**

**VERSUS**

**MARTHA GICHIRA KAMANU & 3 OTHERS.....1<sup>ST</sup> RESPONDENT**

**MARGARET WAMAITHA KAMANU.....2<sup>ND</sup> RESPONDENT**

**VIRGINIA WANJA DICHU.....3<sup>RD</sup> RESPONDENT**

**JOSEPH NG'ANG'A CHEGE.....4<sup>TH</sup> RESPONDENT**

(An application for leave to file a Memorandum of Appeal out of time from the Judgment of the Honourable W. Ngumi SRM delivered on 28/08/2014 in Succession Cause No. 37 of 2013 delivered at Principal Magistrates' Court at Githunguri)

**RULING**

1. The appellant/applicant has filed a notice of motion (exparte) Under order 42 rule & 2 Order 32 rule 15 of the Civil Procedure Rules 2010, Section 1A, 3A 65(1) (b), 79G, 95, 100 of the Civil Procedure Act Cap 21, Section 50 of the Law of Succession Act Laws of Kenya, seeking the following orders;

- i. That the proposed appellant being dissatisfied of the decision therein be granted leave to appeal

out of time against the whole judgment of the learned senior Resident Magistrate Honourable W. Ngumi delivered on 28<sup>th</sup> July, 2014 vide Succession Cause No. 37 of 2013.

ii. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.

iii. That the said Ephantus Wachira Ng'ang'a be hereby appointed to institute this appeal as a next friend to Ng'ang'a aged 75 years.

iv. That this Honourable court be pleased to make such orders as it may deem fit for the quick dispensation of this application and appeal hereto.

v. That costs of this application be provided for.

2. The application is supported by the affidavit of Ephantus Wachira together with the grounds of the face of the application. The Respondent filed a Notice of Preliminary Objection dated 12<sup>th</sup> March 2015. In it the respondent object to the application dated 6<sup>th</sup> April 2014 on the following grounds.

i. The applicant lacks *locus standi* to bring this application as he was not a party in the lower court proceedings.

ii. The applicant ought to have applied for substitution and not as next friend only applicable where minors are involved.

iii. The application is frivolous and vexatious and otherwise an abuse of the court process.

3. Mr. Ephantus Ng'ang'a depones that he presents this application as the next friend to Ng'ang'a Chege who is 75 years old hence not competent to further the proceedings as a result of his age and thus this application to be appointed as a next friend. That the matter arose from succession Cause No. 37 of 2013 that was previously determined at the Principal Magistrate's Court at Githunguri. That Judgment therein was delivered on the 28/7/2014 by the learned Honourable W. Ngumi SRM. That upon delivery of the said judgment, he being dissatisfied with the same immediately applied to have typed and certified copies of the proceedings and judgment to enable him file an appeal against the said decision of the learned Honourable W. Ngumi SRM. That he obtained the said proceedings and judgment on 16<sup>th</sup> October 2014 and he was accordingly issued a certificate of delay on 27<sup>th</sup> October, 2014. That the delay in filing this appeal is entirely attributed to the delay in obtaining the proceedings herein from the trial court such delay was way out of his realm.

4. That he is informed by his advocate on record that the time allowed to appeal under the law has since lapsed but nevertheless this court has the power to enlarge such time for reasons aforesaid. That he believes that the delay occasioned herein is not so inordinate as to be inexcusable and he humbly ask this court to so find. That the annexed draft Memorandum of Appeal is coated with triable issues and has good chances of success. That no prejudice shall accrue to the respondents as the intended appeal is only meant to scrutinize the authenticity of the learned trial magistrate and to advance the intended appellants interest herein. He also filed a replying affidavit to the preliminary objection reiterating what he deponed in his supporting affidavit. He further deponed that his application to sue and/or institute this appeal as next friend to his father is properly rested upon order 32 Rule 15 of the Civil Procedure Rule 2010 which provides such. That he also wish to state the failure to annex a medical document and/or evidence to his father's mental state was inadvertent and largely attributed to the fact that his father was previously reviewed by a doctor who left their area of domicile.

5. This ruling is on the Preliminary Objection dated 12<sup>th</sup> March 2015. I have read the applicant /intended appellants written submissions filed in court on the 18<sup>th</sup> May 2015 together with the case cited of *Stephen Mbugua Ikigu (suing through his father as next friend Douglas K. Ikigu Vs. Peter M. Mbugua and others* .

6. in the applicant's application dated 6<sup>th</sup> November 2014 he seeks to be appointed to institute the appeal as a next friend to Ng'ang'a Chege who is said to be 75 years and is senile the applicant has not complied with the provisions of Section 26 and 27 of the Mental Health Act which provides as follows;

*i. the court may make orders;-*

*ii. for the management of the estate of any person suffering from mental disorder, and*

*iii. for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.*

*Section 27 of the same act provides that;*

*iv. where a manager is appointed under this part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper.*

7. It is important that the mental status of Nga'ang'a Chege has to be determined as provided under Section 26 and 27 before the intended appellant can file the application to be substituted as the appellant. The provision of order 35 rule 15 in my view are only applicable once an application is made under section 26 and 27 of the Mental Health Act. The said rule provides that the provisions contained in rules 1 to 14 so far they are applicable shall extend to persons adjudged to be off of sound mind, therefore the process of having one declared to be of sound mind must be followed. The medical report attached is not adequate to determine the mental status of Nga'ang'a Chege and in the absence of such evidence I find that the applicant lacks locus standi to file the application as he was not a party in the Lower Court Proceedings. The Preliminary Objection is therefore upheld and the application is dismissed with costs. It is so ordered

Dated, signed and delivered this 31<sup>st</sup> day of May 2016

**R. E. OUGO**

**JUDGE**

**In the Presence of:**

.....For the Applicant / Intended Appellant

.....For the Respondent

M/s Charity Court Clerk