



IN THE MATTER OF THE ESTATE OF JIDRAPH NYORO KANGETHE-(DECEASED)

CYRUS KANGETHE NYORO::: APPLICANT

VERSUS

ENAN MUNYUA GICHINI::::::::::::::::::::::::::::::::::::;:::::1ST RESPONENT

LAZARUS MUYA NGANGA:::::::::::::::::::::::::::::::::::::2ND RESPONDENT

RULING

1. On 28th March 2012, I delivered a ruling in the applicant's application of 14th October 2011, staying this succession cause pending the hearing and determination of the applicant's appeal against Hon. Justice Karanja's ruling of 27th September 2011. The stay was conditional upon the applicant filing his Memorandum of Appeal within 14 days.

2. On 12th April 2012 the applicant filed an application referenced "Summons For Review of the last paragraph of the order dated 28th March 2012", praying, inter alia, that:-

1. The condition imposed by the court on 28th March 2012 requiring a memorandum of appeal to be filed within 14 days of the court ruling be varied and set aside or that the period for compliance be extended by a further 14 days.

2. The filing of the Notice of Appeal be deemed to be sufficient compliance of the condition requiring the applicant to file the memorandum of appeal within 14 days.

3. The applicant states that his appeal would be rendered nugatory if the succession proceedings are not stayed and the Grant issued to the respondents on 20th December 2007 confirmed without his involvement. He filed an affidavit of protest to confirmation on 25th October 2011 having filed a notice of appeal on 7th October 2011. Copies of both the affidavit of protest and the Notice of Appeal are annexed to the affidavit in support of the stay application.

4. The application is said to be founded on the following grounds:-

1. That a civil appeal is initiated by the filing of a Notice of Appeal and not a memorandum of appeal.

2. That rule 87 of the Court of Appeal Rules requires an appellant to include a Memorandum of Appeal in the record of Appeal.

3. That the appellant cannot lodge an appeal in the absence of the proceedings which have not been typed.

4. That the court ought to have considered the filing of the Notice of Appeal and deem the same to be

sufficient.

5. Also stated as a ground is the applicant's undertaking to comply with all the requirements of filing the record of appeal after being supplied with the High Court proceedings.

6. The application is opposed on the strength of grounds of opposition filed on 23rd April 2012, wherein the respondents state that the application is, inter alia, bad in law, frivolous, vexatious and an abuse of the process of the court, as the applicant ought to have appealed instead of asking for a review of the orders of 28th March 2012. The respondents also state that the applicant ought to have complied with the court's order and should not, on one hand ask for orders to be varied and/or set aside and at the same time ask for an extension of the time for compliance.

7. I have considered the written submissions filed herein. This court saw the Notice of Appeal filed on 7th October 2011 and the letter written to the court on 5th October 2011, asking for copies of proceedings and a certified copy of the ruling of Justice Karanja.

8. This court is not ignorant of the legal requirements/procedures for the institution of appeals in civil matters. Whereas it is true that the court shall deem an appeal as having been lodged on the filing of the Notice of Appeal, the process does not end there. When citing only **Rule 87 (1) of the Court of Appeal Rules** to support the present application, the applicant appears oblivious of the requirements of **Rule 82(1) and(2)** which provides as follows:-

“82(1) subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within 60 days of the date when the notice of appeal was lodged-

(a) A memorandum of appeal in quadruplicate;

(b) The record of appeal in quadruplicate;

(c) The prescribed fee; and

(d) Security for costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

9. This court took cognisance of the fact that as at 28th March 2012, the applicant had had over six months within which to obtain the proceedings and ruling of Justice Karanja. Until the stay was granted, the applicant had no reason to rest on his laurels. It is irrelevant that this court referred to the filing of a memorandum of appeal as if the same was to be filed apart from the record of appeal.

10. As is evident from the provisions of **Rule 83 of the Court of Appeal Rules**, the law treats with seriousness the failure to institute an appeal within the prescribed time after a notice of appeal has been lodged. Counsel for the applicant knew what needed to be done in order to comply with the order of 28th March 2012 and he ought to have done it. I note with interest that he applied to the Court of Appeal for an order dispensing with the service of the Notice of Appeal. He obtained an order to that effect from Maraga JA on 19th January 2012 (erroneously stated as 19th January 2011, a date when his honour was not a Judge of Appeal).

11. If the issue of proceedings was as serious as the applicant now wants this court to believe, he would have applied for an extension of time to comply with **Rule 81** in the **Court of Appeal** or at least mention the same in his application for stay.

12. With due respect to Mr. Kinuthia, I consider the present application not to have been brought in good faith. It is, as submitted by counsel for the respondent, frivolous, vexatious and without merit. It is hereby dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF August, 2012.

M.G. MUGO
JUDGE

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In the presence of :

Mr. Kinuthia for the applicant.

Miss. Kalsi holding brief for Mr. Njenga for the respondents.