



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.126 OF 2000

IN THE MATTER OF THE ESTATE OF THE LATE RAHAB WARUGURU MWANGI

FRANCIS KIBE

MWANGI.....APPLICANT

VERSUS

HANNAH

MUTHONI.....RESPONDENT

RUTH WANGARI.....RESPONDENT

RULING

On 27th April, 2010 this court (Maraga, J) in his judgment of that date ordered that two parcels of land forming the estate of the deceased, Rahab Waruguru Mwangi be shared equally between the four (4) dependants. The present applicant who had raised an objection culminating in the said judgment has been aggrieved by the judgment and intends to challenge it in appeal to the Court of Appeal. But in the meantime, he has brought the present application seeking that he be granted leave to file the appeal out of time; that pending the hearing and determination of the intended appeal, there be a stay of execution of the orders issued on 27th April, 2010; that the 3rd petitioner be restrained from selling, transferring, alienating, dealing or offering for sale any of the two parcels of land forming the estate.

The application is premised on the grounds that the applicant was under a mistaken belief that the appeal ought to have been brought within thirty (30) days; that he had made an application for leave to file appeal out of time in Nakuru H.C.Misc. Civil Application No.5 of 2010 which he subsequently withdrew and is now seeking those orders in this application; that the 3rd petitioner is intermeddling with the estate and has sold part of the estate to two persons; that the 2nd petitioner has died and no grant of representation has been issued in respect of her estate; that it is only fair to grant the reliefs sought herein pending the determination of the intended appeal.

In response, the 3rd petitioner has explained that as one of the administratrix she is only distributing the estate in accordance with the orders of the court and cannot be an intermeddler; that the applicant is a vexatious litigant whose aim is to frustrate the distribution of the estate; that the applicant be ordered to deposit Kshs.1,000,000/= into court.

I have considered the application. Although the respondents had notice of the hearing of the application, they or their advocate did not attend court to canvass their grounds in the replying affidavit. The applicant has explained that due to a misconception of the law, he assumed that he had thirty (30) days within which to file a notice of appeal.

By dint of **Rule 75(2)** of the **Court of Appeal Rules, 2010**, a notice of appeal must be lodged within fourteen (14) days of the date of the decision against which it is desired to appeal. **Section 7** of the **Appellate Jurisdiction Act** on the other hand gives to the High Court a discretion to extend the time for giving notice of intention to appeal from its judgment. It is settled that the court's discretion in considering whether or not to extend time is unfettered. But it must consider the period (length) of the delay, an explanation of that delay and whether the respondent will be prejudiced if the extension is granted.

The judgment was delivered on 27th April, 2010. Approximately one month later, on 2nd June, 2010, the applicant filed H.C. Misc. Civil Application No.5 of 2010 which he subsequently withdrew. This application was brought five (5) months after the date of the judgment. Although the matter he has deposed he was mistaken about is one of law, namely the time for filing a notice of appeal and whereas ignorance of the law is no defence, besides being represented by counsel at the time the judgment was delivered, I find that the delay has not been inordinate and the respondents will not be prejudiced. The applicant has leave to file the notice of appeal within 14 days from the date of this order.

While it is clear that an order of stay of execution under **Order 41** of the revoked **Civil Procedure Rules** or **42** of the **2010 Rules** is not one of the provisions imported into the **Law of Succession Act** by dint of **Rule 63** of the **Probate and Administration Rules**, the court is empowered by **Rule 73** of the **Probate and Administration Rules** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Having been granted leave to challenge the decision in question, the applicant stands to suffer greatly if the distribution which has aggrieved him is not stayed. There are also the issues of one of the administratrix having died and the alleged sale of part of the estate to 3rd parties, Henry Ruguti and Joseph Njoroge.

For those reasons, there will be a stay of execution in terms of paragraph 4 of the summons of 20th September, 2010 pending the hearing and determination of the intended appeal subject to the applicant depositing in court the costs of the intended appeal in the sum of Kshs.50,000/=. An injunction sought in paragraph 5 is superfluous in view of the stay orders.

The costs of this application shall be costs in the intended appeal.

Dated, Delivered and Signed at Nakuru this 12th day of April, 2011.

W. OUKO

JUDGE