



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(MILIMANI LAW COURTS)

SUCCESSION NO 1061 OF 1991

KIRERU KAPOYA 1ST APPLICANT

RAPHAEL SENTERO KAPOYA2ND APPLICANT

ELIJAH KAPOYA MOSIRO 3RD APPLICANT

versus

GRACE MASIEKU KAPOYA 1ST RESPONDENT

RUTH WANJIRU KAPOYA 2ND RESPONDENT

RULING

The Grant of Probate of the will of the late Moses Kapona Ole Mosire was granted on 2nd December 1991 to his two widows GRACE MASIEKU KAPOYA and RUTH WANJIRU KAPOYA, who were named as the executrix of his will.

KIRERU KAPOYA ('Kireru'), RAPHAEL SENTERO KAPOYA and ELIJAH KAPOYA MOSIRO who felt dissatisfied with that appointment, moved the Court seeking an order to have the said grant revoked or annulled. It was their ground that the will on which the grant of probate was based, was a forgery, and that the deceased had not made any will, and on which basis, Kireru, the third wife of the deceased also sought an order to be named as one of the administrators of her husband's estate.

After a full hearing in which several witnesses testified, Githinji J. (as he then was) found that the will was valid and he ruled in favour of the executrix and proceeded to dismiss the application with costs.

Nor to be deferred, KIRERU KAPOYA, RAPHAEL SENTERO KAPOYA and ELIJAH KAPOYA MOSIRO who I shall now refer to as 'the applicants', moved this court on 26/5/2006 and sought an order to review Githinji J's order on the grounds that they had, since the delivery of the ruling, discovered new evidence which was not available at the time when the application for revocation was heard.

Dulu J who heard that application was of the view that the alleged new evidence which the three claimed to have discovered was not clearly explained and further thereto, they had not disclosed when it was discovered. He also found that the three who had taken six years to move the Court had failed to explain the delay, and were thus guilty of laches, and he proceeded to dismiss their application with costs on 27/2/2007.

The applicants, who were dissatisfied with that dismissal, moved this court on 5/1/2009 and sought the following orders:

1. That the Land Registrar Kajiado District be restrained from registering any dealings against **Ngong/Ngong/11077** and **Kajiado/Kitengela/1992** ('the subject properties'), pending the hearing and determination of this application and/or further orders of this Court.

2. That this Honourable Court be pleased to enlarge time stipulated for the filing of a notice of appeal and that the annexed notice of appeal be deemed to have been duly filed upon payment of the requisite fees.

They also pray for costs.

They base their application mainly on the grounds that they stand to suffer irreparable loss if GRACE MASIEKU KAPOYA and RUTH WANJIRU KAPOYA who are the respondents herein, proceed to execute the contentious order. It is also their ground that it has always been their intention to appeal against the said ruling.

Mr. Njugi, who urged the court to allow the application pointed out, and rightly so, that the power of the court to enlarge time within which to perform an act is discretionary.

Mr. Gathara was however of the view that there has been an inordinate delay of seven years, and also that even if the order which they now seek is granted, it will not assist them at all since the ruling Githinji J., which they did not appeal against still remains intact.

I have considered this application and the submissions of both counsel and it is clear that though the order which the applicants wish to appeal against is dated 27/2/2007, the respondent's counsel made reference to Githinji J's order when he rose to oppose the application on the grounds of delay. The applicants have deposed that they were unable to obtain the proceedings in time and hence the delay of over eighteen months in filing this application.

Though the applicants took their time in moving this court, I do however note that since this application revolves around the emotive subject of land, more so when it involves members of one family. It is also on record that they are neighbors by virtue of the fact that they all live on the subject land. In my view it is very important that the parties be given an opportunity to have all contentious issues resolved to finality. In my humble opinion the executrix who are in possession of the land stand to suffer no serious prejudice if I were to allow this application.

I would in the circumstances and in the interests of justice allow the application subject however to applicants filing their Notice of Appeal within the next twenty one days. The applicants shall also be required to pay the sum of shs.15,000/00 to the executrix which I have assessed as their costs of this application within the next fourteen days, otherwise the order to file the Notice of Appeal out of time shall be deemed as lapsed.

Dated and delivered at Nairobi this 11th day of March 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the applicants:

For the executrix: