

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

Succession Cause 3281 of 2004

IN THE MATTER OF THE ESTATE OF MUSANJI KUBUTA – DECEASED

RULING

The application of 20th January, 2000 by way of Notice of Motion was provided under Section 50(1) of Law of Succession Act (Cap 160) Sections 79 (a) and 3A of the Civil Probate Act, Order XLIX Rules 5 and Order L Rule 1.

It seeks prayers that the applicant be granted leave to file an appeal out of time against the order of learned Senior Resident Magistrate Kerugoya in succession Cause No.177 of 2003 dated 1st October, 2004.

After delivering the judgment, on an application by the present applicant, a stay of execution for 30 days was granted.

The counsel for the Applicant thereafter filed a summons for revocation of the grant on the ground that the learned Senior Resident Magistrate misdirected himself in the interpretation of Section 40 of the Laws of Succession Act (Cap 160), hereinafter referred to as '*The Act*'). The applicant's counsel then realized that the process in law taken after the said order was erroneous and thus she wants to rectify the same and urged that the error was not intentional and was under her counsel's advice.

The proposed memo of Appeal is filed along with the application and it is urged that appeal have very good chance of success.

I have perused the judgment and note that the learned Magistrate had not disputed the facts laid down before him.

The Respondent in opposition to the application, has filed grounds of objection dated 24th November, 2006. In short, it raised grounds of delay and competence of the application.

I have carefully considered the application and the affidavit in support with all the annexures. I also note that the applicant was not just idling her time before filing this application. She had promptly filed a summons for revocation under the advice from her counsel, which turned out to be not right. She thus now wants to follow a proper channel to vindicate her complaints against the judgment.

I also note that it is well established principle that errors of the counsel cannot be visited against the litigant.

I am also satisfied that the appeal, if allowed to be filed, has good chance of success.

I therefore use my discretion and allow the appeal to be filed out of time.

I direct that the appeal be filed and served within seven days from the date hereof.

The costs of the application be to the respondent by the applicant.

Dated and signed at Nairobi this 28th day of February, 2007.

K.H. RAWAL

JUDGE

28.2.07