

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Misc Appli 25 of 2004

IN THE MATTER OF THE ESTATE OF DANSON MAINA

CHURI – DECEASED

AND

BEATRICE WANGITHI MAINA APPLICANT

VERSUS

PERIS WANJIRU MAINA RESPONDENT

R U L I N G

Beatrice Wangithi Maina, has come to this court under section 3A of the Civil Procedure Rules seeking to be granted leave to file an appeal out of time and that the draft memo of appeal be deemed duly filed and that leave do operate as a stay of execution in Karatina RMCC No. 10 of 1994.

It is the applicant's contention that her appeal has overwhelming chances of success and that the failure to file the appeal in time was occasioned by her former advocate who failed to diligently pursue the matter.

The Respondent Peris Wanjiru Maina objects to the application contending that the same is defective as the same ought to have been brought under the provisions of the law of succession Act and not the Civil Procedure Act and Rules. She further contends that the applicant has not satisfactorily explained the delay of 5 years, and that the application is brought too late in the day as the execution has already taken place.

It is evident that the suit which is the subject of the intended appeal relates to land to which the applicant is threatened with eviction. The applicant has explained that she relied on her former advocate who failed to take action as required. The applicant appears to be unfortunate in her choice of counsels. Her current advocates have improperly drafted her application seeking leave to appeal against a ruling in R.M.C.C. No. 10 of 1994 when it is evident from the draft memo of appeal that the suit in respect of which an appeal is intended to be lodged is R.M. Succession Cause No. 10 of 1994. That defect has however not caused any prejudice to the Respondent.

Under rule 63 of the Probate & Administration Rule, Order XLIX of the Civil Procedure Rules is applicable to succession matters. The application is therefore properly grounded under Order XLIX rule 5 of the Civil Procedure Rules. I have considered the draft memo of appeal and do find that the applicant has an arguable appeal. It is only fair and just that she be given an opportunity to be heard on the same.

The applicant sought to have leave granted by this court to operate as a stay of execution. No particular provision was quoted in support of that prayer. In any case the Respondent's contention that the execution has already taken place was not disputed. I will therefore not grant that prayer.

The upshot of the above is that I do grant leave to the applicant to file an appeal against the judgment of the R.M. in Karatina in Succession Case No. 10 of 1994 made on 11th December 2000 within 21 days from the date hereof.

The applicant shall pay costs of this application to the Respondent. Orders accordingly.

Dated signed and delivered this 28th day of July 2005.

H. M. OKWENGU

JUDGE