



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. NO. 12 OF 2021

PATRICK MAPANGO WAFULA

(Suing thro' DINAH NAKHUMICHA WAFULA).....APPLICANT

VERSUS

SIMIYU WEBULE.....1ST RESPONDENT

FRANK ANDIVA BUTICHI.....2ND RESPONDENT

RULING

The Application

1. By an application dated **6/7/2021** and filed in court on the same date brought under **Sections 3, 3A, 3B, 63(e) 79G, and 95** of the **Civil Procedure Act** and **Order 50 Rule 5** of the **Civil Procedure Rules**, the applicant seeks the following orders:

1. ...spent

2. ...spent

3. That the applicant be granted leave to appeal from the decision of the Hon. C.M. Kesse (SRM) in Kitale CMC Suit No. 158 of 1993 delivered on 28/5/2019.

4. That costs of this application be provided for.

2. The application is supported by sworn affidavit of the applicant sworn on **6/7/2021**. The grounds on the face of the application and in the supporting affidavit are that the judgment was delivered in the applicant's absence and the applicant only learnt of the judgment in **October 2020** when she was served with a notice to show cause and that the intended appeal raises arguable grounds. She also asserts that she is of advanced age and failing health.

The Response

3. The respondents filed a replying affidavit sworn by counsel for the respondents on **12/7/2021**. Their response is that the applicant lacks *locus standi* as she lacks letters of administration to the estate of *Patrick Wafula Mapanga* who had donated to her a power of attorney before his demise; that the suit is old, having been filed in **1993**; that the parties' counsel were both present when the court set the date of judgment; that the judgment was however not read on that date but on a subsequent date; that counsel for the applicant became aware of the judgment on the date it was delivered; that in **September 2019** a bill of costs was served upon the applicant's counsel and a notice of assessment of costs; that the applicant became aware of the judgment in **October 2020** when she was served with the notice to show cause; that in any event the applicant has not explained the delay after **October 2020** which the respondents term as inordinate; that the applicant was released from civil jail by consent; that an eviction notice has been served on her relatives on the suit land and that the application is in bad faith as it is meant to stall the execution process.

The Submissions

4. The applicant filed her submissions on **21/7/2021**. The respondent filed his submissions on **6/7/2021**. I have considered the application, the response and the filed submissions.

Determination

5. The issue that arises for determination in the instant application is whether this court should grant leave to enable the applicant lodge an appeal against the subordinate court's decision.

6. The provisions of **Section 79G** of the **Civil Procedure Act** provide for the lodging of a memorandum of appeal from a subordinate court decision within **30 days** of the delivery of the judgment. That statutory period has long since passed. **Section 79G** grants the court a wide discretion to permit an applicant to file an appeal out of time provided a good and sufficient cause is demonstrated. Has the applicant shown good and sufficient cause in the instant application?

7. I have considered the fact that it is not disputed that the judgment was not delivered on the date that the court has set but on a subsequent date. The applicant maintains that she was not present when the judgment was delivered. The respondents contradict this but provide no evidence that the applicant or her counsel were present at the delivery of the judgment. The respondents do not also indicate whether notice was issued to the parties in respect of the second date on which judgment was delivered. I am inclined to believe the applicant when she says neither she nor her counsel were present when the judgment was delivered. I am also inclined to believe the applicant when she states that she came to know of the judgment in **October 2020** as no evidence to the contrary has been provided by the respondents. In addition the applicant blames her failing health for the delay in filing the instant application and I am persuaded that that is a good ground, having noted that the applicant is quite of advanced age.

8. However notwithstanding the other merits of the instant application as outlined above, I find that the ground raised by the respondents that the applicant has no *locus standi* also has merit.

9. The applicant was pursuing the suit only as a holder of a Power Of Attorney donated by the substantive defendant whom she now admits to be deceased.

10. The respondents cite the case of **Alfred Ngutuk Wamalwa Vs Justus Ogunyo & Others 2014 eKLR** to support the proposition that the donor of a Power Of Attorney dies with the power and the applicant can not purport to rely on the power of attorney after the donor's demise.

11. **Section 45** of the **Law of Succession Act** states as follows:

“45.No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

12. I find that this is a proper case for the obtainance of a grant of letters of administration to the deceased's estate before an application such as the instant one is lodged. I am persuaded that the instant application lacks merit and is incompetent for want of a grant of letters of administration issued to the applicant over the deceased defendant's estate.

13. Consequently I hereby strike out the application dated **6/7/2021**. Each party shall bear its own costs of the application.

14. However, notwithstanding the fatal defects in the application and considering the unique circumstances of this case, this court *suo motu* and in the interests of justice hereby orders a temporary stay of execution that will last only **30 days** from the date of this order.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9TH DAY OF AUGUST, 2021

MWANGI NJOROGE

JUDGE, ELC, KITALE.