In re Estate of George Njambuya Kariuki (Deceased) (Succession Appeal 15 of 2009) [2024] KEHC 12660 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL 15 OF 2009

DKN MAGARE, J

OCTOBER 17, 2024

IN THE MATTER OF THE ESTATE OF GEORGE NJAMBUYA KARIUKI (DECEASED)

BETWEEN

ROSE WANGARI NGARI ..... APPLICANT

AND

MUNENE NGUYO ..... 1ST RESPONDENT

DAVID GITHAE ..... 2ND RESPONDENT

TERESA NDUTA ..... 3RD RESPONDENT

RULING

1. This is a ruling in respect of the application dated 8/3/2021. The Appellant filed the application seeking the following orders:-

    a. This matter be certified as urgent and service thereof be dispensed with in the first instance;

    b. The honourable court be pleased to extend the orders of stay issued on 20th May, 2011 pending the hearing and determination of this application and appeal and/or further orders of this court;

    c. The honourable court be pleased to review, vary and or set aside the order issued on 30th July, 2012;

    d. Upon grant of prayer No (3) the honourable court be pleased to extend time for filing the record of appeal and the same be deemed as properly filed upon payment of requisite court charges;

    e. The applicant, the legal representative of the deceased be made a party to this suit.

2. The Respondents told me they were not aware why they were in court. The Applicant Rose Wangari Ngari sought to be joined as a party.

3. The matter had proceeded to conclusion in the lower court, in Karatina P&A No 77 of 2004 in respect of the estate of the late George Njambuya Kariuki who died on 26/12/1992.

4. Rose Wangari Ngari was aggrieved by the decision. The court found that the appeal abated by operation of the law on 1/8/2012. Nothing was done for ten (10) years. Then this application was filed three (3) years ago. They also filed a Record of Appeal on 13/12/2022. This was eleven (11) years since the appeal abated.

Analysis

5. I shall not go into submissions but subsume the same in the ruling. The court has no jurisdiction to vary the order of 30/7/2013. The appeal abated. It cannot be said that the same can be revived these many years later. The issue of review was introduced into the Probate and Admiration by dint of Rule 63 of the *Probate and Administration Rules*. It imports Order XLIV which is now Order 45 of the *Civil Procedure Rules*. The same provides as follows: -

   (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

   (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

6. Section 80 of the *Civil Procedure Act* states that:

   " Any person who considers himself aggrieved—

      (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

      (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

7. Section 63 (e) of the *Civil Procedure Act* states that:

   " In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

8. Order 45 of the *Civil Procedure Rules* provides for Review and it states as follows:

   " (1) Any person considering himself aggrieved—

      (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

9. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and another* Kisumu HCCC No 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

10. The factors to consider in dealing with such an application are: -

    a. The length of delay.

    b. The reason for delay.

    c. The animus of the applicant.

    d. The prejudice to the Respondent.

11. Further, as regards the application for extension of time for filing of the record of appeal, it is not necessary as there is no appeal to speak of. When addressing the question of extension of time, Waki,

JA in *Seventh Day Adventist Church East Africa Ltd. & another v M/S Masosa Construction Company* Civil Application No Nai. 349 of 2005 held that:

> "As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."

12. The extension of time for appeal is out of doubt an exercise of discretion. In the Supreme Court's decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR it was held as doth:-

> "(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
>
> (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
>
> (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
>
> (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

13. There must be some material before the court to enable its discretion to be so exercised. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-

> "In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.

14. The next question is on abatement of the appeal. The Appellant died on 1/06/2011. His case abated on 1/6/2012. The Applicant took out ad litem vide High Court Succession Cause No 1090 of 2011. Nothing was done since then until this application was filed in 2021. The Applicant states that the grounds in Order 45 are not exhaustive. That is not correct. The court can only exercise jurisdiction

as provided under Section 80 of the *Civil Procedure Rules* by dint of Rule 63 of the *Probate and Administrative Rules*. This cannot be by whim, caprice or fiat or through judicial craft or innovation to take jurisdiction it does not have. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

15. There are no grounds for review that have been shown to exist. The question of abating is a question of law. It is not subject to review. There has been no explanation for 11-year delay. There is no valid ground for reviewing the order. The Applicant is guilty of laches having been aware of the order for over 11 years. The Applicant having been given Letters of Administration way back in 2011 did not act at all. She is thus guilty of laches. In the case of *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR the learned Judge stated as follows:

> 82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party.
>
> When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim.
>
> Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.

16. There is no other way of conceptualizing, problematizing and contextualizing this application other than an attempt to wake up sleeping dogs. The Applicant rightly relied on the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling). I fully associate myself with the holding therein.

17. The last question is whether the court ought to join the Applicant. The estate is fully administered. There is nothing to deal with. The appeal has abated. The Applicant is an unnecessary party. The Court of Appeal in *Mary Wambui Kibunya v Peter Kariuki & another* (ELD CA 308 of 2019) held as follows:-

> As already stated, the 1st deceased's estate was only made up of LR No Muguga/ Kahuho/428, which had been transferred to third parties by the time the application for revocation of the grant was being made. In the circumstances, even if we allow the application for substitution and appoint the respondents and Teresiah Mukuhi Muriithi as the administrators and administratrix of the estate of the 1st deceased, we shall be appointing them to manage a shell estate as there is nothing left of the estate to be administered. As correctly held by the learned Judge, the appellant's application had been overtaken by events.

> Although courts have a duty to render substantive justice, sometimes parties arrive in court when it is too late for the courts to assist them. We therefore do not find fault in the learned Judge's declination of the application for substitution. It is apparent from the record that the 2nd deceased had fully administered the estate of the 1st deceased.

18. The letters for the Respondent's estate were given in June 2011. The Applicant is guilty of laches. Contrary to the Applicant's assertion they are not entitled to review. The order was given by a court of co-ordinate jurisdiction. There is no error apparent on the face of the record. There is nothing useful the Applicant will serve in this appeal.

19. I find no merit. I have no problem having the same dismissed in limine. On costs, I note that there were no responses to the application. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

20. Consequently, each party shall bear their costs.

Determination

21. The upshot of the foregoing is that I make the following orders: -

    a. The application dated 8/3/2021 is dismissed with no order as to costs.

    b. I decline to grant leave to appeal.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF OCTOBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Gacheru for the Applicant

Munene Nguyo present

Court Assistant – Jedidah