



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. SUCCESSION CAUSE NO. 5 OF 2020

NANCY NAFUNA.....APPLICANT

VERSUS

AYUB SEBAT WEKESA.....RESPONDENT

R U L I N G

1. The Court has before it an application brought under certificate of urgency. The Applicant wishes to appeal against the judgment of the Chief Magistrate's Court which was delivered some time ago.

2. The Application is brought by Notice of Motion and seeks the following orders:

3. The Application is supported by the Affidavit of Nancy Nafuna. The Grounds upon which the Application is based are:

(a) That judgment was delivered on 7-5-2020 in the absence of the applicant.

(b) That the applicant had no notice of the delivery of the judgment.

(c) That failure to be present at the delivery of the judgment was not deliberate.

(d) That the applicant learned of the delivery of judgment on 5th day of July, 2020.

(e) That the time within which to lodge an appeal to this court had expired.

(f) That the applicant is aggrieved by the judgment of the court.

(g) That the intended appeal is arguable.

(h) That the present application has been brought without undue delay by taking into account the date of knowledge of the judgment.

(h) That the respondent shall not be unduly prejudiced.

4. The Supporting Affidavit is relatively short so it is set out below. The Applicant states:

1. That I am the applicant herein and am hence competent to make this oath.

2. That on 03/07/2020 I was informed that judgment had been delivered in Kakamega Chief Magistrate Succession Cause No. 247/2017 on 7th day of May, 2020. Annexed hereto and marked NN1 is a copy of the judgment.

3. That the judgment was delivered in my absence of my counsel.

4. That am aggrieved with the judgment and wish to lodge an appeal against it.

5. That at the time I received the information about the judgment the time for lodging an appeal had lapsed.

6. That it is for that reason am lodging this application for leave to appeal out of time.

7. *That my failure to lodge an appeal on time was not deliberate hence executable.*
8. *That the intended appeal herein is arguable as per the annexed draft memorandum of appeal marked NN2.*
9. *That the present application has been made without undue delay regard being had to the fact that I knew of the judgment on 03/07/2020.*
10. *That the respondent shall not be unduly prejudiced.*
11. *That on 6/07/2020 the respondent brought some strangers to the estate with intention of subdividing the land that is the only asset of the estate.*
12. *That I had raised the issue of the respondent having disposed of part of the land to 3rd parties before commencement of the succession cost and during the hearing of this succession cause.*
13. *That it is in the interest of justice that the distribution ordered by the Chief Magistrate be stayed pending the hearing of this application and the intended appeal in order to preserve the estate.*
14. *That the respondent does not reside on the land and taking into account her age she is only interested in disposing of the estate.*
15. *That we stand to suffer substantial loss if the Respondent uses her power as the administratrix to further dispose of the estate.*
16. *That it is in the interest of justice that the orders sought be granted.*
17. *That what is herein above deponed it is true to the best of my knowledge, information and belief.”.*

5. The Supporting Affidavit further elucidates on the Application which is requesting leave to Appeal out of time. The Application is opposed by the Respondent. She filed her Replying Affidavit on 2nd October 2020. She puts forward strong grounds. Firstly, she says that the Applicant was absent but that was a deliberate act done knowingly by the Applicant and her Advocate because they were in Court when the Judgment date was given. Secondly, she says that in light of her advanced age the delay by the Applicant causes her extreme prejudice. She also asserts that in light of her conduct in the original succession suit, the Applicant does not come before the Court with clean hands.

6. The Replying Affidavit also sets out the background to the Application so it is set out below. The Deponent states:

1. *That I am female of sound mind and disposition, the Respondent herein therefore capable of making and swearing this affidavit.*
2. *That Nancy Nafuna the applicant herein is my daughter in law who survives my late son by the name Manoah Lumasayi Mumanani.*
3. *That the applicant herein filed Kakamega Chief Magistrate Success Cause Number 247 of 2017 intentionally concealing a material fact of my existence.*
4. *That the judgment dated 3.07.2020 in Kakamega Chief Magistrate Succession cause number 247 of 2017 by Hon. B. Ochieng – CM issued orders which gave my preference as an administratrix pursuant to Section 66 of the Law of Succession Act (Cap 160) as the surviving spouse to the deceased (Ayub Manda Omumanani).*
5. *That I am swearing this affidavit in support of the aforesaid judgment which accurately captured the situation of the estate of the late Ayub Manda Omumanani who was my husband with we were blessed with 2 children namely Manoah Lumasayi Mumanani – son (deceased) and Jully Muchina Mungonyi-daughter (deceased).*
6. *That feeling aggrieved by the aforesaid judgment in number 4 above the applicant herein intends to lodge an appeal by filling an application seeking for leave to appeal out of time and stay of proceedings against the judgment.*
7. *That the applicant herein has demonstrated bad faith through her action to discreetly file the aforementioned succession cause without my knowledge and sought to disinherit me by distributing land parcel Kakamega/Shambere/758 to herself (Nancy Nafuna) as the petitioner – 3.0 acres, Sylvano Odongo Lumasai – 3 ½ acres, Simeon Ingwe Manaha – 3 ½ acres.*
8. *That the estate has no liabilities. It is my prayer that this honourable court should affirm the trial court’s decision which was sound, wise and based on the law.*

7. Both Parties have exhibited a copy of the Judgment of the Chief Magistrates Court delivered in Succession Cause No. 247 of 2017 by Hon. B. Ochieng. The Judgment runs to 11 pages. The Applicant has also exhibited a “Memorandum of Appeal dated 13th July 2021.

8. Both Parties were directed to file their Written Submissions. They filed their Submissions which the Court has considered carefully.

9. In addition there is a document on the Court File entitled: **“THE BENEFICIARIES’ WRITTEN SUBMISSIONS”**. The Beneficiary to

whom they refer is not identified at all within that document. It is noted that both of the Children of the Deceased have since, passed away.

10. Surprisingly, that document also contains an Application by the Firm of Dennis Kipchumba Tanui to come on the Record after judgment. It is expressed thus:

1. *My Lady we are very aware of the procedural requirement placed by under Order 9 rule 9 of the Civil Procedure Rules concerning leave to come on record after judgment has been made; we however point to the following;*
2. *We receive instruction to act for the beneficiaries and filed our notice of appointment after the matter had been mentioned before court.*
3. *That following concerns from our clients of injustice of Discrimination and exclusion occurring against the as women and girls entitled to benefit from the Estate....”.*

11. That cannot be considered a proper application as it is not in the correct form. Further, then appropriate filing fee has not been paid. It is also clear that existing Counsel who conducted the hearing of the suit has not been served or even informed of the intended application. Therefore that application is not properly before the Court.

12. The Submissions part of that document asks the Court to dismiss an appeal that has not yet come into existence. Dealing with the merits of the Application. The Applicant seeks leave to appeal out of time because she says she was not aware of the judgment or the date on which it was delivered. The Respondent challenges that assertion and says the Applicant and her Advocate were in Court when the Ruling date was given. There is also the question of delay which the Respondent argues is excessive. The Statements made by the Applicant are also taken in the context that the Applicant originally petitioned to administer the estate on the basis that she was her father-in-law's wife, and during that process she was able to comply in a timely fashion. Nevertheless the Court is willing to give her the benefit of the doubt. The Court must however, balance the interests of an elderly Respondent with the right of access to justice.

13. In relation to a stay pending appeal. There is no appeal. The Applicant has made no offer of security for costs. The Grounds in the Draft Memorandum of Appeal, can – at best – be described as generic. They are not sufficiently strong nor do they appear sufficiently persuasive to justify an unconditional stay.

14. For the reasons set out about it is Ordered and Directed that:

1. The Applicant be and is hereby granted leave to file an Appeal provided that the memorandum is filed with 7 days of the date hereof.
2. Application for stay of execution is dismissed with costs.

Order accordingly,

Farah Amin

JUDGE

Delivered, Signed and Dated in Kakamega on this the 10th day of March 2021