



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. E007 OF 2021

PURITY KAGENDO ANAMPIU.....1ST APPLICANT

JOY JEMTAL.....2ND APPLICANT

VERSUS

NELIE MUGAMBI.....1ST RESPONDENT

BEATRICE MURIITHI.....2ND RESPONDENT

RULING

1. Before the Honourable Court is an Application dated 10th February 2021 seeking the following orders: -

i) Spent

ii) That this Honourable Court be pleased to grant leave to extend the time limited for filing of the Succession Cause herein.

iii) That there be a stay of execution of the whole Ruling/Orders of the Chief Magistrate's Court at Meru in Succession Cause No. 60 of 2020 pending the hearing and determination of the Appeal to this Court.

iv) That corollary to the foregoing, the memorandum of appeal filed by the Appellants be deemed as properly and duly filed and thus part of the record.

v) That the costs of an incidental to this application do abide the result of the said appeal.

2. The application is premised on the grounds on the application and is further supported by the supporting affidavit sworn by Purity Kagendo Anampiu, the 1st Applicant herein. She has annexed a copy of the Ruling they intend to appeal and she avers that they did not know the date of the Ruling since the same was delivered electronically and that they only knew of the same when they visited their Advocates' offices to inquire of the progress of their matter. That once they read the ruling, they were dissatisfied with the same and they decided to appeal against it. She avers that they then instructed their Advocates to request for the proceedings but it took long before they were availed due to the failure in the e-filing system that was experienced throughout the country and that they were only told to pay for the proceedings on 7th January 2021 but due to the system failure, they were not able to do so within time. She avers that the Respondents are moving with unprecedented speed to implement the Ruling which shall occasion injustice to them. She avers that the Respondents have moved ahead and demolished the deceased's house and burnt all his valuables including vital documents and she has annexed photographs to evince this. She avers that they were unable to file an appeal within time due to the harsh economic moments they are experiencing due to the COVID 19 pandemic and the fact that the Courts were shut down due to the pandemic and systems failure. She avers that they have an arguable appeal with high chances of success and has attached a draft memorandum of appeal. She avers that the Respondents, unlike them, are well endowed and have vowed to use any means in their disposal to disinherit them. She avers that the Respondents should not be allowed to take advantage of the situation and enforce the Ruling since the delay was not deliberate.

3. The Application is opposed vide the replying affidavit of Beatrice Murithi, the 2nd Respondent herein sworn on 19th February 2021. She avers that the Applicants' application is an afterthought and a waste of time since the Ruling they intend to appeal against was delivered on 11th November 2020 and sent via email to the Advocates of both parties. She avers that it is the duty of a diligent litigant to follow up on their Advocates and check the progress of their case and that the Applicants' failure to follow up on the progress should not affect the Respondents. She avers that the Applicants are not candid as they are trying to mislead the Court by stating that they are in occupation of the suit property, a fact that was confirmed by the lower Court. She avers that the Applicants are strangers to the deceased's estate. She avers that

if the Applicants' claim has any factual foundation, they should have raised this in the main succession cause. She further avers that the Applicants' application is fatally defective as they are moving the Court on the wrong provisions of the law and that no notice of appeal is required to appeal from a judgment/ruling of a subordinate court to the High Court and that the Applicants are using the COVID 19 pandemic as an excuse for their indolence and that save for a 14 day closure between November and December 2020, Meru Law Courts have been operating since July 2020. She avers that the intended appeal is a mere waste of this Court's precious time as it will be an appeal against a Ruling of an interlocutory application in the succession cause that is pending before the subordinate Court and that since the Applicants herein are the Petitioners in the succession cause in the lower Court, it would be prudent for them to prosecute their case in the lower Court instead of filing a myriad of applications and appeals against rulings of interlocutory applications. She avers that the Applicant's application does not disclose any grounds for issuance of the orders sought and that the application should be dismissed with costs.

4. The application was argued orally. The Appellant reiterated the explanation for the delay as per their supporting affidavit. The Respondents relied on the contents of their replying affidavit.

Issues for Determination

5. The two issues that arise for determination from the pleadings on record are as follows: -

i) Whether this Court should extend time limited for filing an appeal.

ii) Whether this Court should order for stay of execution of Ruling/Orders of the Chief Magistrates Court in Succession Cause No. 20 of 2020 pending the hearing and determination of the instant appeal.

Whether this Court should extend time limited for filing an appeal.

6. The Applicants seek to have the time extended to file their appeal out of time. In their application however, they make reference to 'time limited for filing the succession cause herein.' This mistake should not recur as the sensitive nature of pleadings demand their full attention.

7. The Applicants have brought their application under Section 7 of the Appellate Jurisdiction Act. The Respondents have submitted that the Applicants have approached the Court using a wrong provision of law. The said Section provides as follows: -

Power of the High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

8. The above section, although giving the Court jurisdiction to extend time for filing an appeal, it applies to instances when the appeal is one from a decision of the High Court intended to be appealed at the Court of Appeal. In the present case however, the Applicants seek to appeal a decision of the lower Court and not one of the High Court. This leads to the conclusion that Section 7 of the Appellate Jurisdiction Act is not the right provision of law under which to bring the instant application.

9. This Court however finds that failure to cite the correct provisions of law is not fatal and would not per se warrant a dismissal of the application. This Court has jurisdiction to go ahead and determine the matter in the interests of substantive justice. To this end, I respectfully agree with the finding of P. N. Waki JA, M. Warsame JA and F. Sichale JA in the case of **Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR** who held as follows: -

“Lastly, having established that the respondent's application dated 17th December 2010 had been brought under the wrong law, we agree with the court's finding that the irregularity was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it and found that there would be no injustice visited on the appellant in the spirit of Article 159 (2)(d) of the Constitution and Sections 1A and B of the Civil Procedure Act.”

10. Order 51 Rule 6 of the Civil Procedure Rules which is the correct provision of law under which the Applicants ought to have approached the Court under provides for extension of time even where the application to extend is brought after the lapse of the time allowed for the doing the action or taking of the step relevant to the application as follows:

“Power to enlarge time [Order 50, rule 6.]

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

11. Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya provides the statutory basis for extension of time, and there is power to

extend time even where the application to extend is brought after the expiry of any such time, as follows: -

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

12. In similar terms Section 59 of the Interpretation and General Provisions Act provides as follows: -

59. Where in a written law a time is prescribed for doing an act or taking proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.

13. In the case of *Omar Shurie v. Marian Rashe Yafar (Civil Application No. 107 of 2020)* Asikhe Makhandi JA, cited with approval the *locus classicus* of *Leo Sila Mutiso v. Hellen Wangari Mwangi* (1999) 2EA 231 which laid down the parameters of deciding an application for extension of time to file a Notice of Appeal as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

14. Although the above case applies to appeals from the High Court to the Court of Appeal, this Court finds that the principles to be considered cut across. In the present case, there has been a delay of slightly over 2 months between the end of the thirty (30) day period that the Rules allow for filing a Memorandum and Record of Appeal and the filing of the instant application seeking extension of time. Materially, part of this 2 month period fell during the annual court vacation period i.e from 21st December 2020 to 13th January 2021. It is also admitted that there was a fourteen (14) day period between the months on November and December when the courts in Meru were closed.

15. The explanation given by the Applicants for this delay is that they only realized that the Ruling had been delivered when they visited their Advocates offices. They however don't indicate when this visit was made. They also attribute the delay in the challenges posed by the e-filing system and closure of Courts due to the COVID 19 pandemic. This Court indeed takes cognizance of the challenges of the e-filing system, this being the first time it had been introduced in the country, which may reasonably have contributed to the delay. The Respondents on the other hand claim that the Applicants are using the COVID 19 pandemic as an excuse for their indolence and that they should not be affected by the Applicants' own indolence. Although it is true the equity aids the vigilant and not the indolent, this Court is of the view that the circumstances surrounding this cases do not totally connote indolence. This Court has considered the delay involved in the matter and is of the view that a delay of 2 months, which delay coincided with the court's annual vacation period is not inordinate.

16. On the chances of the appeal succeeding if the application is allowed, this Court has had a chance to peruse the Memorandum of Appeal. The intended appeal seeks to challenge the Ruling of the lower Court refusing to grant an application for review brought under Order 45 of the Civil Procedure Rules. Such an appeal is indeed allowed under the Rules.

17. The main issue that is raised in the Memorandum of Appeal is the refusal of the Learned Magistrate to consider that the tenancy in issue was a tenancy in common and not a joint tenancy and thus the inapplicability of the doctrine of survivorship. Whether this is a good ground to warrant disturbance of the Ruling of the lower Court is for the Court sitting on appeal to decide. It is not for this Court at this stage, to go into the merits of the Appeal. In case of *Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)* it was pointed out in the case of the appeal court that:

“As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015 this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

18. For the above reasons, first that the delay herein has not been inordinate, and secondly, that there is an arguable point to be canvassed on appeal, this Court will allow the application for extension of time.

Whether this Court should order for stay of execution of Ruling/Orders of the Chief Magistrates Court in Succession Cause No. 20 of 2020 pending the hearing and determination of the instant appeal.

19. The Applicants in their application are seeking stay of the Ruling of the Chief Magistrates Court. It is alarming that the Applicants failed to give the date of the Ruling and/or to expound on the negative effects of the same, if any in relation to their application for stay in view of the threshold set in Order 42 Rule 6 of the Civil Procedure Rules. There is however only one Ruling which has been annexed to their application i.e the one dated 11th November 2020 delivered by Hon E. Tsimonjero RM. This Court has perused the said Ruling and observes that the effect of the said Ruling was to dismiss the Applicants' application for review dated 10th August 2020. In the words of the Court, the following was the finding: -

“The above analysis leads me to one conclusion that the application dated 10th August 2020 lacks merit and whose only fate is

dismissal. Consequently, the application is dismissed with costs to the Respondents.”

20. This Ruling, having dismissed an application for review dated 10th August 2020, was a negative finding, not requiring any of the other parties to do a positive act so as to act upon the Court order. This Court has held time and again that, an application for stay of execution would normally only be entertained when what is intended to be stayed is a positive order, requiring the positive action of another. In the present case, there would be nothing to stay since a dismissal of an application does not impose the doing of any positive act on another. This principle is well accepted in numerous court decisions including the case of **Electro Watts Limited Vs Alios Finance Kenya Limited Civil Appeal No. 96 of 2018 (2018) eKLR** where Kamau J. held as follows: -

“Having said so, this court noted that the order the lower trial court granted was not a positive order. It was a negative order. The Appellant had been granted an injunction on condition that he paid fifty (50%) per cent of the contested amount. In the event it failed to deposit the said sum, the injunction it had been granted would be discharged. That was not an order that was capable of execution.

This court dealt with the issue of negative orders in the case of Milcah Jeruto vs Fina Bank Ltd [2013] eKLR where it held that an order for stay cannot be granted where a negative order had been issued. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed.”

21. See also **Beatrice Kariuko Muriithi Vs Peter Karani Wanjau Kerugoya ELC Appeal No. 8 of 2020 (2020) eKLR** to similar effect where the Court (Cherono J.), in dismissing an application for stay of execution where the Ruling intended to be appealed against was one dismissing an application held as follows: -

“The dismissal of an application is a negative order. It was an order incapable of execution. In the case of Milcah Jeruto Vs Fina Bank Ltd (2013) e K.L.R., the Court held that an order for stay cannot be granted where a negative order had been issued. Section 2 CPA defines a decree holder as the holder of an order/decreed that was capable of being executed.”

See also **Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah (2008) e K.L.R**

22. For the above reasons, this Court finds no reason to grant let alone entertain the merits of the Applicant’s application for stay. The Court does not have jurisdiction to stay a negative order such as the one issued by the lower Court dismissing the Applicant’s application dated 10th August 2020.

23. Furthermore, parties did not submit on the question of the threshold for grant of stay as provided for under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Ordinarily, an applicant seeking stay would be arguing that unless stay is granted, they are likely to suffer substantial loss and their intended appeal would be rendered nugatory. They also must show that they have made their application without delay and that they are willing to deposit such security as may be ordered by the Court to secure the payment of any decretal sums in question. The Applicants have not raised any such arguments. Although the Applicant’s allege that the Respondents have moved with speed to demolish the deceased’s house and burn all his valuables including his vital documents, the Applicants have not given this Court a background as to how this came to be and neither have they given the dates when these acts took place to allow this Court to make an informed judgment of the nexus between these acts and the instant application. The houses and valuables admittedly belong to the deceased and not to the Applicants. The Applicants have also not claimed that they are in occupation of the said house. It also appears that the purported acts of demolition and burning up of the deceased’s house have already been done and thus a stay order would not serve any deterrence purpose. In totality, this Court finds that the Applicants have not shown the nature of prejudice and/or substantial loss that they are likely to suffer should stay not be granted.

24. This Court did not, as the same was not attached, have the benefit of examining the findings of the Court in the Ruling/Orders of 29th July 2020 in respect of the application dated 2nd July 2020 whose Ruling was the subject of review in the subsequent application dated 10th August 2020. The upshot of the foregoing is the Applicant has failed to prove its case. This Court finds that the application for stay is not merited.

ORDERS

25. In the end, this Court makes the following orders: -

- 1. Leave be and is hereby granted to the Applicants to file their appeal against the Ruling/Orders of the Chief Magistrates Court at Meru in Succession Cause No. 60 of 2020 out of time.***
- 2. The Applicants are directed to file their Memorandum of Appeal within 7 days from the date of this order.***
- 3. The application for stay of execution of the Ruling/Orders of the Chief Magistrates Court at Meru in Succession Cause No. 60 of 2020 pending the hearing and determination of the Appeal to this Court is declined.***
- 4. As the application has partially succeeded, each party shall bear their own costs.***

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MARCH 2021.

EDWARD M. MURIITHI

JUDGE

APEARANCES

M/S M. D. Maranya & Co. Advocates for the Applicants

M/S Ngunjiri Michael & Co. Advocates for the Respondents