



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS APPLICATION NO. 8 OF 2019

THOMAS OCHIENG APOPAAPPLICANT

VERSUS

GEORGE ONYANGO APOPA 1ST RESPONDENT

FREDRICK APOPA2ND RESPONDENT

JULIAS APOPA..... 3RD RESPONDENT

DOMNIC APOPA.....4TH RESPONDENT

RULING

The application before me is dated 19th November 2019. The Applicant, **THOMAS OCHIENG APOPA**, has sought leave to appeal to the Court of Appeal, in respect to the Ruling and Decree in **Succession Cause No. 370 of 2006**.

1. Secondly, the Applicant sought leave to appeal out of time.

2. The application was supported by the Applicant's affidavit which was sworn on 19th November 2016. The affidavit explained that the reason why the Applicant moved the court with his current application was that the Respondent intended to dispose of **L.R. NOs. 1185 and 1217, NORTH UGENYA SIMUR**, which constitute the Applicant's homestead.

3. In response to the application, the Respondents, **GEORGE ONYANGO APOPA, FREDRICK APOPA, JULIAS APOPA** and **DOMNIC APOPA** filed Grounds of Opposition.

4. They expressed the view that the application was misconceived, irregular, bad in law and an abuse of the process of the court.

5. The Respondents also stated that the application lacked merit.

6. The Respondents disclosed that the Ruling which the Applicant had sought to appeal against, was made on 10th August 2016. Therefore, the application now before the Court had been brought after the lapse of more than 3 years.

7. It was the Respondents' view that the Applicant had failed to offer any explanation for the delay in bringing the application.

8. Indeed, the Respondents believe that the application was just an afterthought.

9. The Applicant filed a "*Response to the Respondent's affidavit*", on 10th March 2020. The said "*Response*" was in the format of an affidavit sworn by the Applicant.

10. He exhibited an Order that had been issued by the Court of Appeal in **THOMAS OCHIENG APOPA & ANOTHER Vs GEORGE ONYANGO APOPA & 3 OTHERS, CIVIL APPEAL (APPLICATION) NO. 72 OF 2016**. Upon the face of the said Order, it is evident that it was made in an application for stay of execution of the Orders made by Majanja J. on 10th August 2016.

11. The Ruling of the Court of Appeal was delivered on 18th December 2018, and the Orders extracted therefrom were as follows;

“IT IS HEREBY ORDERED THAT

a. THAT we dismissed the application as it relates to stay of execution of the order granting a life interest of KISUMU/ MUNICIPALITY 5/75 and KISUMU/MUHORONI/ 1098 to the 3 surviving widows of the deceased namely, DOMITILLA ADUDA, FILLLLIGONA OCHOLA and ROSE ATIENO APOPA and the incomes accruing therefrom in equal shares.

b. THAT we grant an order staying the delivery by Thomas Ochieng Apopa of title documents in his possession, relating to the estate of the deceased, pending the hearing and determination of the appeal, on condition that he does not sell, charge or in any way dispose of the properties and assets.

c. THAT this being a family matter, there shall be no order as to costs.”

12. When canvassing the application, the Applicant asserted that notwithstanding the Order granted by the Court of Appeal, the Respondents were in the process of selling the two parcels of land which are the subject matter of this application.

13. He cited the case of **ZIPPORAH WANJUGU KINARO Vs GEOFFREY WACHIENI KINARO, (NYERI) HIGH COURT SUCCESSION CAUSE NO. 12 OF 1998** as authority for the proposition that leave was required before an appeal can be lodged at the Court of Appeal, arising from a Succession Cause.

14. In that case Makhandia J. (as he then was) held as follows;

“An appeal to the Court of Appeal arising out of a succession cause is not automatic. The intended appellant must seek and obtain leave of this court in order to file an appeal to the Court of Appeal out of succession cause.

.....

The appeal, to the extent that it was filed without leave of this court is a nullity.”

15. In this case, the Applicant has exhibited an order which was apparently issued by the Court of Appeal, in **CIVIL APPEAL NO. 72 OF 2016**. That suggests that there is an appeal which is already in place. If there was no appeal pending at the Court of Appeal, it would be difficult to understand how or why the said Court would have granted an order of stay.

16. In any event, the Applicant has not satisfied this court that there was any matters which merit serious judicial consideration, to warrant the grant of leave to appeal.

17. Secondly, the Applicant has not provided this court with any Satisfactory explanation for the delay in bring the application.

18. I find that the Applicant is guilty of unexplained inordinate delay, as he has waited for more than 3 years before seeking leave to appeal.

19. In the case of **RHODA WAIRIMU KIOI & ANOTHER Vs MARY WANGUI KARANJA & ANOTHER CIVIL APPEAL NO. NAI 69 OF 2004**, the Court of Appeal underscored the importance of expedition in succession matters. This is what the Court said;

“We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

20. The practice that was being alluded to is that of the High Court or if leave is refused there, the Court of Appeal would only grant leave to appeal where it appears, prima facie, that the intended appeal raised grounds which merited serious judicial consideration.

Leave to appeal out of time

21. As I have already held above, the application before me was brought after an unexplained period of inordinate delay. That finding applies to both the limb of the application seeking leave to appeal, as well as the limb seeking leave to appeal out of time.

22. In **RAPHAEL MUSILA MUTISO & 3 OTHERS Vs JOSEPH NDAVA NTHUKA & ANOTHER, CIVIL APPLICATION NO. 27 OF 2019**, Ouko P held as follows;

“In an application for extension of time, the most critical consideration is the explanation for the delay. A delay of a day will result in the application being dismissed if there is no explanation.”

23. In this case the delay is for more than 3 years; and the same is not explained by the Applicant. Therefore, the Applicant failed to meet the threshold for the grant of an extension of time, within which to file an appeal.

24. Accordingly, the application dated 19th November 2019 is dismissed, with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE