

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 6 OF 2005

IN THE MATTER OF THE ESTATE OF LUKA MUYUMBU (DECEASED)

RULING

1. The Motion for determination is dated 13th October 2020. It is brought at the instance of Elijah Wekesa Muyumbu, who I shall refer him heretoafter as the applicant. He seeks leave to lodge appeal against a ruling that was delivered on 3rd December 2018, and maintenance of *status quo* on Bunyala/Sindikho/419. His case is that he is aggrieved by the subject ruling, he has a good case on appeal, and he was unable to lodge appeal timeously for lack of finances and due to ill-health.

2. There is opposition to it, by Muhavini Cleophas Wawire, who argues that the application lacks merit and is *res judicata*.

3. The application was canvassed by way of written submissions, lodged in the record by the parties. I have read through them and noted the arguments made.

4. The impugned ruling was delivered on 3rd December 2018. Any appeal ought to have been lodged within twenty-eight days. Has any explanation been given for the delay? The applicant says that he did not have money, so he was unable to make a move on the proposed appeal. I have perused the court record, and noted that the applicant has been fairly active in the matter in the period after the delivery of the said ruling. Firstly, he lodged a document herein, through an advocate, on 7th May 2019, dated 6th May 2019, titled "Objection to Making of Grant." On the same day, he filed a Motion, dated 7th May 2019, seeking stay of execution and injunctions. On 20th July 2020, a notice of change of advocates was filed, denoting that the applicant was changing his lawyers on record. When he filed the application dated 13th October 2020, it was by an advocate other the ones who had filed documents on his behalf in 2019 and 2020. So, I am not persuaded that he had financial difficulties that stopped him from filing appeal. He had money to engage three different advocates in a span of two years. Never mind that he was even represented by another advocate for the purpose of the confirmation application itself. The application that he filed in October 2020, could have been filed in 2019, instead of the Motion dated 6th May 2019. About his eyesight, I do not see how it prevented him from appealing, if it did not prevent him from engaging advocates who lodged various documents in court on his behalf. I am not persuaded that the delay in appealing has been explained.

5. Does he have an arguable appeal? It may not be a consideration at this stage, but the applicant has submitted on it. He has not deposed to it in his affidavit in support of the application. He has also not attached, to his affidavit, a draft memorandum of appeal, displaying his proposed grounds of appeal. He says he was not involved in the canvassing of the summons for confirmation of grant. He was represented by an advocate in the summons for confirmation of grant, who drew and filed an affidavit of protest, sworn by the applicant. When the court directed that the summons for confirmation of grant be canvassed by way of written submissions, the advocate did prepare and file written submissions. There was no oral hearing, as oral evidence had been taken previously, at the hearing of an application for revocation of grant. The summons for confirmation of grant was founded wholly on the written submissions. I do not think there is any viable appeal.

6. In view of the above, there is no merit in the application dated 13th October 2020, and I hereby dismiss the same. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE 2021

W. MUSYOKA

JUDGE