REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 463 OF 2011

IN THE MATTER OF THE ESTATE OF NAAMAN M'MWARANIA-DECEASED

ELIZABETH NAAMAN.....PETITIONER

-VERSUS-

DAVID M. M'MWARANIA.....RESPONDENT

LILIAN GAKII.....INTERESTED PARTY

RULING

1. The court is called upon to determine a notice of motion brought under certificate of urgency dated 10/02/2021 pursuant to Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya. In it, the petitioner seeks extension of time to give, issue and serve Notice of appeal against the ruling of this court dated 14/12/2020 and delivered on 16/12/2020.

2. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of Elizabeth Naaman, the petitioner herein, sworn on 10/02/2021 and can be summarized to be that in the impugned judgement, the applicants being widow and daughter of the deceased were left with no property as their due inheritance. It is further contended that unless the application is allowed, they will get nothing from the husband's estate and the delay in filing the intended appeal was not deliberate because it was occasioned by the late receipt of the typed copy of the judgment.

3. The respondent despite having been given leave on 11/02/2021 to file a response to the application, never did so and thus the application proceeded for hearing without any response thereto in writing though the respondent was granted an opportunity to oppose the application on points of law only.

4. During the hearing of the application, conducted by way of oral submissions, Miss Otieno appeared for the petitioner while Miss Muriithi was for the respondent. Mr. Ouma representing the interested party told court that they were not opposed to the application being allowed.

5. In the submissions, counsel for the applicants maintains that two beneficiaries were left out from the list of distribution whose remedy was only on appeal. It is asserted that a copy of the impugned ruling was only received by the petitioner in January 2021 despite having asked for the same on the day it was delivered. That the petitioner received the ruling on 06/01/2021 and only filed this application on 10/02/2021 because it was difficult to get all the clients at a go. The need to get the typed judgment was said to haven necessitated by the need to read and advice the clients on the prospects of the appeal hence the delay. The court is urged to allow the application on the basis of such submissions.

6. For the respondent, it was maintained that the petitioner was by statute mandated to file the notice of appeal on or before 17/01/2021 which was not done. That the ruling having been delivered on 21/12/2020 (sic), the same was available to the petitioner and moreover, the copy exhibited is not certified hence there was no need for certification. That the length the delay of 26 days was unexplained and the chances of the appeal succeeding have not been demonstrated. It was stressed that the applicants were not rendered landless hence the application is merely meant to delay justice and waste resources of the respondent. To the respondents, the distribution was done according to the proposal by the petitioner in the affidavits dated 19/3/2014, 18/12/2015 and 15/11/2015 as reflected in the judgement of 12/02/2019.

7. I have anxiously considered the application and the oral submissions made by the applicant and the respondent. For a litigant to succeed in a request to have time extended, he must show a sufficient cause for the delay, explain the delay and show that it was not inordinate. It must also be demonstrated that there is substance in what they want to pursue by demonstrating that the intended appeal is not frivolous but raises, at least, an arguable point. For matters under the Law of Succession Act, the jurisdiction to extend time is, in addition to the general and inherent power of the court to make orders that facilitate justice, donated by **Rule 67** of **Probate & Administration Rules which**

provides as follows-;

> ***"where any period is fixed or granted by these rules or by an order of the court for doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired."***

8. There is no dispute that a party who wishes to appeal to the Court of Appeal is required by **Rule 75(2) Court of Appeal Rules** to file Notice of Appeal within 14 days from the date of the delivery of the decision on which the intended appeal is based. The applicants here state that they were unable to lodge the Notice of Appeal on time due to the late receipt of a typed copy of the ruling and the need to read and understand the contents therein.

9. Before I delve on the decision sought, it need clarification that the decision was made by **Gikonyo J** but read by **Cherere J** on the 16th December 2020. In my calculation and computation of time, noting that the period between 21 December and 16th January in every year is excluded from such computation because time does not run, the applicants had up to the 26th January 2021 to file the Notice of Appeal. Accordingly, when the applicants counsel received the decision on 6th January 2021, they were clearly within time to file the notice and it baffles why more time has been wasted with this application. I therefore find and hold that the delay here was not occasioned by the need to peruse the decision and advice client but rather by misapprehension of how to compute time and the clear disregard of the period time stops running.

10 But then I consider the drawing of a notice of appeal to be a mechanical act that requires no much facts and application of the law. Even where one is in doubt of the merits of the decision and may want to read before making an informed decision, due diligent would dictate that a notice of appeal be filed before hand and in time, pending a firm opinion. When I apply the law to the facts reveled here, I do find that there is no plausible reason for the delay to be attributable to the court. Maybe the counsel needed to talk to his clients and get instructions on the application but again that was informed by an incorrect appreciation of the law. That incorrect appreciation however was a mistake of counsel which should not be the only reason to deny the applicants their day in court. If this was the only consideration, I would have granted the extension sought.

11 The second threshold to be considered by a court in the exercise of discretion to enlarge time is the substance or the strength of the appeal to be pursued. The intended appeal is premised on the allegation that the petitioner and one of her daughters have been disinherited as no property has been distributed to them rendering them landless. The petitioner only intends to appeal against the ruling dated 16/12/2020 which emanated from her application for rectification of the grant. The errors of names and the inclusion of a non-existent parcel of land were resolved through the said ruling and an amended certificate of confirmation of grant was issued in that regard. Having anxiously looked at the amended certificate of confirmation of grant, I note that the petitioner was solely given ½ an acre out of land parcel number **KIIRUA/RUIRI/3507** and to hold the reminder of 1½ acres of the said parcel in trust for John Mburugu and JM (minor). Moreover, she was solely given Motor Vehicle Registration Number KQG Land rover. Therefore, her allegations on being rendered landless and getting nothing out of her deceased husband's estate are manifestly unfounded. However, the allegation that one of her daughters namely Leah Gacheri was completely left out of the schedule of distribution cannot be said to be frivolous. In its reserved ruling, now sought to be challenged, the court stated at paragraph 15 as follows:

> **"15 In addition, the application seeks to have one of the beneficiaries of the deceased advertently left out to be included as such and be provided for in the estate. A perusal of the court record shows that Leah Gacheri was indeed a beneficiary as listed in the chief's letter and the pleadings herein. <u>There was an advertent omission of the name of Leah Gacheri. But, provision for her cannot be done without distorting the distribution of the estate. This will require careful consideration and hearing the parties. For this reason, I should think that the grant should not be implemented pending resolution of this aspect of the case."</u>**

12 I read this excerpt to say that the claim on behalf of the daughter is merited and the grant cannot be implemented before the matter is addresses. I do not think that the decision has disinherited that daughter to merit the matter being escalated to the court of appeal. I find it left open for this court to resolve. I therefore find that there is no arguable point to be taken to the court of appeal. Accordingly, I find no reason to extend time and it thus follows that the application lacks merits and it is thus dismissed. Being a family dispute, I make no orders as to costs.

13 Having determined the application as aforesaid, and noting that there is a pending decision to be made before the estate can be wound up, I direct the parties to sit down as a family and agree on how to accommodate **Leah Gacheri** in the scheme of distribution. That be done within 60 days so that the parties attend court on 23/11/2021 to record a possible consent by way of rectification of the grant.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY BY MS TEAMS THIS 17TH DAY OF JUNE 2021.

PATRICK J O OTIENO

JUDGE

No appearance for Mrs Otieno for applicant

No appearance for Miss Murithi for respondent

PATRICK J O OTIENO

JUDGE