



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS APPLICATION NO. 70 OF 2020

LYDIA KAIRUTHI KAARIA.....1ST APPLICANT

JOYCE NKIROTE KAAL.....2ND APPLICANT

VERSUS

FLORENCE KINAIROTE M'IMANYARA....RESPONDENT

RULING

1. Before the Court is an application dated 6th August 2020 seeking leave for the Applicants to prefer an appeal against the Ruling delivered on 16th June 2020 by Hon (Mrs) L. N. Juma in Meru Succession Cause No. 295 of 2016 out of time; and for stay of the implementation of the confirmed grant issued on 15th July 2019 by Hon M. K. N. N. Maroro (PM) pending the hearing and determination of the appeal.

Applicant's Supporting Affidavit

2. The Applicant's application is premised on the grounds on the face of it as well as on the supporting affidavit. They state that they were aggrieved by the Ruling of 16th June 2020 which dismissed their application seeking to review the Court's earlier Ruling of 30th May 2019 and seeking to have their case re-opened but owing to the financial constraints precipitated by the COVID 19 pandemic, they were not able to raise the requisite fees to prefer an appeal within the prescribed timelines; That they are apprehensive that the Respondent may proceed to administer the Estate on the strength of the certificate of confirmed grant issued on 15th July 2019, thereby rendering their intended appeal a nullity. That they are apprehensive that the Respondent may proceed to administer the Estate on the strength of the certificate of confirmed grant issued on 15th July 2019, therefore rendering their intended appeal a nullity.

Applicant's Submissions

3. The Application was canvassed by way of written submissions. The Applicants filed their submissions dated 26th January 2021. They submit that the Ruling sought to be challenged arises from the Applicants' application dated 27th November 2019 in which they sought for the Court to review and/or vary the Ruling delivered by Hon. Maroro on 30th May 2019 (who had since gone on transfer) and re-open the case to allow them adduce new evidence on gift *inter vivos* which was not within their knowledge during the trial.

4. They submit that the gist of their claim is that they proceeded at the trial unrepresented by an Advocate and therefore did not know the importance of adducing evidence on inchoate gift *inter vivos*, as such, when the Ruling on distribution was issued, they were greatly prejudiced since the portions of land they had developed for decades with the blessings of the deceased were granted to other beneficiaries who do not live or occupy any portion of the estate; That the Court that made the impugned Ruling ought to have noted that there was no oral evidence adduced by the Applicants in support of their claim for gift *inter vivos* and failure to allow them to adduce fresh evidence will prejudice them.

5. They submit that due to the financial constraints brought about by the COVID 19 pandemic, the statutory period of 30 days within which to prefer an appeal lapsed before they could raise the finances to prefer an appeal; That they however proceeded to promptly file an application to be granted leave to appeal out of time and the delay cannot be termed as inordinate; That they are persons of meagre earnings and entirely relied on the subject matter of the intended appeal for their livelihood and subsistence of their families which they solely provide for since they are widowed and/or abandoned.

Respondent's Replying Affidavit

6. The Respondent opposed the application vide her replying affidavit sworn on 3rd November 2020. She states that the application is an

afterthought and is meant to delay the distribution of the estate as per the confirmed grant; That the Applicants ought to have applied for review and/or appeal when the objection was dismissed and before the estate was confirmed; That no protest was filed against the application for confirmation of grant and the Court went ahead and distributed the estate; That the Applicants are guilty of inordinate delay in filing the said Appeal and no good reason has been advanced for failure to appeal on time; That filing a Memorandum of Appeal does not cost more than Ksh 1,000/=; That the orders sought to be appealed against is not one that is appealable as of right and the Applicants ought to first seek leave of Court to Appeal before filing this application; That stay of execution cannot be granted at this time as the appeal is yet to be admitted; That she as well as all the other beneficiaries stand to suffer if the application is allowed; That litigation must come to an end; That the intended appeal lacks merit as it raises issues that ought to have been determined through an appeal and not review.

Respondent's Submissions

7. The Respondent filed its submissions dated 12th April 2021. The Respondent submits that the Applicant ought to have sought for leave to file an appeal pursuant to the provisions of Order 43 (1) of the Civil Procedure Rules since there is no automatic right of appeal against the orders sought to be appealed against. Relying on the case of *Stephen Myasani Menge v Rispah Onsase (2018) eKLR*, she submits that where leave to appeal is a prerequisite before filing an appeal, failure to seek and obtain leave is fatal and consequently no competent appeal can be lodged against such an order.

8. She further submits that as per Section 79, upon which the application is premised, the Applicant has a duty to satisfy a number of requirements. The first requirement is sufficient cause which she submits has not been met since the Applicant has not advanced any good reason for failing to file an appeal on time and that the reason of financial constraints does not hold water and that no correspondence has been shown to prove the genuineness of this allegation thereby making this reason an afterthought.

9. She further submits that the reason for COVID 19 is a sham and that the Applicants are out to delay the implementation of the confirmed grant because they are the ones utilizing a big chunk of the estate property to the detriment of other beneficiaries.

10. On the second requirement, the Respondent submits that the appeal does not raise any triable issues for the reason that the grounds stated in the memorandum of appeal have nothing to do with the ruling dismissing the application for review and that the Applicants are actually appealing against the Ruling of Hon Maroro dated 30th May 2019 through the back door.

11. On the other requirement on prejudice to be suffered, the Respondent submits that herself, as well as other beneficiaries stand to suffer because the instant application and intended appeal are intended to delay or frustrate the implementation of the confirmed grant especially because the administrator who is the Respondent is of old age. She submits that the application lacks merit and ought to be dismissed with costs.

Issues for Determination

12. The two main issues for determination in the instant application are: -

i. Whether to grant leave to the Applicant to file their Appeal out of time.

ii. Whether to stay implementation of the grant issued on 15th July 2019.

Leave to Appeal out of time

13. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the making of the impugned decision. The Applicants having been locked out by this timeline seek to have this time extended.

14. Extension of time is a matter of discretion. Indeed, the law gives this Court jurisdiction to extend time upon application even when the time for doing the act in question has already lapsed. This is the spirit of the law in Section 79 G of the Civil Procedure Act, Cap 21 Laws of Kenya which provides as follows: -

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

15. See also Order 50, Rule 6 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and Section 59 of the Interpretation and General Provisions Act.

16. In the case of *Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)* Asikhe Makhandia J, sitting at the Court of Appeal, cited with approval the *locus classicas* of *Leo Sila Mutiso Vs 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.”

17. Concerning the length of the delay, the time period between the last day (i.e thirtieth day) on which the Appeal ought to have been filed and the time of making the instant application was 21 days. This period of time with respect to the aspect of delay is relative. However, the reasons advanced for this delay are to be considered alongside this period of delay.

18. On the reasons for the delay, the Applicants state that they had certain financial constraints and that they are persons of meagre income and that by the time they raised the funds required for filing the Appeal, they were already out of time. The Respondent on the other hand argues that there is no evidence whatsoever adduced to prove these alleged financial constraints. She states that filing an appeal costs no more than Ksh 1,000/=. This Court will not be quick to assume the financial status of either party. The Constitutional principles of access to justice demand that no persons should be driven out of the seat of justice more so owing to their financial limitations. On a balance of probabilities, this Court finds that it is the Applicants who know best their financial situation.

19. On the chances of the Appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal. The grounds of Appeal concern failure by the Court to appreciate the importance of the matter of gift *inter vivos* as well as the fact that they were unrepresented in the proceedings. These grounds, to this Court’s mind are to be considered against the backdrop that what is being challenged is a ruling refusing to review a previous ruling. In the said Ruling for which the Applicants seek to appeal, the Court was of the view that the Applicants had not satisfied the grounds for review and that they ought to have filed an appeal instead of an application for review. In the premises, what this Court expects is that the Applicants ought to argue that they had indeed satisfied the grounds for review. The nature of grounds for review vis a vis the holding of the Court have not been clearly identified in the Memorandum of Appeal.

20. Looking at the Memorandum of Appeal on record, the Ruling for which an appeal is sought and the previous ruling which was delivered on 30th May 2019, this Court finds that there is some disconnect. The Ruling of 30th May 2019 emanated from an application wherein the Applicants argued that the application for letters of administration was done secretly and without their consent or knowledge and through concealment of facts. In the application for review that culminated in the Ruling of 16th June 2019, despite urging for review, the Applicants merely stated that they had been unrepresented in the proceedings and that they needed to present evidence on matter of gift *inter vivos*. There is an apparent disconnect.

21. This Court is however alive to the fact that the law allows for Appeals from orders refusing an application for review as follows: -

Order 43 Appeals from Orders

Order 43, Rule 1 Appeals from Orders

1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act

(x) Order 45, rule 3 (application for review);

22. Such appeals seeking to challenge a ruling on an application for review in fact lie as of right. This Court does not therefore agree with the submission made by the Respondent that the Applicants sought to have first of all sought leave for an appeal of this nature. In any event, the instant application is such one seeking leave.

23. For the reasons that the law allows for such appeals as of right, that the delay in bringing the instant application was not inordinate and that the matter of inability to obtain funds for filing the Appeal may be genuine, this Court will allow the Applicants to file their appeal out of time.

Stay of Implementation of the Grant

24. In considering whether to grant stay, the first issue is on whether there is an arguable appeal. As has already been pointed out, the law under Order 43 of the Civil Procedure Rules allows for the filing of an appeal against the Ruling of the Court on an application for review. There is therefore an arguable case to be argued on appeal. An arguable case does not mean one that must eventually succeed and it is not for this Court to go into the merits of the claim at this stage. See the above mentioned case of **Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)** where Asikhe Makhandi J, held as follows: -

“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.”

25. On the nature of prejudice to be suffered by the Respondent, the Respondent urges that all the beneficiaries stand to suffer because the

instant application and intended appeal are intended to delay or frustrate the implementation of the confirmed grant especially because the administrator who is the Respondent is of old age. While it is true that there should no be delays in the administration of the estate, this Court also has to ensure that the ends of justice are met. If the administrator is indeed of old age, there is provision in the law for substitution of such deceased administrators.

26. The upshot of the foregoing is that the Court finds merit in the instant application.

ORDERS

27. Accordingly, this Court makes the following orders: -

i. Leave is hereby granted to the Applicant herein to file an Appeal out of time against the Ruling and Order delivered on 16th June 2020 by Hon Mrs. L. N. Juma in Meru CM Succ Cause No. 295 of 2016.

ii. An order for stay of execution of the confirmed grant issued on 15th July 2019 by Hon M. K. N. N. Maroro in Meru CM Succ Cause No. 295 of 2016 is hereby issued pending the hearing and determination of the intended Appeal.

iii. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JUNE, 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kaumbi & Co. Advocates for the Applicants

M/S J Nelima & Co. Advocates for the Respondent