



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 252 OF 2005**

**IN THE MATTER OF THE ESTATE OF KIRIGU MAHINDA alias KIRIGO MAHINDA (DECEASED)**

**JAMES MAHINDA KIRIGU.....PETITIONER/APPLICANT**

**VERSUS**

**JESSEE NDIRANGU KIRIGU.....PROTESTOR/RESPONDENT**

**RULING**

**Brief facts**

1. The applicant has brought this application dated 28<sup>th</sup> February 2020, under **Section 7 of the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya, Section 95 of the Civil Procedure Act, Article 159(1) of the Constitution of Kenya, 2010** seeking for orders for stay of any further proceedings in Nyeri High Court Succession Cause No. 252 of 2005 pending the hearing and determination of the intended appeal. He also seeks for extension of time for filing and service of the Notice of Appeal in the intended appeal against the judgment herein dated 22<sup>nd</sup> January 2020 and to deem the annexed Notice of Appeal as properly filed within the prescribed time.

2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 20<sup>th</sup> July 2020 and filed in court on 28<sup>th</sup> July 2020.

**The Applicant's Case**

3. It is the applicant's case that judgement was delivered on 22/1/2020 to which his advocate was notified by a telephone call from the court registry on 21/1/2020. The advocate could not reach the applicant to notify him of the judgment or to receive instructions on an appeal. The applicant further states that he learnt of the judgment on 25/2/2020 when he sent a representative to check on the position of the matter. Upon being notified of the judgment, the applicant contends that he instructed his advocates to lodge an appeal but time had since lapsed.

4. The applicant contends that his appeal has a high chance of success as it raises meritorious and weighty issues for determination by the court and thus this Honourable court ought to extend time within which the applicant can lodge an appeal. He adds that failure to file his Notice of Appeal on time was not deliberate but was a result of an excusable mistake on his part and his advocates.

5. The applicant further contends that he is apprehensive that the respondent may proceed to execute the grant at any time. He adds that in the event the orders sought are granted, no prejudice will be occasioned to the respondent which cannot be compensated by way of damages.

6. The applicant's advocate also swore an affidavit to the application in which he reiterated what the applicant stated in his application save to add that the applicant will suffer irreparable loss because he has been residing on the suit property and has developed the same since 1962.

**The Respondent's Case**

7. It is the respondent's case that the applicant only filed this application after his advocates served the applicant with transfer forms to execute the grant. As such, the respondent contends that the applicant is not serious with his application.

8. The respondent depones that the applicant is not being truthful as he has not explained what was wrong with his phone, neither has he disclosed the name of the representative he sent to check on the position of the file. Further, the respondent states that the applicant's advocate ought to have filed a Notice of Appeal within the time prescribed to safeguard his client's interests despite not being able to reach him.

9. The respondent further states that the succession proceedings herein were filed 37 years ago and the parties have been coming to court

diligently and thus the applicant is using this opportunity to delay the matter. Further, the applicant has no chances of success in his appeal as the court ruled that the applicant, the respondent and their brother were to share the deceased's assets equally. The respondent adds that he will be greatly prejudiced because the proceedings will continue to delay in court. He states that he is an old man and ought to be allowed to enjoy the fruits of his judgement.

10. The respondent contends that stay of proceedings and execution pursuant to Section 5(2)(b) of the Appellate Jurisdiction Act provide that stay can only be granted by the Court of Appeal. More so, the applicant has not shown any sufficient cause to warrant this honourable court exercise its discretion in granting the orders sought.

11. The respondent contends that if the court allows for the orders sought herein, the applicant ought to furnish the respondent with security of costs to the tune of Kshs. 500,000/- or an amount to be determined by the court to be deposited in a joint account in the names of the advocates herein.

12. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

### **The Applicant's Submissions**

13. It is the applicant's case that in exercising its discretion on whether to grant stay of proceedings, the court ought to balance between the appellant's rights to his appeal and the respondent's rights as the decree holder with a competent decree. The applicant relied on the case of **Absalom Dova vs Tarbo Transporters [2013] eKLR cited in Antoine Ndiaye vs African Virtual University [2015] eKLR** to buttress his point.

14. On the issue of substantial loss, the applicant has stated that he will undergo substantial loss if the judgment dated 22/1/2020 is allowed as is. He submits that he has stipulated his reasons in his Memorandum of Appeal. The applicant submits that he has brought the application timeously as judgment was delivered on 22/1/2020 and the application was filed on 28/2/2020. He relied on the case of **Savanna International Ltd vs Dennis Wekesa Nyongesa [2011] eKLR** which held that a one month delay was not unreasonable. The applicant further adds that no decree of the court had been extracted at the time causing him to make the application herein as he was apprehensive execution may commence at any time.

15. The applicant contends that the delay in filing the appeal was by a few days and thus the applicant prays that the court may exercise its discretion under Order 50 Rule 6 of the civil Procedure Rules, Sections 79G and 95 of the Civil Procedure Act and enlarge time within which the applicant may lodge his appeal. Case law relied on is **Charles Munyeki Wachira vs Kenya Pipeline Company Limited [2006] eKLR**.

16. The applicant relies on the case of **Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2018] eKLR** and submits that the right of appeal is a constitutional right and to deny a party such a right would amount to denying them justice under Articles 48, 50(1) and 25 of the Constitution. The applicant contends that he should be allowed a chance to ventilate his appeal on the merits as he has demonstrated that his appeal has merit and is not frivolous.

17. The applicant thus submits that his application has merit and the same ought to be allowed.

### **The Respondent's Submissions**

18. The respondent submits that the judgment of 22/1/2020 resulted into a decree which is appealable as of right and does not require an application such as the one the applicant has filed herein. The respondent relies on the cases of **In the Matter of the Estate of Hezron Bernard Wamunga (Deceased) [2004] eKLR and Peter Wahome Kimotho vs Josphine Mwiyeria Mwanu [2014] eKLR**.

19. The respondent reiterates that the applicant's advocate ought to have filed a Notice of Appeal to safeguard his interests. He relies on the cases of **Njoka Muriu & Another vs Evan Githinji Muriu & Another, Court of Appeal Civil application No. Nai 356 of 2003 (NYR. 19/2003); Gachanja Muhoro & Sons Ltd vs Titus Mwala Nduva (2016) eKLR and Koki Katua vs Michael Mutisya Kithome (2001) eKLR** to support his contention that a Notice of Appeal is a simple document that can be filed without the instructions of a client and can be withdrawn at any time at minimal costs in case the party does not go through with the appeal. As such, the respondent submits that the application ought to be dismissed as it does not comply with Rule 74(2) of the Court of Appeal Rules.

20. The respondent contends that the applicant is dilatory and indolent and as such his application ought to be dismissed with costs. Further, the age of the case which is contrary to Article 159(1)(b) of the Constitution of Kenya is yet another reason why the application lacks merit.

### **Issues for determination**

21. After careful analysis, we humbly submit that the main issues for determination are:

- a) Whether the applicant has met the prerequisite for grant of stay of proceedings pending appeal.
- b) Whether the applicant ought to be granted leave to appeal out of time.

### **The Law**

#### **Whether the applicant has met the prerequisite for grant of stay of proceedings pending appeal.**

22. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by **Ringera J in Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000:-**

**“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

23. Similarly the threshold for stay of proceedings has been illuminated in the passages in **Halsbury's Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332** that:-

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.**

**This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.**

**It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. An applicant seeking stay orders on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”**

24. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-

- a) Whether the applicant has established that he/she has a *prima facie* arguable case;
- b) Whether the application was filed expeditiously; and
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

25. Judgement herein was delivered on 22/1/2020 and the applicant filed this application on 2/3/2020. This is about 8 days outside the time limited for filing an appeal. The applicant explained that the reason for delayed in filing the appeal on time was because he was not in communication with his advocate.

26. The question is whether this a good reason for this court to exercise its discretion in favour of the applicant. This case belonged to the applicant as a party and not to his advocate. He knew that the case was fixed for judgement. Even if he was not able to attend court, for delivery of the judgment, he ought to have taken due diligence in following up the matter with court registry to find out the outcome. To the contrary, the applicant waited for over 1½ months to take the necessary action. It was stated by the respondent which is not denied that the applicant woke up from slumber when the transmission documents were taken to him by the respondent's counsel.

27. Consequently, I find that although this delay cannot be termed as inordinate, the applicant has failed to explain the said delay.

**Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought**

28. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR** the court observed that:-

**“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”**

29. The respondent contends that he will suffer prejudice if stay is allowed because he has a valid decree from a competent court after litigating for over 38 years and thus the appeal will cause more delay yet he is an old man. The applicant on the other hand states that he will suffer substantial loss as he has resided on the parcel of land since 1962. Notably, the supporting affidavit was sworn by the applicant's advocate and not the applicant himself.

30. I have looked at the judgement of the honourable judge and note that the applicant, the respondent and respondent's brother who are all children of the deceased were given equal shares in the estate of the deceased in accordance with the law.

31. I am of the considered view that the applicant has failed to demonstrate sufficient cause in this application.

**Whether the applicant ought to be granted leave to appeal out of time.**

32. It is trite law that the powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

33. The law on extension of time is to be found in **Section 95 of the Civil Procedure Act** which states as follows:

**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.**

34. **Section 7 of the Appellate Jurisdiction Act, Cap 9** provides:-

**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.**

35. The parameters for the exercise of a court's discretion have been concisely laid out in the case of **Mwangi vs Kenya Airways Ltd [2003] eKLR** where the Court of Appeal expressed itself thus:-

**“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 or not 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.”**

36. The **Mwangi case** brings out issues which this court has already discussed in this ruling and formed its considered opinion

37. I have considered all the issues in this application including the likelihood of success of this appeal which is quite grim in my view. For these reasons, I am of the view that in the interests of justice the applicant ought not to be denied his right of appeal since the delay of eight(8) days is not inordinate.

38. For the above reasons I hereby partly allow this application. The following are the orders of the court:-

a) The applicant is hereby granted extension of time to lodge his appeal within 14 days and in default, the orders to lapse automatically.

b) The prayer for stay of execution is hereby declined.

39. Each party to meet their own costs of this application.

40. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 1<sup>ST</sup> DAY OF JULY 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 1<sup>st</sup> day of July 2021**