



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO. E006 OF 2021**

**NKATHA CHARLES IKAMATI.....APPLICANT**

**VERSUS**

**FRANCIS MURIUNGI M'IMUNYA.....RESPONDENT**

**RULING**

1. The Chief Magistrate's Court sitting at Maua issued a confirmed Grant of Letters of Administration in Maua Succession Cause No. 96 of 2013. The Applicant, a widow to the deceased whose estate was the subject of the succession cause claims that the Respondent is in the process of implementing the grant and there is a likelihood that she will be evicted from the suit property. She intends to appeal against the Ruling delivered by the Court on 19<sup>th</sup> October 2020 refusing her application for review. By her application dated 8<sup>th</sup> February 2021, she seeks stay of execution or implementation of the letters of administration, leave to be allowed to file an appeal against the Ruling of the Court of 29<sup>th</sup> October 2020 out of time and leave to substitute her representatives from FIDA Kenya to the firm of Haron Gitonga & Co. Advocates.

***Applicant's Case***

2. The Application is supported by the grounds on the face of it and by the supporting affidavit sworn by the Applicant on 8<sup>th</sup> February 2021. The Applicant claims to be the widow of the deceased. She is aggrieved by the decision of the trial Court to award the Respondent a half share of the suit property on the basis that the same was family land being held in trust. She claims that the same was not family land but was property solely purchased by the deceased. She claims that she was unable to produce a copy of the green card during the time of the hearing and that it was only after FIDA's intervention that she got the green card. That it is on the basis of this new evidence that she made an application for review which was however dismissed. She claims to have instructed her Advocates to file an appeal but they did not do so.

***Respondents' Case***

3. The Respondent opposed the application by his replying affidavit filed in Court on 18<sup>th</sup> February 2021. He is the brother to the deceased. He states that during hearing in the trial Court, the Applicant never sought time to obtain any such documents. He claims that his late brother held the suit property in trust for him and he is the beneficiary of a half share of the property. He urges that there was no agreement produced to show that the deceased bought the land from any party. He also states that the Applicant has not advanced any reason as to why she didn't file the appeal in time.

4. He also filed a further affidavit sworn on 3<sup>rd</sup> March 2021 reiterating that the suit property is family land. He states that he has been in possession of the same and has built 3 front shops and 2 single rooms thereon and that after the death of his brother, the Applicant threatened to evict him and he reported this matter to the Chief. That he later sued her in Maua Civil Case No. 132 of 2013 only for her to file Succession Cause No. 96 of 2013 to which he successfully filed an objection and that the Court heard all parties with their witnesses.

***Issues for Determination***

5. The three main issues for determination in the instant application are: -

***i) Whether the Court should grant leave for the firm of Haron Gitonga & Co. Advocates to come on record for the Applicant.***

***ii) Whether the Court should grant leave to the Applicant to file her appeal out of time.***

***iii) Whether Court should stay implementation of the Letters of Administration issued in Succession Cause No. 96 of 2013 pending the hearing and determination of the intended appeal.***

***Determination***

### ***Leave to substitute Advocates***

6. The Applicant asked to be allowed to substitute her Advocates from FIDA Kenya to the firm of Haron Gitonga & Co. Advocates. Order 9 Rule 9 provides that once Judgment has been delivered, a party may change their advocates through an order of the Court, upon application or by consent of parties. The Respondent has not oppose this application and the Court sees no reason to reject this request. Leave is hereby granted to the Applicant to substitute her Advocates.

### ***Leave to Appeal out of time***

7. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the decision sought to be challenged. Extension of time is a matter of discretion and 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.***

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

8. This Court dealt with the issue of leave to appeal out of time in the case of ***Meru Misc Application No. 70 of 2020 Lydia Kiaruthi Kaaria & Ano vs Florence Kinairote M'imanyara***. The test for determining whether or not to grant leave involves an analysis on a number of key issues. These include the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to be suffered by the Respondent if the application is granted.

9. On the length of the delay, there has been a delay of approximately 70 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.

10. On the reasons for the delay, the Applicants state that she had instructed her Advocates to file an appeal but she came to discover that this had not been done. She has however not annexed any evidence to support her averments. This Court is however alive to the fact that litigants rely on advice by Counsel and on a balance of probabilities, this Court finds that this a reasonable explanation. In any event, the Applicant in this very application is seeking to substitute her Advocates and this decision may be used to read her dissatisfaction with her former Advocates. The Court, being a Court of Justice will give the Applicant the benefit of the doubt.

11. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal dated 8<sup>th</sup> February 2021. The grounds of Appeal therein concern failure by the Court to appreciate the purported new and important evidence she had obtained in her application for review. There is a clear nexus between the Applicant's grounds of appeal and the Ruling which she seeks to appeal against. It is not for this Court to go into the merits of the appeal so as not to embarrass the Court that will hear the appeal. However from the face of it, there appears to be an arguable appeal.

12. Concerning the prejudice to be suffered by the Respondent, this Court observes that the Respondent admits to be in possession of the property and he admits that he has built 3 front shops and 2 single rooms thereon. What may be in issue is transfer of title since if the property is found to be rightfully his, the delay in transfer of title may be prejudicial. However, it would also be in the interest of the Respondent to wait until a final determination in the matter is made to minimize exposure of himself and other third parties should the Court ultimately determine in favour of the Applicant. This Court does not therefore see any real prejudice to be suffered by the Respondent, should leave be granted since his operations remain undisturbed. For these reasons, together with the fact that the Applicant's Advocates may have contributed to the delays, this Court will exercise its discretion in favour of the Applicant and extend the time within which she may file an appeal.

### ***Stay of Execution/Implementation of Grant***

13. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

*a) substantial loss will result to applicant if stay is not granted; and*

*b) security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and*

*c) the application has been brought without unreasonable delay.*

### ***Arguable Appeal***

14. Arguability of appeal as a condition for stay is found under Rule 5 (2) (b) of the Court of Appeal Rules and not under the Civil Procedure Rules. This Court nonetheless has a duty to ensure that any such intended appeals are indeed arguable and not frivolous. An arguable appeal is not one that must eventually succeed. This Court observes that parties have made extensive representations on the merits of the appeal as to whether there were proper grounds for review. It is however not for this Court to go into the merits of the claim at this stage. This Court has dealt with this issue in the case of *Meru Misc Civil Application No. E021 of 2020 Elias Kithinji Karia vs Silas Kimathi Japhet*. See also the case of *Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)*.

15. All in all, 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);**

16. Such appeals in fact lie as of right. For this reason this Court finds that there is indeed an arguable appeal. The Applicant attached her Memorandum of Appeal dated 8<sup>th</sup> February 2021 in her supporting affidavit which proves his averments. This is indeed an arguable appeal.

***Substantial Loss***

17. The Applicant claims that unless stay orders are granted she will be evicted from the suit property. The Respondent on the other hand claims that he has been in possession from the suit property and it is in fact the Applicant who has previously made attempts at evicting him. This is a matter that can only be determined on evidence. The Court is alive to the fact that the Applicant lays a claim on the suit property and there is a possibility that if the grant implemented, title will be transferred and the property may pass to other parties through sale or otherwise. Indeed, it would not be convenient for parties to go through the trouble of re-transferring properties amongst each other bearing in mind the bureaucracies, attendant costs and the lengthy processes that often become of land transfers. It would be better to wait for a final determination on the rightful heirs as opposed to allowing the parties to deal with the property whilst a dispute is pending. This is with respect to the issue of title, notwithstanding the question of possession.

***Security***

18. On security, parties did not address the Court on this issue. Furthermore, the provisions of Order 42 of the Civil Procedure Rules on stay pending appeal are exempted from the domain of succession matters. Section 63 of the Probate and Administration Rules lists down the provisions of the Civil Procedure Rules which apply to succession proceedings and Order 42 is not among them. The Court is therefore not obliged to order for security and even then, the subject matter herein is not a money decree that would require payment in future.

***Undue Delay***

19. This Court has already dealt with the issue of delay. A delay of 70 months is relative. However in the circumstances of the case, this Court finds that the same was not unreasonable delay.

**ORDERS**

20. In the end, this Court makes the following orders: -

***i) Leave is hereby granted for the firm of Haron Gitonga & Co. Advocates to come on record for the Applicant.***

***ii) Leave is hereby granted to the Applicant to file her Appeal out of time on condition that she files the Record of Appeal within 30 days from the date of this order.***

***iii) An order for stay of execution of the Letters of Administration issued in Succession Cause No. 96 of 2013 is hereby issued pending the hearing and determination of the intended Appeal.***

***iv) There shall be no order as to costs.***

*Order Accordingly*

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JULY 2021**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

**M/S Haron Gitonga & Co. Advocates for the Applicant**

**M/S Francis Muriungi M'Imunya, the Respondent in person.**