



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSIONCAUSE NO. 252 OF 2013

IN THE MATTER OF THE ESTATE OF PETER NDERITU GATUMBO (DECEASED)

BEATRICE NYAGUTHII NDERITU.....APPLICANT

VERSUS

EDWARD WACIRA NDERITU.....RESPONDENT

RULING

1. This is a ruling on application dated 18th January 2021 seeking the following orders: -

i. Spent.

ii. Spent.

iii. That the applicant be granted leave of the court to file an application seeking leave to appeal on the ruling delivered on 10th December 2019 out of time.

iv. That such leave if granted to operate as a stay of execution of the judgment delivered on 10th December 2019 and any other consequential orders thereto pending the hearing and determination of the application for leave to appeal or such other action is taken as the court may deem fit.

2. The application is supported by affidavit sworn by the applicant. She averred that she is the wife of the deceased **Peter Nderitu Gatumbo** and together with her children, she resides on Parcel No. Laikipia/Ol'arabel/53 while the first house resides on L.R. No. Othaya/Itemeini/245.

3. The applicant averred that she was aggrieved by the ruling of this Court delivered on 10th December 2019, which without her knowledge that allocate the respondent a big chunk of L.R. No. Laikipia/Ol'arabel/53. She stated that she became aware of the ruling delivered on 11th December 2019 and instructed her advocate to file an appeal but her advocate failed to apply for leave to file an appeal and instead filed an application for stay of execution pending the appeal.

4. She averred that in the ruling dated 10th December 2020, the Court dismissed the application and held that failure to seek leave to file an appeal was fatal. She stated that the delay in filing the appeal has been occasioned by the delay in getting typed proceedings and she is apprehensive that the respondent will proceed to exercise 30.5 acres from Laikipia /Ol'arabel/53 and sell the same to third parties.

5. In response to the application, the administrator/respondent filed a preliminary objection on the following grounds:-

a. The application is bad in law, fatally incompetent, does not lie, and is an abuse of the court process.

b. There is no requirement or provision of the law for "leave to file an application for leave."

c. This court has no jurisdiction to entertain or grant the aforesaid application.

d. This court is functus officio in respect of the matter before it.

e. The said application is res judicata.

f. The application is premised on an incompetent and invalid notice of appeal and no attempt has been made to correct the fatal anomaly.

6. Directions were taken to have the preliminary objection dispensed by way written submission.

APPLICANT'S SUBMISSIONS

7. Objecting to the preliminary objection, counsel for the applicant submitted that the current application is brought under **Section 7 of the Appellant Jurisdiction Act Cap 9 Laws of Kenya and Rule 39 of the Court of Appeal Rules 2010**: -

Section 7 provide as follows:-

“The High Court may extend the time for giving notice of intention to appeal from the judgment of this court or for making an application for leave to appeal 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.”

8. Further, that the leave to appeal against the judgment of 10th December 2019 will only be granted after an extension of time to file an appeal has been granted since the time within which to file an appeal has lapsed; that the Court is vested with the jurisdiction to grant leave to apply for leave to appeal out of time.

9. The applicant submitted that the Court is not *functus officio* and neither is the application *res judicata*; that the respondent has failed to apply to strike out the defective Notice of Appeal.

RESPONDENT'S SUBMISSIONS

10. In support of the preliminary objection counsel submitted that the application is bad in law as **Section 7 of the Appellate Jurisdiction Act** empowers the High Court to 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 provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence. That there is no law providing for leave to file an application for leave to appeal and the application is a waste of judicial time and resources and against the overriding objectives; that under rule 39 (b) of the Court of Appeal rules, leave is to be sought in the Court of Appeal, not in the High Court.

11. That the earlier summons dated 5th February 2020, by the applicant sought an order of stay pending appeal, and the Court in its ruling dated 10th December 2020, pronounced itself on the issue of leave to appeal, and thus the Court will not re-litigate on the same matter. The Court is *functus officio* and the same prayer being sought is *res judicata*; that Court found that the applicant was not deserving leave to appeal as she did not demonstrate an arguable case and cited the case of **Raila Odinga vs. IEBC & 3 others (2013) eKLR**.

12. Further if the applicant was dissatisfied with the Court ruling of 10th December 2020, the best would have been to apply to the Court of Appeal for further relief. The respondent urged this Court to uphold the preliminary objection as the same satisfies the threshold in **Mukisa Biscuits Manufacturing Co. Vs. West End Distributors Ltd (1969) EA**.

ANALYSIS AND DETERMINATION

13. I note that the applicant seeks the leave of the Court to file an application for leave to file an appeal out of time. The applicant had previously filed an application dated 5th February 2020, for stay pending appeal in which the Court pronounced itself on 10th December 2020 where the Court held that the applicant was not deserving of the orders of leave to appeal as she did not demonstrate an arguable case.

14. **In respect to preliminary objections, the court in Mukisa Biscuit Manufacturing Ltd –vs- West End Distributors Ltd (1969) EA.** Stated as follows:-

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.....”

15. I note that the applicant is aggrieved by the ruling delivered 10th December 2020. I do agree with counsel for the respondent that under rule 39B of the appellate court rules, the applicant should have sought leave before the court of appeal to appeal against my ruling rather than file the current application which raises the same issues addressed by the Court in the ruling of 10th December 2020.

16. The doctrine of *res judicata* is captured under the provisions of **Section 7 of the Civil Procedure Act** which provide as follows:-

“No Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

17. In the case of the **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.*
- b) The former suit was between the same parties or parties under whom they or any of them claim.*
- c) Those parties were litigating under the same title.*
- d) The issue was heard and finally determined in the former suit.*
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

18. It is trite law that every litigation must come to an end and noting that most of the issues raised in the current application were addressed in the ruling dated 10th December 2020, this Court becomes *functus officio*, and entertaining this application is inviting this Court to sit as an Appeal Court on its own decision.

19. From the foregoing, I find the preliminary objection is merited. The application dated 18th January 2021 is dismissed with costs to the respondent.

20. **FINAL ORDERS**

- 1) Preliminary objection dated 2nd February 2021 is upheld.**
- 2) Application dated 18th January 2021 is hereby dismissed.**
- 3) Costs to the respondent.**

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 14TH DAY OF OCTOBER 2021

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

JENIFFER - COURT ASSISTANT

MS. WANJIRU MUREITHI FOR APPELLANT

GATU MAGANA FOR ADMINISTRATOR/RESPONDENT