



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. SUCCESSION APPLICATION NO. E005 OF 2021

ANTHONY MAINA KINYUA.....1ST APPLICANT

GLADYS WAMBUI WAMBUGU.....2ND APPLICANT

VERSUS

JOSEPH MWANGI NJURAL.....RESPONDENT

RULING

Brief facts

1. The application for determination dated 10th May 2021 brought under **Rules 63 and 73 of the Probate and Administration Rules**. It seeks for orders for stay of execution of the ruling in Karatina P.M Succession Cause No. 36 of 2018 and for leave to file an appeal against the ruling delivered on 19th November 2020 in the Karatina Succession Cause.
2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 21st May 2021.

The Applicants' Case

3. It is the applicants' case that a ruling in Karatina P.M Succession Cause No. 36 of 2018 was delivered on 19th November 2020 without their knowledge. The applicants state that they came to know of the ruling when their advocates received a letter from the respondent's advocate on 22nd February 2021. A copy of the ruling was sent to them on 24th April 2021. Being aggrieved with the said ruling, the applicants state that they instructed their advocates to lodge an appeal but the statutory period to file an appeal had already lapsed.
4. The applicants state that their intended appeal raises pertinent and weighty issues with a high probability of success. It is further contended that the respondent is at an advanced stage of executing the ruling and if stay is denied, it shall render the appeal nugatory.

The Respondent's Case

5. It is the respondent's case that the application is an afterthought and an abuse of the court process. It is further contended that at all times, the applicants have been represented by counsel who was served with a mention notice on 8th September and acknowledged receipt. Despite service, neither the advocates nor the applicants attended court on 8th October 2020 when the court slated a ruling date for 12th November 2021. The ruling was delivered on 19th November 2021 as it was not ready on 12th November 2021.
6. The respondent argues that the applicants are not interested in filing an appeal as it took them 2 months to obtain a copy of the ruling after the respondent's advocates wrote to them on 22nd February 2021. Moreover, the respondents states that the applicants have been indolent and the intended appeal is not arguable. The matter has been in court since 2009 and litigation must come to an end. As such, the respondent prays that the application be dismissed with costs.
7. Parties hereby disposed of the application by way of written submissions.

The Applicants' Submissions

8. The applicants submit that the respondent admits that they may not have been aware of the ruling at least until 22nd February 2021. By such time, the statutory period for filing the intended appeal had clearly stretched over three (3) months.
9. The applicants submit that they have brought this application for good order and procedural propriety as no time is prescribed within

which to file an appeal to this court from a subordinate court in probate proceedings pursuant to **Section 50(1) of the Law of Succession Act**. They therefore rely on **Section 58 of the Interpretation and General Provisions Act** which provides that where no time is prescribed on when an action should be done, such thing shall be done without unreasonable delay. Moreover, the applicants contend that they have explained reasons for delay in filing the intended appeal. They argue that their appeal raises substantial points of law and pray that the application be allowed and the court prescribe a time frame within which to file the intended appeal.

The Respondent's Submissions

10. The respondent reiterates what he has deposed in his affidavit and submits that the instant application has been made six (6) months after the ruling was delivered. The respondent denies having conceded to the fact that the applicants may not have known about the ruling but argues that he has demonstrated that the applicants participated throughout the proceedings in the trial court leading to the ruling. He further argues that the applicants have not shown why they did not follow up with the court on their own or through their advocate to establish what transpired after 30th July 2020. Moreover, the respondent submits that through his advocates, he wrote to the applicants' advocates on 22nd February 2021 requesting for their identity cards, PIN Certificates and passport size photos but they did not respond. The respondent argues that the applicants were indolent and they are undeserving of the discretionary orders they seek.

11. The respondent relies on the decision of the Court of Appeal in **Ferruz Omar Mahedan & 4 Others vs Ahmed Mohammed Honey [2016] eKLR** and submits that in the exercise of the court's discretion, it looks at the conduct of the parties in the proceedings. The respondent refutes the claim made by the applicants that the court ought to be guided by **section 50 of the Law of Succession Act** and urges this court to be persuaded by the cases of **Rocky Juma Mzee vs Rehema Salim Nodoro, High Court of Kenya at Mombasa, Civil Appeal 11 of 2015 [2020] eKLR** and **Farhiya Ibrahim vs Amina Geni Ishmael & 2 Others, High Court at Nairobi, Civil Appeal 90 of 2017 [2021] eKLR** where both courts found the parties conduct appalling and rejected their applications. As such, the respondent prays that the application be dismissed.

Issues for determination

12. After careful analysis, the issues for determination are identified as follows:-

- a) Whether the applicants have satisfied the conditions set out for stay of execution pending appeal;
- b) Whether the applicants ought to be granted leave to appeal out of time.

The Law

Whether the applicants have satisfied the conditions set out for stay of execution pending appeal.

13. The applicants have sought for orders of stay pending appeal and has relied on **Section 50 of the Law of Succession Act** and **Rules 63 and 73 of the Probate and Administration Rules**. According to the applicants, there is no time prescribed by **Section 50** of the Law of Succession Act as to when one ought to lodge an appeal. **Section 50** of the said Act provides:-

An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.

14. Although section 50 of the Act does not explicitly prescribe a timeline for when to lodge an appeal to the High Court, the instant application ought to be determined on the basis of whether sufficient cause has been shown for stay for purposes of **Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules**. The sentiments of Warsame J. (as he then was) in **Samir Trustee Limited vs Guardian Bank Limited [2007] eKLR** are instructive:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgment; hence, the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court...”

15. Looking at the competing interests of the parties, the applicants contend that they came to know of the ruling on 22nd February 2021 when the respondent's advocates wrote to their counsels and further that they obtained a copy of the ruling on 24th April 2021. The respondent contends that the applicants were always represented by counsel and in any event they ought to have followed up with the registry on their own or through their advocates what transpired in the matter since 27th August 2020. The respondent swore in his affidavit that the applicants were served with a notice for 8th October 2020. I notice that the applicants were not present in court and were not served with the ruling scheduled for 12th and 19th November 2020. The applicant did not use due diligence in that he was aware of his case and that he had an advocate but neither of them followed to find out the outcome of the case. This leads me to a conclusion that this application is an afterthought or it is designed to buy time. That they would have filed this application immediately for they were aware that by that time, three months had already lapsed since delivery of the ruling. I therefore find that on a balance of competing interests the scale does not tilt in

favour of the applicants, as they have not satisfactorily explained why they took over 6 months to file the instant application.

16. From the time the applicants received the letter from the respondent's advocate on 22/02/2021, they took no steps to file this application. Both of them were well aware that three (3) months had already expired from the date of delivery of the ruling to the time of receipt of the letter. The applicants in my considered view, have not satisfactorily explained the delay, which was no doubt inordinate.

Whether the applicants ought to be granted leave to appeal out of time

17. Notably, the powers of the court in deciding an application to seek leave to file an appeal out of time are discretionary and unfettered. 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.”

18. The above requirements have not been satisfied by the applicant. I have already said that the applicants have not explained satisfactorily why it took them over six(6) months to file the instant application.

Whether the applicants have established that they have a prima facie arguable case

19. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. **Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR.**

20. Additionally, on perusal of the Draft Memorandum of Appeal and on perusal of the magistrate's ruling, I am not convinced that this appeal has good chances of success. The applicants in my view have not raised arguable grounds of appeal.

The degree of prejudice to the respondent if the application is granted.

21. The respondent submits that the matter has been in court since 2009 and litigation must come to an end. The applicants have not indicated how they shall be prejudiced if the orders are not granted. In my view, the respondent will be greatly prejudiced as the applicants have not demonstrated any sufficient reasons why the respondent should be kept away from enjoying the fruits of his judgment.

22. For the reasons discussed above, I am of the opinion that the applicants have not satisfactorily convinced the court that time should be extended to allow them to lodge an appeal.

Conclusion

23. Even though no time is prescribed for lodging an appeal under Section 50 of the Succession Act, it is my considered view that the conduct of the Applicant is paramount in determining the success or otherwise of his application to extend time or to grant leave to appeal. The applicant relies on **Section 58 of the Interpretation and General Provisions Act which provides:-**

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises”

24. The foregoing provisions calls for a party to act without unreasonable delay even where time to do a certain thing is not prescribed by the law. The applicant herein has not passed the test of acting without unreasonable delay given that he took three(3) months to file this application from the date he learnt of the existence of the ruling on 22/02/2021. As argued by the respondent, this application seems to be an afterthought.

25. It is my finding that the applicant has failed to convince this court that he deserves the exercise of its discretion in this application.

26. Consequently, I find no merit in this application dated 10th May 2021 and dismiss it accordingly.

27. Each party to meet its own costs.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 11TH DAY OF NOVEMBER 2021