



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 474 OF 2011**

**IN THE MATTER OF THE ESTATE OF M'MUREMERA IRIA MUGUNA**

**Alias MUREMERA IRIA MUGUNA Alias MUREMERA IRIA-DECEASED**

**DAVIS KIUMBE M'MUREMERA.....PETITIONER**

**-VERSUS-**

**EDWARD MURIUKI.....1<sup>ST</sup> RESPONDENT**

**FLORENCE MWARI MUREMERA.....2<sup>ND</sup> RESPONDENT**

**GLADYS MUKUBA MUREMERA.....3<sup>RD</sup> RESPONDENT**

**JULIA MAKENA MUREMERA.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me is a notice of motion brought under certificate of urgency dated 27/02/2020, and expressed to be pursuant to Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya. The substantive prayer sought therein by the petitioner is the extension of time to give, issue and serve Notice of appeal against the judgement of this court delivered on 13/12/2018.

2. The petitioner in the supporting affidavit sworn on even date alleges that his only interest in the intended appeal is to fulfill his deceased father's wish, as expressed in the will, in order to avoid a curse. He strongly believes that he has good grounds of appeal and he should be allowed to ventilate them.

3. The 1<sup>st</sup> respondent opposed the application through his replying affidavit sworn on 7/9/2021 where he contends that the application should be dismissed for not only being pegged on an invalid and/or forged will, but also for being full of falsehoods. He brought the court's attention to a notice of appeal lodged in this court on 3/3/2020 by the 1<sup>st</sup> objector against the decision dismissing the application for review. In his view, that he has filed a notice of appeal against the ruling of 17/02/2020 makes any leave to the petitioner to challenge the decision of 13/12/2018 untenable for being res judicata

4. The position taken by the petitioner is reiterated in his submissions filed on 10/1/2021 to the effect that the power to extend time is discretionary and unfettered and the factors to be considered are not limited in any way. The decision in **Edward Njane Nganga & anor v Damaris Wanjiku Kamau & anor(2016)eKLR**, citing with approval an earlier decision by the court of Appeal in **Thuita Mwangi vs Kenya airways (2003)eKLR** , was cited on the conditions to be met for grant of the orders of enlargement of time and said to be among others, the length of delay, reasons for delay and the prospects or probabilities of the appeal succeeding.

5. The 1<sup>st</sup> respondent in his submissions filed on 8/9/2021 blamed the petitioner for the unexplained, inordinate and inexcusable delay in filing his application, which he urged the court to dismiss. He submitted that the petitioner has completely failed to satisfy the court that his intended appeal is arguable. He cited the cases of **Imperial Bank Limited (in Receivership) & anor v Alnashir Popat & anor(2018)2018 and Jimcab Services Limited v Bartholomew Bernard Osodo & anor(2018)eKLR** in support of his submissions.

6. The application reveals the fact that the order sought to be appealed against and dated 13/12/2018 was indeed challenged by an application for review dated 15/05/2019 which was heard and determined by the court on the 17/02/2020. That decision has also attracted an appeal evidenced by the Notice of Appeal filed by the Objector/respondent and dated 02/03/2020. The point thus emerges that the decision of 13/12/2018 remains under challenge before the court of appeal. That fact then begs the question of what benefit would be derived by setting

up a second challenge to the same order. This is a question that may be best answered by asking the question whether he who has chosen to challenge an order by way of review is permitted, upon failure to start afresh the same challenge by way of an appeal. I find the answer to be in the negative and expressed that appeal and review are not to be pursued concurrently over the same order. In Chairman Board Of Governors Highway High School -Vs- William Mkosi Moi, (supra) the court of appeal said, and I am bound by the decision:-

**“We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court. The record here shows that the Board filed an application for review dated 24th February, 2004, on 4th March, 2004. That application was determined by the superior court on 7th December, 2004 when it was dismissed for whatever reason. No further action appears to have been taken by the Board after that dismissal. In our view that was the end of the matter and the notice of appeal was rendered purposeless. Both options in our judgment cannot be pursued concurrently or one after the other.”**

7. From the above cited decision, I do find that no appeal lies against a decision against which review has been pursued to its conclusion. If that remains the law, then there would be no benefit at all to be derived by granting leave. I see no chance of the intended appeal succeeding. It is barred by the law.

8. In any event, the order was made on the 13/12/2018 and this application was only brought on the 06/03/2020, a period of some 13 months. The only reason for the delay is that there was need for consultation with the respondent/co-administrator and that while the applicant was waiting for such response, he discovered that the advocate had filed an application which was decided by dismissal on the 17/02/2020. As set out, the grounds founding the application show that it was the dismissal of the application for review which triggered the need to seek extension of time. That I find to be no plausible reason to extend time. I find that there has been no explanation for the delay just as there is no arguable appeal.

9. With such finding, there cannot be any merits in the application which I order to be dismissed with costs for I consider the filling of the same to have not been intended to further the just and proportionate determination of this cause.

10 Having said and found so and for the sake of pushing the matter towards conclusion, I direct that parties take every step towards the conclusion and completion of the administration. For that reason, matter shall be mentioned on the 16/12/2021 for the administrator to report on the progress made.

**DATED SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2021**

**Patrick J.O Otieno**

**Judge**

**In presence of**

Mr. Otieno for respondent

No appearance for Rimita for the Administrator

**Patrick J.O Otieno**

**Judge**