



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 664 OF 1997

IN THE MATTER OF THE ESTATE OF CHARLES NJOROGE KIMANI (DECEASED)

RULING

1. Before this court is the summons dated **8th October 2020** by which the Applicants **SOPHIA MWARA KIMANI** and **SALOME NJERI KIMANI** see the following orders: -

1. “Spent.

2. **THAT the Honorable court be pleased to enlarge time for giving notice intention to appeal to the Court of Appeal.**

3. **THAT the Honorable court be pleased to grant the Objectors leave to file an appeal against this court’s ruling dated 14th February 2018 out of time as per the annexed draft Memorandum of Appeal and notice of appeal.**

4. **THAT the court do issue a stay of execution of the court’s Ruling dated 14th February 2018.**

5. **THAT costs of this Application be costs in the cause.”**

2. The summons was premised upon **Section 7 of the Appellate Jurisdiction Act, Section 47 of The Law of Succession Act; Rule 73 of the Probate and Administration Rules, Section 79G of the Civil Procedure Act** and all other enabling provision of law and was supported by the Affidavit of even date sworn by both Applicants.

3. The application was opposed by one **CHARLES NJOROGE KIMANI** the Administrator of the estate of the late **SAMUEL KIMANI NJOROGE** vide the Replying Affidavit dated **15th February 2021**. The summons was canvassed the way of written submissions. The Applicant filed the written submissions dated **26th June 2021** whilst the Administrator relied on his undated written submissions.

BACKGROUND

4. This succession cause relates to the Estate of **SAMWEL KIMANI NJOROGE** (hereinafter “the Deceased”) who died intestate on **5th June 1996**. The deceased herein in respect of whose estate these proceedings relate left behind the following as dependants:

1) **EWK – (widow of unsound mind)**

2) **Sophia Mwara Nyaga – Adult daughter**

3) **Salome Njeri Gathirwa – Adult daughter**

4) **Grace Wangui Kuria – Adult daughter**

5) **Charles Njoroqe Kimani – Adult son**

6) **Serah Waithira Kimani – Adult daughter**

5. Among the properties left by the Deceased as listed in Form P & A 5 are: -

a) **Dagoretti/Mutuini/1179**

b) **Kshs.123,000/- in Standard Chartered Bank Karen Branch Account No. 0124644300**

c) **Kshs.67,000 at NSSF**

6. Following the demise of the Deceased, his son **Charles Njoroge Kimani** (hereinafter “the Administrator”) sought and obtained a Grant of Letters of Administration intestate issued on **2nd July 1997**. The said Grant was subsequently confirmed on **19th April 2010**. The property of the Deceased was then distributed amongst the beneficiaries, and each beneficiaries received his/her share of the estate.

7. Based on the consent filed in court on **10th November 2009** signed by all beneficiaries in support of the application for confirmation, Land Parcel No. **Dagoretti/Mutuini/797** was shared out in open court in the presence of all beneficiaries save for the widow as follows:

(a) **Charles Njoroge – 2.035 Ha**

(b) **Sophia Mwara Kimani – 0.10 Ha**

(c) **Salome Njeri Kimani – 0.10 Ha**

(d) **Grace Wangui Kimani – 0.10 Ha**

(e) **Serah Waithera Kimani – 0.10 Ha**

8. Thereafter a summons for rectification of grant dated **19th August 2010** was filed in court on **20th August 2010**, seeking to rectify the confirmed grant by amending the descriptive part of the property. The rectification was allowed on **9th February 2011** thus referring the property to as **Dagoretti/Mutuini/824** instead of **Dagoretti/Mutuini/797**. However, the individual beneficiaries’ shares were not affected by the said rectification.

9. Sometime later the two Applicants filed summons for revocation of Grant dated **6th September 2016**. They also sought an injunction to prohibit the transfer charging and/or subdivision of the property known as **LR No Dagoretti/1197**, which was subdivision of **Dagoretti/Mutuini 824**. They also sought an injunction to prohibit the redistribution of the estate of the Deceased among the spouse (widow) and children of the Deceased following due consideration of the interest of “**innocent purchasers**”.

10. The summons for revocation of Grant was duly heard and was dismissed by **Hon Justice Onyiego** vide his Ruling delivered on **14th February 2018**. The court in its ruling stated as follows: –

“In a nutshell the applicants have failed the test of proving that the grant was obtained through deceit, fraud and non-disclosure of material facts. Accordingly, the application for revocation of Grants is dismissed....”

11. The Applicants being aggrieved by the decision of **Hon Justice Onyiego** now wish to appeal against the Ruling of **14th February 2018**, and they seek enlargement of time within which to file the appeal. They submit that following the Ruling the family held a meeting and reached an Agreement dated **9th March 2021** which was **five (5)** days before the statutory period for filing Appeal was to expire. That the Applicants were persuaded that the family Agreement would be honoured and on that basis did not file any appeal. However, after the statutory period for filing appeal had expired the Administrator reneged on the family Agreement. Hence, the present application seeking leave to file appeal out of time.

12. As stated earlier, the application was opposed. The Administrator submitted that the present application has not been brought in good faith. He submits that the Applicants like the other beneficiaries received their share of the estate. That having sold their share they are now seeking to ‘**have a second bite at the cherry**’ by going after the Administrators of the estate. He urged the court to dismiss the application with costs.

Analysis and determination

13. I have considered the summons dated **8th October 2020**, the Replying Affidavit filed by the Administrator as well on the written submissions filed by both parties. The key question for determination is whether the Applicants have advanced a persuasive case for this court to exercise its discretion in their favour.

Section 7 of the Appellate **Jurisdiction Act** provides as follows: -

14. **“S. 7: Power of High Court to extend time**

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:

15. Case law on this issue abounds. In the case of **STANLEY KAHORO MWANGI & OTHERS – VS – KANYAMWI TRADING COMPANY LIMITED [2015] eKLR** the court set out the principles for extension of time as follows: -

“The Principles guiding the court on an application for extension of time premised upon *Rule 4* of the Rules are well settled and there are several authorities to it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being in his favour.....It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The court has to balance the competing interest of the applicant with those of the Respondent. This was well stated in the case *M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, VICIL APPEAL NO. 63 OF 1997* where the court stated:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right:

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised” (own emphasis).

16. The parameters for the exercise of a court’s discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd [2003] eKLR** where the Court of Appeal stated as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionally. It is also well settled that in general 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.”

17. The Applicants claim that they did not file appeal within the time allowed because the family had reached an agreement which they believed took care of their interests. That is only when the Administrator reneged on the agreement that they decided to move the court in exercise of their right of appeal.

18. This argument is however, not convincing for several reasons. Firstly, the Applicants who were represented by counsel were well aware of the timeline for filing an appeal. The existence of a family agreement should not to have dissuaded them from filing an appeal if they were truly aggrieved by the Ruling of the High Court.

19. Secondly, I find that there has been inordinate delay on the part of the Applicants in approaching the court for an extension of time. The ruling in question was delivered in **February 2018**. This application was filed in **October 2020** more than 2 ½ years **after** the Ruling was delivered. I do not accept that the Applicants were sitting around for 2 ½ years waiting to see if the family agreement would be honoured.

20. The Applicants further allege that the delay in filing this application was occasioned by the interruption of court sittings due to the **COVID -19 Pandemic**. They claim that their lawyer had closed his office. Once again, this excuse is not persuasive. It is a fact that courts have continued to operate throughout the **COVID** period. Likewise, Advocates have continued to offer services to their clients and to appear in court online. Moreover, the **COVID-19** Pandemic did not begin until **May 2020**. The applicants have not sufficiently explained their inactivity from **2018** to **May 2020**.

All in all, I find there has been inordinate delay in bring the application.

21. The Applicants have in this application sought for a stay of the Ruling of **14th February 2018**. The Ruling dismissed the application to revoke the Grants issued to the Administrator. Thus, the court made a negative order, which cannot be stayed. In **TITUS KEMA – VS NORTH EASTERN WELFARE SOCIETY [2016 eKLR]** it was stated as follows –

“I appreciate the order to be negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore one would pose the question: what execution is threatened and that needs to be stayed? I have been unable to see any such threat..... The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: “This is the order against me. It commands me to do a, b & c within this time and I fail to do so as I await the outcome of this appeal, I stand the peril of the consequents which I need to be saved from facing so that my appeal does not turn out to have been an academic exercise” (own emphasis).

22. I find that there were no orders granted in the Ruling of **14th February 2018** capable of being stayed.

23. Finally, the estate of the Deceased has been fully distributed. Each beneficiary has received his/her share. It is too late now to re-open the issue.

24. All in all I find that this application has come too late in the day. I therefore decline to enlarge the time for filing appeal. This application is dismissed in its entirety. This being a family matter I made no order on costs.

DATED IN NAIROBI THIS 1ST DAY OF OCTOBER 2021.

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MAUREEN A. ODERO

JUDGE