



**REPUBLIC OF KENYA**

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

**P&A CAUSE NO. 55 OF 2016**

**IN THE MATTER OF THE ESTATE OF THE LATE WILSON NGUMBI KATHESYE (DECEASED)**

ALICE MWIKALI NGUMBI )

SAMMY NGANDA NGUMBI )

PETER NGILA NGUMBI )

**JOHN CARTHESE NGUMBI )**

AMOS KYONDU NGUMBI )

STEPHEN MUSELI NGUMBI )

JOSEPH MUNYENYI NGUMBI )

CHRISTINE NGINA NGUMBI ).....OBJECTORS/APPLICANTS

**VERSUS**

SABINA MUMBUA NGUMBI.....RESPONDENT

**R U L I N G**

1. The Objectors/Applicants filed a Notice of Motion dated 06/11/2019 expressed to be brought under Section 1A, 1B, 3A of the Civil Procedure Act 2010, Section 95 of the Civil Procedure Act, Order 43 Rule 1(3) of the Civil Procedure Rules, Rule 39 (a) of the Court of Appeal Rules, Article 48, 50 and 159(2) (d) of the Constitution and all enabling provisions of the law. It seeks the following reliefs:-

***i) Spent***

***ii) That this Honourable Court be pleased to grant an extension of time for the Applicants to file an application for leave to appeal against part of the ruling dated and delivered on the 30/07/2019 dismissing the application dated 20/11/2019 out of time.***

***iii) That this Honourable court be pleased to grant leave to the Applicants to appeal against part of the ruling dated and delivered on 30/07/2019 dismissing the application dated 20/11/2019 to the court of appeal.***

***iv) That costs be in the cause.***

2. The application is supported by grounds on the face thereof and by a supporting affidavit of Kariuki E. Kamau the Advocate for the Applicants sworn on even date raising certain issues *inter alia*: that they are dissatisfied with the Ruling dated 30/07/2019; that a Notice of Appeal has been lodged; that due to an oversight, leave to lodge appeal was not sought from this court; that the intended appeal raises good grounds meriting judicial consideration by the Court of Appeal; that the Advocates mistake should not be visited upon the Objectors/Applicants; that no prejudice will be occasioned to the Respondent if the application is allowed as she can be compensated by an award of costs.

3. The Administrator/Respondent filed grounds of opposition dated 25/11/2019 where she raised the following issues *inter alia*: that the application is incompetent, defective and an abuse of court process; that the Notice of Appeal was issued without leave of this court; there has been no explanation for the delay to approach court four (4) months after the ruling; that the applicants have not demonstrated that they have an arguable appeal with chances of success; that the Respondent stands to suffer prejudice as there will be delays in accessing the

property allocated to her; that the matter has been in court since 1994 and that the Applicants are out to delay the same in order to enable them continue collecting rent from the property allocated to the Respondent.

4. Learned counsel for the Applicants raised one issue for determination namely whether the Applicants are deserving of the orders being sought. He submitted that vide Section 50 of the Law of Succession Act there is no automatic right of appeal to the Court of Appeal and one has to obtain leave from the High Court. Reliance was placed in the case of **Rhoda Wairimu Karanja –vs- Mary Wangui Karanja [2014] eKLR**. Learned counsel submitted that there are grounds which merit serious judicial consideration in the appeal and therefore the Applicants deserve to be given the leave sought. It was also submitted that the mistake in failing to seek leave was by the Applicants erstwhile Advocates and that the mistake be excused by this court and grant the Applicants an opportunity to proceed with their intended Appeal. Reliance was placed in the case of **Philip Chemwolo & Another –vs- Augustine Kubende [1982 – 88] KAR 103**. Finally it was submitted that this court should not sacrifice substantive justice at the altar of technical and procedural technicalities.

5. Learned counsel for the Respondent raised one main issue for determination namely *whether leave should be granted*. It was submitted that the Applicants are now using their former Advocate as a scapegoat for their indolence since the Applicants current Advocate has not explained why he was in a hurry to file a defective Notice of Appeal without ensuring leave and procedural aspects were complied with first and therefore the present application is an afterthought. It was submitted that the Notice of appeal filed by the Applicants is incompetent for want of leave and that the Applicants cannot file the notice and then come back to seek leave of this court. It was finally submitted that the application has been brought under wrong provisions of the law and thus the same should be dismissed with costs.

6. I have considered the Applicants application together with affidavit in support plus the grounds of opposition. I have also considered the submissions of both learned counsels. The issue for determination is whether the Applicants have furnished sufficient reasons to warrant the orders being granted.

7. Starting with the provisions of the law under which the application has been brought, I note that the Applicants cited Section 1A, 1B, 3A and 95 of the Civil Procedure Act, Order 43 Rule 1(3) of the Civil Procedure Rules, Article 48, 50 and 159(2)(d) of the Constitution. I do not understand why the Applicants had to resort to other provisions yet the Law of Succession Act not only provides the substantive law but also rules of procedure regarding matters to do with succession. The said Act is self-containing and parties need not delve into other provisions. The only entry point of the Civil Procedure Rules is vide Rule 63 of the Probate and Administration Rules. The Rules cited by the Applicants herein appear not permitted under Rule 63 of the Probate and Administrative Rules. The intention of Parliament when enacting the Law of Succession Act was that all matters to do with succession should be governed by the said Act. The Court of Appeal seemed to be of this view when it held in the case of **Josephine Wambui Wanyoike –vs- Margaret Wanjiru Kamau & Another [2013] eKLR** as follows:-

***“We hasten to add that the law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and rules of procedure. In few instances where need to supplement the same has been identified some specific rules have been directly imported into the Act through its rule 63(1)”***

It is therefore clear that the application has not been brought under the correct provisions of the law. However, I will treat it as a lapse of procedural technicality and excuse the Applicants on that ground as substantive justice ought to be done as dictated by Article 159(2) (d) of the constitution. Hence the Applicants have passed the first hurdle.

8. The next hurdle is the issue of the notice of appeal already filed. The Applicants have maintained that they have already lodged the Notice of Appeal to the Court of Appeal. They are now arguing that since they have done so in compliance with Rule 75 of the Court of Appeal Rules they should now be granted leave. I find it was improper for the Applicants to file the Notice of Appeal and then come back here to seek leave. Indeed the Applicants agree that the purported Notice of Appeal was unprocedurally filed since no leave was sought. Learned counsel for the Applicants in his submissions concedes that it was improper. That being the position it is untenable to sustain it as it is incompetent and bad in law for want of leave. Even though the said notice has been filed at the court of Appeal registry the same has no force of law and that the applicants cannot rely on it.

9. On the issue of whether there is an automatic right of appeal from the High Court to the Court of Appeal, Section 50 of the Law of Succession Act is clear that no such automatic right of Appeal is available and thus a party who is intending to lodge an appeal from the High Court must seek leave. In the case of **Rhoda Wairimu Karanja & Another –vs- Mary Wangui Karanja & Another [2014] eKLR** the Court of Appeal held thus:-

***“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of Appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that out to be retained in order to promote finality and expedition in the determination of Probate and Administration disputes.....”***

The above position was also held in the case of **Hafswa Omar Abdalla Taib & 2 others –vs- Swaleh Taib [2015] eKLR** where the court struck the appeal as no leave had been sought from the High Court.

Going by the above authorities, I find the Applicant has rightly approached this court for the requisite leave to lodge the appeal to the Court of Appeal and that the next hurdle is in regard to explanation for delay to lodge the application for leave to appeal.

10. On the issue of whether an explanation has been rendered by the Applicants for the delay, it is noted that the Applicants maintain that it was due to an oversight and/or mistake on the part of the Applicants former Advocates who failed to seek leave to lodge appeal against the Ruling dated 30/07/2019. Applications of this nature require Applicants to satisfy certain conditions before the discretionary remedy can be

granted. The principles were laid down in the case of **First American Bank of Kenya Limited –vs- Galab P. Shah & 2 others [2002] IEA 65** as follows:-

“ (i) *Explanation if any for the delay.*

(ii) *The merits of the contemplated action, whether the matter is arguable and deserving or whether it is frivolous thus delaying the course of justice.*

(iii) *Whether or not the Respondent can adequately be compensated in costs for any prejudice that might be suffered as a result of a favourable exercise of discretion in favour of the Applicant.”*

Learned counsel for the Applicants has urged this court to accept the Applicants explanation for delay. The former Advocate is being blamed for the failure to seek leave to lodge appeal. Indeed it is common knowledge that human beings are not infallible and do make mistakes. The courts are aware that blunders are made from time to time and that they go out of their way to ensure that cases are heard on the merits. (See the case of **Philip Chemwolo & Another –vs- Augustine Kubende [1982 – 88] KAR 103**). Learned counsel for the Applicants seems to lay blame squarely at the doorsteps of the Applicants former Advocates. However the record reveals the contrary. The Applicants present Advocates filed a notice of change of Advocates on 9/08/2019 as well as a Notice of Appeal dated 9/08/2019. The present application is dated 6/11/2019. The question to be asked is “*what action has been taken since 9/08/2019 up-to 6/11/2019?*” Learned counsel claims that he has been pursuing proceedings all along. I find he was expected to have at least perused the court file to establish the current position. I also note that it is the present counsel for the Applicants who lodged the said Notice of Appeal and not the former Advocates. It seems to me that the present counsel for the Applicants had been aware of the court record but he ignored it until he met roadblocks at the Court of Appeal Registry. The present counsel has been seized with the matter all along and he cannot now turn around and shift blame upon the former advocate. He has had about four months to take the appropriate steps but he has done nothing and he seems not ready to take responsibility for the same. I am therefore persuaded by the Respondent’s counsel’s submissions that this is an afterthought as it has taken the Applicants counsel almost four (4) months after the delivery of the ruling to file the present application. The applicants counsel in his affidavit avers that he has already filed the notice of appeal in compliance with Rule 75 of the Court of Appeal Rules and thus they ought to be granted the requisite leave. I find this to be untenable as there would be no need to come and seek leave when the notice of appeal has already been filed before the appropriate court. In the circumstances, I find no good reasons have been given for the delay in filing the application for leave to lodge appeal.

11. As to whether there are grounds which merit serious judicial consideration, it is noted that the Applicants appeal is against part of the ruling. Indeed the merits or otherwise of the appeal is within the province of the Court of Appeal to determine as this court is functus officio. I only wish to point out that from the confirmed grant dated 30/09/2014 each family was fully catered for as by then the 1<sup>st</sup> Objector/Applicant was a co-administrator when the grant was confirmed in Nairobi High Court and that she had distributed the property namely **LR 337/449 Athi River** to the Respondent absolutely and which fact had informed this court when it rejected the Applicants summons for revocation of grant dated 20/11/2017. Hence the 1<sup>st</sup> Objector/Applicant’s distribution of the subject property to the Respondent on 30/09/2014 militates against the 1<sup>st</sup> Applicants quest to have the grant dated 30/09/2014 revoked.

12. As to whether the Respondent stands to suffer prejudice, there is likelihood of delay in the finalization of the Succession Cause. The matter had been filed way back in 1994 and there is need to bring it to a closure. The Respondent who has been allocated the property namely **LR 337/449 Athi River** is yet to access the same and is unable even to receive rent therefrom. I find an award of costs would not adequately compensate the Respondent as she is likely to be kept out of reach of the property duly allocated to her.

13. In the result, it is my finding that the Applicants application dated 6/11/2019 lacks merit. The same is dismissed. As parties are members of one family, I order that each should bear their own costs.

It is so ordered.

**Dated and delivered at Machakos this 21<sup>st</sup> day of January, 2020.**

**D. K. Kemei**

**Judge**