



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1914 OF 2016

IN THE MATTER OF THE ESTATE OF ELIUD NJUGUNA MUIRU- (DECEASED)

SISTERS OF ST. MARIANA OF JESUS.....APPLICANT

VERSUS

STANLEY MUIRU NJUGUNA.....ADMINISTRATOR/RESPONDENT

RULING

1. The deceased Eliud Njuguna Muiru alias Eliud N. Muiru alias Eliud Njuguna died intestate on 27th January 2016. He left a widow and 6 children, one of whom is Stanley Muiru Njuguna (the respondent) who petitioned for, and got, a grant of letters of administration intestate in respect of the estate. The deceased left several properties, including Ngong/Ngong/1631 that is the subject of this application.
2. The dispute between the estate and the applicant Sisters of St. Mariana of Jesus is that the latter is the registered proprietor of Ngong/Ngong/7568 which, on the ground, occupies the same space as the estate's Ngong/Ngong/1631. The applicant bought Ngong/Ngong/7568 from a third party in 2012 and a title issued to them on 8th February 2013.
3. The respondent, as administrator of the estate of the deceased, complained about the encroachment onto the deceased's Ngong/Ngong/1631 by the applicant. The court heard the dispute and on 18th October 2018 rendered a ruling to say that the deceased was the legitimate owner of the ground on which Ngong/Ngong/1631 was, and that the applicant was a trespasser; that the applicant was a trespasser in so far as it claimed the same ground on which Ngong/Ngong/1631 was. The applicant had undertaken developments on Ngong/Ngong/7568, believing that this was their ground. It was asked to vacate the premises.
4. This ruling aggrieved the applicant who seeks to appeal. One of the grounds in the intended appeal is that the court had no jurisdiction to hear and determine this dispute, because this was a land dispute that ought to have gone to the Environment and Land Court. The applicant has built a convent on the premises. It seeks stay of execution of the orders. It states that its removal from the premises will cause it irreparable damage and loss as the convent will have to be pulled down.
5. The applicant's advocates at the time of the hearing and determination were J.B. Mwangi & Co. Advocates. The present application dated 7th January 2019 was filed by Ombati, Otieno, Opondo Advocates who seek to be allowed to come on record for the party. The second prayer is for leave to appeal out of time and, thirdly, pending the filing of the appeal, the stay of the orders in the ruling.
6. The application was opposed by the respondent. His case was that the intended appeal lacks merits; leave was not sought for the new advocates to come on record before they filed the application; the former advocates were not served with the application; on the issue of substantial loss, the land can revert back to the applicant if they are successful on appeal; there was no explanation given for the delay in filing the appeal on time; and no security was offered.
7. On the issue of security, the applicant stated that the land, as developed, was enough security. The respondent asked for the deposit of KShs.17 million (the value of the property) if the court is inclined to grant leave to appeal, and to give stay.
8. The applicant seeks leave to be represented by Ombati, Otieno Opondo & Co. Advocates, in place of J.B. Mwangi & Co. Advocates. Under **Order 9 rule 9** of the **Civil Procedure Rules** such leave should not be withheld. Any party has the constitutional right to be represented by an advocate of his or her choice. In any case, under **rule 10** –

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

I grant leave to the firm of Ombati, Otieno, Opondo & Co. Advocates to come on record for the applicant.

9. The ruling sought to be appealed from was delivered on 18th October 2018. The present application was filed on 9th January 2019. The notice of appeal was filed on 9th January 2019. There was a delay of about two months in filing the notice. The delay was not inordinate. What was the explanation for the delay? The respondent’s case was that there was no explanation at all. I have read the affidavit sworn by Pillajo Correa Consuelo Mercedes to support the application. There was no single averment explaining why the notice of appeal was not filed on time. The applicant was at the time represented.

10. The decision whether or not to extend time for appealing is essentially discretionary (**Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 (Unreported)**). In **County Executive of Kisumu –v- County Government of Kisumu & 8 Others [2017]eKLR**, the principles to be considered in exercising the discretion to extend time to appeal were outlined as follows:-

- a. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;
- c. whether the court should exercise the discretion to extend time is a consideration to be made on case by case basis;
- d. whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. whether there will be prejudice suffered by the respondents if extension is granted;
- f. whether the application has been brought without undue delay; and
- g. whether in certain cases, like election petitions, public interests should be a consideration for extending time.

11. There was no explanation for the delay. It has not been alleged that there was delay in bringing the application for extension of time. The applicant is seeking to appeal, in exercise of its undoubted right. What prejudice will the respondent suffer if time is extended to allow the appeal? The succession case that begun in 2016 is still pending. The estate of the deceased has not been distributed. The grant issued to him has not been confirmed. With the finding in favour of the estate, there is no risk that Ngong/Ngong/1631 may be disposed of. In any case, it has been developed by the applicant. I find that, in the circumstances of this case, whatever prejudice or inconvenience that the respondent may suffer (in having the appeal filed, heard and determined) may be compensated in costs.

12. I consider that this court cannot consider the merits of the intended appeal. However, the issue whether this court had or did not have jurisdiction to hear and determine the application that led to the ruling sought to be challenged is a consideration that has weighed in favour of allowing this application. This is to enable the Court of Appeal to determine the issue. I am also conscious of the fact that the dispute relates to a piece of land which the applicant has developed by putting up a convent on it. Land is an emotive subject in Kenya.

13. I allow the request to extend time to appeal, and order that the notice of appeal filed on 9th January 2019 shall be deemed to be properly filed, and on time.

14. On the question of stay under **Order 42 rule 6(2)** of the **Civil Procedure Rules**, I am aware of the principles at play. There has to be proof of substantial loss if stay is not granted; the application should have been brought without unreasonable delay; and there has to be provision of security for the due performance of such decree or order that may untimely be binding on the applicant (**Kinyunjuri Muguta – v- Wotuku Muguta [2018]eKLR**). The court has to weigh the right of the applicant to appeal against the right of the respondent to the fruits of his ruling.

15. There was no delay in bringing the application. The applicant will certainly suffer substantial loss if the orders in the ruling are executed. It will mean that it be evicted and the convent demolished. As for security, I direct that the *status quo* be maintained until the appeal is heard and determined. The applicant shall not be evicted, but shall not undertake any further developments and will not sell, lease, charge or otherwise deal with the land to the detriment of the respondent’s claim.

16. In those terms, the application is allowed. Costs shall be borne by the applicant who has been indulged.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE