



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 76 OF 2017

(FORMERLY SUCCESSION CAUSE NO. 91 OF 2009 NAIROBI)

IN THE MATTER OF THE ESTATE OF STEPHEN MBURU WANGONDU (DECEASED)

ROBINSON WAWERU MBURU.....PETITIONER/APPLICANT

VERSUS

MARY NDUTA MWAURA.....1ST RESPONDENT

GRACE WANGARI MBURU.....2ND RESPONDENT

RULING

1. Before the court is a Chamber Summons filed on 7th March, 2018 brought under Rules 49, 63 and 73 Probate and Administration Rules and all other enabling provisions of the law. The Petitioner/Applicant (“Petitioner”) sought the following order:-

a) That leave be granted to the Petitioner to Appeal against the decision of the Hon. Judge William Musyoka delivered herein on 5th May, 2017.

2. The Application is premised on the ground that the Petitioner was dissatisfied with the decision of the Honourable Court.

3. **Robinson Waweru Mburu** the Petitioner herein swore the supporting affidavit. He deposed that he is dissatisfied with the judgment of the court as orders issued were not according to the wishes of the deceased. That he immediately filed a Notice of appeal and applied for proceedings which are yet to be supplied.

4. The Respondents opposed the application by their replying affidavit filed on 24th July, 2018. **Mary Nduta Mwaura** deponed that despite the applicant having filed a notice to appeal after being aggrieved by the judgment of the court, she was never served with the said notice of appeal and that apart from requesting for proceedings and judgment the Petitioner has not made any efforts to get the said proceedings. Moreover, the Memorandum of appeal is yet to be filed. She contended that the intended appeal is an afterthought and the delay of 10 months has not been explained. She deposed that the Petitioner’s application was only brought to delay the distribution of the estate.

5. The application was canvassed with by way of written submissions. Counsel for the Applicant submitted that the right to appeal is part of the rights to access to justice and to a fair hearing guaranteed under Articles 48 and 50 of the Constitution. He relied on the case of **Machira T/A Machira &**

Company Advocates vs Mwangi & Anor (2002)2KLR 391 where the court stated that leave to appeal is a matter within the discretion of the court. Counsel urged court to allow the Petitioner an opportunity to ventilate his grievances in the Court of Appeal.

6. Counsel for the respondents submitted that the power to grant leave to appeal out of time is discretionary. It was submitted that the Petitioner has not sought extension of time to bring his instant application as time has already expired. Counsel further submitted that the Petitioner has not demonstrated how he will suffer prejudice if his application is disallowed. The petitioner's explanation for the delay was said to be unsatisfactory.

7. The court has considered the affidavits filed in support of and in opposition to the summons, as well as the parties' respective submissions. The application is brought under Rules 49, 63 and 73 of the Probate and Administration Rules.

8. There is no dispute that following the decision of **Musyoka J** on 5th May 2017, the Applicant filed a notice of intention to appeal in this court on 11th May 2017, and in the Court of Appeal on 15th May 2017. Nonetheless, it was not until the 7th of March 2018 that the instant application for leave to appeal was brought. So far as an intended appeal to the Court of Appeal is concerned, Section 7 of the Appellate Jurisdiction Act and the procedural law regulating appeals proper and provide a guide as to the principles that apply to summons of this nature. This is principally out of necessity as the Law of Succession Act and subsidiary legislation made thereunder do not appear to expressly anticipate an appeal.

9. Order 43 r 3 of the Civil Procedure Rules provides that an application for leave to appeal ought to be filed within 14 days of the decision sought to be appealed from. This is the same period provided for under Rule 75(2) of the Court of Appeal Rules for the filing of the notice of appeal. The High court may extend these periods under Section 7 of the Appellate Jurisdiction Act. Rule 77(1) of the Court of Appeal Rules further provides that the ***"intended appellant shall, before or within 7 days after lodging the notice of appeal serve copies thereof on all persons directly affected by the appeal."*** Further, the sum effect of Rules 82(1) and 83 of the Court of Appeal Rules is that an appellant who has served a notice of appeal ought to file his appeal within 60 days of the lodgment of the notice and in default, is deemed to have withdrawn his appeal.

10. The general principle to be drawn from these rules is that time is of essence. The applicant herein filed his notice of appeal five days after the judgment intended to be appealed from was delivered.

There is no evidence that he served the notice of appeal on all the parties likely to be affected by the appeal. Evidence of service is by way of a duly filed affidavit of service. Annexure **RWM1** to the Applicant's Further Affidavit which is purported to be such an affidavit reflects service on only two of the several beneficiaries in this case. Secondly the affidavit was not filed into court as required.

11. There is no plausible explanation given for the fact that the Applicant waited over 10 months to file the application for leave to appeal. He has not even sought to extend the time. The Applicant asserts at paragraph 6 of his Further affidavit that:

"The application (instant) could not have been filed earlier as the file was in Nairobi.

12. The record herein shows that the instant file was forwarded to the Family Division, Nairobi, from whence it had earlier transferred to this court, to facilitate typing of proceedings. The Deputy Registrar's forwarding letter in this regard is dated 5th March 2018. However the present summons was filed on 7th March 2018, which puts paid the Applicant's assertions above. Besides, the Applicant did not require proceedings in order to file the present application or to prepare a draft memorandum of appeal to demonstrate that his intended appeal is one that raises serious questions.

13. In **Zeinab Khalifa and 4 Others v Abdulrazak Khalifa and Another [2016] e KLR** the Court of

Appeal was dealing with a Succession Cause. The Court observed that:

“[I]t is not disputed that that outside Section 47 of the Law of Succession Act, that Act does not provide for leave to appeal from the High Court to this Court, and therefore leave was required..... (see Makhangu v Kibwana [1995 – 1998] I EA 175. The main consideration in determining whether to grant or refuse an application for leave to appeal is whether the intended appeal raises issues which merit serious consideration. In Sango Bay Estate Ltd and Others v Dredner Bank A.G.[1971] EA 17, Spry v P speaking for the former East Africa Court of Appeal, stated thus:

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration...”

And in **Machira t/a Machira & Co. Advocates v Mwangi & Another [2002] 2 KLR 391**, this Court stated that granting or refusing an application for leave to appeal is a matter within the discretion of the court; that the court will only refuse leave if it is satisfied that the applicant has no realistic prospects of success on appeal; and that the court can grant leave even where it is not so satisfied where the issue is of public interest or raises a novel point requiring clarification”.

14. In the instant case, the Applicant has not deemed it necessary to place before the court a draft memorandum of appeal. He could have but did not attempt even through his affidavit, a demonstration of grounds of appeal that merit serious judicial consideration, or public interest or novel issue requiring clarification. Moreover, having filed a notice of appeal he did not move with alacrity to bring this application but waited 10 months to move the court. It is not certain whether in light of Rules 82 and 83 of the Court of Appeal Rules there is a subsisting appeal before that court. This court is therefore not persuaded that this is a proper case to invoke its discretion in the Applicant’s favour. The court finds no merit in the application. The same is dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 2ND DAY OF APRIL 2019

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C. MEOLI

JUDGE

In The Presence of:-

Mr. Olaka holding brief for Mr. Kiarie

Mr. Njuguna for Applicant

Respondent – No appearance