



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 54 OF 2016

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO.326 OF 2006)

IN THE MATTER OF THE ESTATE OF THE LATE GEDION M'MURUNGI M'MUTHARA alias MURUNGI NJARA alias MURUNGI MUTHARA (DECEASED)

ASENATH GATAKAA NTWIGA.....ADMINISTRATRIX

VERSUS

PURITY CIRINDI KAMUNDI.....PROTESTOR

R U L I N G

1. **PURITY CIRINDI KAMUNDI**, the Applicant herein has moved this honourable court through summons dated 29th April 2019 and issued on 30th April 2019 for the following orders namely:-

i. This application be heard urgently due to its nature (prayer spent)

ii. That pending the hearing of this instant application this honourable court be pleased to restrain the 1st to 6th Respondent through themselves their agents and/or anybody acting on their behest from assuming possession of the mutants portions/parcels in respect to the subdivision of L.R No. Mwimbi/Chogoria/258.

iii. That pending the hearing of the instant application inter partes this honourable court be pleased to issue inhibition orders inhibiting all dealings on L.R. No. MWIMBI/CHOGORIA/6928, 6929, 6930 and 6931 (subdivisions of Mwimbi/Chogoria/258).

iv. That pending the hearing and final determination of this instant application and/or further orders from this court, this honourable court be pleased to issue restraining orders against 1st, 2nd, 3rd, 4th, 5th and 6th Respondent through themselves, their agents and/or anybody acting on their behest from assuming possession of the surveyed portions and/or mutant portions/parcels in respect of the original Mwimbi/Chogoria/258.

v. That pending the hearing and final determination of this application and/or until further orders from this honourable court, this honourable court be pleased to issue inhibition orders, inhibiting all dealings on L.R. Mwimbi/Chogoria/6928, 6929, 6930 and 6931. (subdivisions of original L.R. Mwimbi/Chogoria/258.)

vi. That the Applicant be granted leave to appeal out of time against judgment of this honourable court delivered on 15th October, 2018.

vii. That this honourable court be pleased to grant the Applicant leave to appeal to the Court of Appeal against the decision of this court delivered on 15th October, 2018.

viii. That status quo be maintained on the original L.R. Mwimbi/Chogoria/258 pending the filing, prosecution and determination of this intended appeal to the Court of Appeal against the judgment of this court delivered on 15th October, 2018.

ix. That costs be provided.

2. This application is based on the following grounds namely:-

a) That the applicant was greatly dissatisfied with the judgment delivered by this honourable court on 15th October, 2018 and

she instructed Ms Mwenda Kinyua Advocate to lodge an appeal against the judgment.

b) That the firm of Mwenda Kinyua filed Notice of Appeal on 25th October and filed an application dated 25th October 2018 for stay of execution of the judgment delivered on 15th October 2018.

c) That the application dated 25th October 2018 was dismissed on 12th November 2018 for non-attendance by both the Applicant and her counsel.

d) That Ms Mwenda Kinyua & Co. Advocate did not inform the applicant about hearing date of 12th November, 2018 when the application was dismissed for want of prosecution.

e) That the Notice of Appeal filed was incompetent as no leave was sought as provided by law.

f) That it is now trite that a party should not suffer prejudice on account of mistakes and/or indolence of his/her counsel.

g) That the foregoing clearly demonstrates that Mwenda Kinyua & Co Advocate did not defend the applicant appropriately as per the law and that the mistakes of counsel should not be attributed to her.

h) That the mistakes of her counsel has enabled the Respondents to execute the judgment delivered in this court on 15th October, 2018 despite the fact that they were not in occupation of the original Mwimbi/Chogoria/258.

i) That the execution of the judgment delivered on 15th October, 2018 is recipe for fatal conflicts unless restraining orders are issued.

j) That the Respondents have never resided on the estate and have their parcels elsewhere and would therefore suffer no prejudice if the prayers sought are granted.

3. The Applicant has supported the above ground with a Supporting Affidavit sworn on 29th April 2019 where she has basically reiterated the above grounds.

4. Through learned counsel Mr. Kirimi, the Applicant contended that the Respondent's actions would negate the intended appeal.

5. The Applicant has further contended that the prayers sought herein would enable her pursue her appeal and that no prejudice will be occasioned to anyone.

6. On the other hand, the Respondents have opposed this application vide a Replying Affidavit sworn on 20th May 2019 by Asenath Gatakaa Ntwiga on her own behalf and the other Respondents.

7. The Respondents have contended that this Application is designed to delay the final distribution of the estate of the deceased.

8. They have further asserted that they have not forcefully taken possession of the estate but only intend to take possession of their respective portion in L.R. Mwimbi/Chogoria/258 as per the certificate of confirmation of grant.

9. The Respondents have faulted the Applicant for having all through expressed her desire to keep the entire parcel of Mwimbi/Chogoria/258 and unleashing violence to any beneficiary expressing interests on the estate.

10. The Respondents aver that the respective beneficiaries have obtained title deed of their respective portions and that it would be unfair to deny them the fruits of justice by granting the reliefs sought in this application.

11. The Respondents have faulted the applicant for indolence arguing that there is no explanation given for inaction since she instructed her counsel in October 2018 when she was aware of the fact that the surveyors visited the estate on 22nd October, 2018.

12. The Respondents through learned counsel Mr. Murithi have asserted that litigation need to come to an end citing the fact that this matter has been in court for more than 13 years. They further contend that the Applicant could have secretly sold portions of the estate and is now embarking on a firm grip in view of money received.

13. The Respondents have further pointed out that prayers 2, 4, and 8 have already been overtaken by events as the titles have already issued and that it would be unjust and unfair to deny the Respondents possession of what they legally own by law and especially when no challenge has been raised in their ownerships.

14. This court has considered this application, the grounds upon which it has been brought and the response or the objection made by the Respondents.

15. There is no dispute that this matter has been in court since 2006 as seen from. The deceased in this cause died on 5th June, 1975 and incredibly 44 years later the beneficiaries are still squabbling over his estate. This is both undesirable and unfair to particularly those yet to enjoy the fruits of possession of a share of the estate.

16. This application has raised two main issues for determination.

i. Whether the applicant has raised sufficient grounds to warrant grant of leave to appeal out of time.

ii. Whether the Respondents should be restrained from taking possession and/or exercising their proprietary rights over their respective portions from the estate.

17. **(i) Whether leave to appeal out of time should be granted.**

The Applicant has sought leave to appeal out of time blaming her erstwhile advocates for the tribulations she finds herself in and states that mistakes of counsel should not be visited on her or her quest to appeal against the decision of this court. While this court agrees that in some circumstances genuine mistake of counsel should not be visited on hapless litigants, parties or litigants should not be allowed to use the same as a shield to indolence, inaction and unnecessary delays.

18. This court prior to the judgment delivered on 15th October 2018 in presence of the Applicant personally, had been forced to put its foot down to ensure that the matter was heard and determined after it realized that the Applicant and her former Advocates were only interested in delaying the trial perhaps informed by the fact that she was occupying one of the assets comprising the estate in exclusion of others, an advantage she wanted to enjoy as long as possible. This court was and is still alive to the fact that parties who view their chances as slim upon adjudication of a dispute by court, usually employ the only card/defence available - delay to ensure that the adversary/adversaries are kept at bay as long as possible. It was on the basis of that this court ensured that the matter was heard and determined despite futile attempts made to derail hearing and final determination of the cause by the Applicant and her counsel as seen from the record of proceedings.

19. This court as I have observed above delivered its judgment on 15th October, 2018 in the presence of the Applicant. The record shows that she appointed a new advocate who brought a Notice of Motion dated 25th October 2018 under certificate of urgency. That application was certified urgent on 29th October, 2018 and the Applicant to serve the Respondent promptly. The said application was slated for hearing on 1st November, 2018 but the Applicant delayed on service and only served the Respondent on 1st November, 2018 in court forcing the hearing of the said application to be adjourned to enable Respondents file their responses. This court was not told why there was delay in service but that notwithstanding the hearing of the said application was adjourned to 12th November 2018. On that date, the applicant and her counsel were absent forcing this court to dismiss the Notice of Motion dated 25th October, 2018 for want of prosecution.

20. The Applicant did not take any further action until 30th April 2019 when she brought this present application through the current firm of Advocates. The Applicant in this application is deliberately silent on her earlier application and the dismissal of the same perhaps fully aware that she really has no reason to explain her inordinate delay in asking this court to set aside the dismissal order of her application where among other prayers was an order of stay of execution of judgment of this court dated 15th October 2018. It is quite clear that prayers 2, 3, 4, 5 and 8 of the present application are in effect asking for stay of execution. The Applicant should have applied to set aside the dismissal order rather than mount a fresh application for the same relief and by making a fresh application and disregarding the dismissal of her earlier application, the applicant is in effect trying to attain the same result without giving any reason why she did not prosecute her application dated 25th October 2018 leading to its dismissal on 12th November 2018. That in my view in the first place is an abuse of court process.

21. Secondly, the Applicant has not given satisfactory reasons to explain her delay from October 2018 to 30th April 2019 which is a period of 6 months. It is not enough in my view for a litigant to heap blame on a former counsel and lord over the rights of the other parties in litigation. The sword of justice cuts both ways so that while a litigant should not be punished for obvious mistakes of counsel, the other parties in the suit should not be prejudiced or to put it in another way, an indolent litigant should not be allowed to use the shield of mistakes of counsel to prejudice or delay the fruits of litigation of his/her adversaries in litigation. To allow the same would certainly not serve the interest of justice.

22. In this application, the Applicant despite being present in court when this court rendered itself on the question of distribution of the estate, has not persuaded this court that her reasons for the delay is solely due to mistakes of her former counsels. She has had representations from three different counsels since the judgment was delivered on 15th October 2018 and she cannot blame all of them for the unexplained delay. In any event, the applicant has remedy against any counsel, if at all they misrepresented her in any way and she has not shown that she has explored that avenue before asking this court to exercise its discretion in her favour.

23. The Applicant has also failed a crucial test of disclosing that she has an arguable case or prima facie case to be granted leave to appeal out of time. This court determined that all beneficiaries were entitled to an equal share of the estate and every beneficiary got almost one acre in the estate but the applicant got 3 acres notwithstanding that her dependency on the estate ranked lower (being a daughter in law) as compared to the children of the deceased. It is also true that the applicant having occupied the estate to the exclusion of other beneficiaries for a long period of time, she would obviously be better off if this matter or her pursuit of appeal takes time to be determined. This court finds that the other beneficiaries to the estate, contrary to the applicant's assertions, will be prejudiced by reliefs sought in this application. They have waited and have been waiting for justice for now almost 13 years and it is time that they also come into possession of their respective share of the estate in order to enjoy fruits of litigation without further delays. This court finds that the applicant has not given good reasons to explain the inordinate delay in seeking leave to appeal and has also not shown good reasons to be granted that leave in the first place. I am not persuaded to grant the said leave to Applicant.

24. **(ii) whether the Respondents should be restrained from taking possession of their respective portions**

As I have observed above, the Applicants have not demonstrated any good faith in keeping other beneficiaries from taking possessions of their respective adjudicated shares in estate. The Applicant has been utilizing the estate to the exclusion of other beneficiaries. While she had the option to pursue appeal against the decision of this court with leave, the same should have been pursued expeditiously instead of

using it to delay the fruits of litigation to their parties in this cause. I do not find any merit in restraining or inhibiting the other beneficiaries from utilizing and occupying their portions of the estate as adjudged by this courts.

In the end, for the aforestated reasons this court finds no merit in the application dated 29th April, 2019. The same is dismissed in its entirety with costs.

Dated, signed and delivered at Chuka this 6th day of June, 2019.

R. K. LIMO

JUDGE

6/6/2019

Ruling signed, dated and delivered in the open court in presence of Kirimi for the Applicant and in the absence of Murithi for Respondent who are present.

R.K. LIMO

JUDGE

6/6/2019