



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 274 OF 2008

IN THE MATTER OF THE ESTATE OF M'RINGERA M'ARITHO (DECEASED)

RAEL GAITI M' RINGERA.....PETITIONER

VERSUS

JOSEPHINE KANYUA.....1ST APPLICANT

EVELYNE KARAMBU.....2ND APPLICANT

RULING

1. **M'Ringera M'Aritho** alias **Mutungera Ringera M'Aritho** (the deceased) herein died intestate on 23rd May 1991 leaving behind a wife, three daughters and three sons. **Rael Gaiti M' Ringera** (the petitioner herein) petitioned for letters of administration on 3rd July 2008. She cited the following as persons with equal or lesser priority i.e. **Jacinta Kathambi Charity Cungu, Jericah Kananu and Solomon Muthiri**. The Consent was however not signed.

2. On 2nd September 2011 the petitioner filed summons for confirmation of grant seeking consent from **Jacinta Kathambi, Charity Cungu** and **Solomon Muthuri**. She cited **Jericah Kananu** and **Janet Ngacheke** as deceased.

Protest

3. **Charity Makandi Mutwiri** filed a protest to the confirmation of grant stating that she is a wife to **Stephen Mutwiri** (deceased) who was a son of the deceased herein. She also averred that they had established a home in the suit premises i.e. Parcel No. Ntima/Igoki/4002 where they live. After the demise of petitioner herein his son, **Solomon Muthuri M' Ringera** was substituted in her place. He was also appointed as the administrator of the estate on 24th November 2015. This Honourable Court granted him time to file for the confirmation of the grant but he failed to do so within the given timelines. The court therefore revoked the grant and issued a grant to the Objector herein on 14th November 2016.

4. On 20th December 2017 this honourable Court Considered the proposed mode of distribution made by the objector and appreciated that the objector had listed all the beneficiaries including the deceased daughters of the deceased. The court however found that none of the children of the deceased daughters have staked a claim on the estate property. The court thereafter distributed the estate as follows;

Ntima/Igoki/4002

Solomon Muthuri - Son - 0.103 Ha

Charity Mbobua Daughter - 0.101 Ha

Catherine Makandi Mutwiri, Daughter in Law 0.101 Ha

5. **Josphine Kanyua and Everlyne Karambu** being daughters of **Janet Gacheke (deceased)** and **Jacinta Kathambi** respectively filed application dated 24th October 2018 in their capacities as children of the deceased daughters of the deceased. They now seek the following Orders;

1. Stay of execution of the judgement pending the filing of the intended appeal.

2. An order of inhibition on L.R. No. Ntuma/Igoki/4002 pending the filing of the intended appeal.

3. Extension of time for the giving of notice of appeal.

6. The application has been supported by the sworn affidavit of Josephine Kanyua and Evelyne Karambu. They aver that these proceedings were commenced in 2008 and concluded without other beneficiaries or the petitioner ever informing them of the proceedings.

7. They claim as children of the daughters of the deceased but who are now deceased and are therefore entitled to inherit their mothers' share. The said daughters were included in the list of beneficiaries. Now they say that there are arrangements to subdivide the estate pursuant to the judgement herein and a surveyor is set to visit the parcel at any time to subdivide it. They believe that unless the Orders sought are granted they stand to suffer prejudice and irreparable harm. They also filed a draft memorandum of Appeal.

8. The application was opposed by **Catherine Makandi Mutwiri** (the protestor herein) vide Replying Affidavit dated 28th November 2018. She averred that the applicants herein are strangers since they have not filed any competent protest or objection upon which they may be enjoined in these proceedings. He also argued that the applicants are not duly appointed legal representatives of the persons they purport to represent. They have also not been substituted for the parties they are claiming under. And that the interest of the applicants mothers have already been dealt with in the application for confirmation and in the judgement. On that basis, the applicants have no right of appeal hence no period should be extended for lodging any appeal.

Submissions

9. On 15th January Parties agreed to canvass the application through written submissions. Both parties have since filed their respective submissions.

10. The applicants submitted that the Court ought to have included the applicants in the mode of distribution since they had not renounced their share. They also submitted that as children to daughter of the deceased they have a right to appeal against the aforesaid decision. They urged that, from the provisions of Section 7 of the Appellate Jurisdiction Act this Court has the jurisdiction to extend the time for giving the notice of intention to appeal.

11. They relied on the following authorities in support of their submission i.e. **Re Estate of Joyce Kanjiru Njiru (deceased) [2017] eKLR Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, Edward Njane Nganga & Anor v Damaris Wanjiku Kamau & Anor [2016] eKLR.**

12. The Respondent submitted that the applicants were not party to the proceedings that led to the judgement and did not enter appearance as per the provisions of Rule 60 of the P&A Rules. They did not comply with the provisions of Section 76 of the Law of Succession Act. That whereas this court is not *functus officio* the application for extension of time to file appeal to the court of appeal has no merit since the court of appeal lacks original jurisdiction to hear a claim for a share of the estate by a party who has not exhausted the mechanisms provided by the Law of Succession Act and its subsidiary legislation.

13. He is of the view that extension of time is not an automatic right and the party seeking such leave must demonstrate that there are grounds which merit serious judicial discretion. They relied on the following authorities; **Rhoda Wairimu Kioi & John Kiri Wanja vs Mary Wangui Karanja & Salome Njeri CA Application No. 69 of 2004 Nicholas KiptooArap Korir Salat vs. Iebc & 7 others.**

ANALYSIS AND DETERMINATION

14. Arising from the facts of the case and the submissions of the parties are the following issues for consideration;

a. Whether the Applicants have Capacity to file the Application

b. Whether this Honourable Court has jurisdiction to hear and determined the application.

c. Whether the applicants have met the threshold to warrant the prayers sought.

Of Jurisdiction and Capacity

15. According to **Section 7 of the Appellate Jurisdiction Act**–

“7. The High Court may extend the time of giving notice of intention to appeal or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that time for giving such notice or making such an appeal may already have expired.

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

16. See also the case of **M’Mugambi Ndagacha V Karuka Ndagacha & another [2009] eKLR** where the Court stated;

.... Section 7 of the Appellate Jurisdiction Act like the said Section 68 of the Law of Succession Act and Rule 17 (1) of the

Probate and Administration Rules donate to the Court unfettered discretion to grant extension of time. Such discretion, like all discretion must be exercised judicially, and not arbitrarily or capriciously, and nor should it be exercised on the basis of sentiment or sympathy; So the Court held in the case of SHAH MBOGO & ANOTHER [1967] E.A.116.

17. Therefore, this court has jurisdiction to entertain an application for extension of time to lodge a notice of appeal.

18. The Law of Succession Act has elaborate and quite generous provisions to address matters that may arise out of the estate. Nonetheless, whereas there may be more than one type of remedy available, it is the aggrieved party who elects the remedies that best suits his situation. Except, however, the court is obligated to protect and promote the best interest of parties such as minors or persons with disabilities. The applicant herein suffers not of any such disability. They have opted to file appeal as opposed to filing for provision of dependants or revocation of the grant.

19. Having stated the above, the applicants herein have presented the application in their own capacities as children of the deceased daughters of the deceased. They are claiming the share of their deceased parents in the estate under the principle of representation and as such they have capacity to so claim either before this court or by way of an appeal. See the case of in the **Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR** where the Court held as follows;

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

20. With this position in mind, the grandchildren can step into the shoes of their deceased parents for purposes of succession law. It is arguable that it would have been more potent to apply as representatives of the estates of their respective parents. But, I do not think failure thereto takes away their capacity to bring this application.

Extension of time to file Notice of Appeal

21. The Application for extension of time has been brought eleven (11) months after delivery of the judgement of this trial court. The delay has been explained to have been caused by the fact that the applicants were not aware of these proceedings. Looking at the consent by persons of lesser or equal priority it is clear that the daughters of the deceased were not informed of these proceedings. At the time of the confirmation of grant the two daughters were deceased and there is no acknowledgement of their children or that they were informed of the proceedings.

22. The reasons given for the delay are reasonable and supported by evidence. Accordingly, I find and hold that the delay has been explained to the satisfaction of the court and therefore excusable. In addition, the attached a draft memorandum of appeal raises triable issues. Therefore, the applicants have satisfied the threshold for extension of time to file notice of appeal.

Stay of Execution

23. As for stay of execution of the judgment herein, **Order 42 Rule 6 of the Civil Procedure Code** is the guide. I should be satisfied that sufficient reason exists to order stay of execution upon consideration of the entire circumstances of the case and in particular ***whether substantial loss may result to the Applicant unless the order of stay of execution is made.*** See **In re Estate of Kimari Gitere (Deceased) [2018] eKLR**

24. In **re Estate of Atanasio Karanu [2018] eKLR** the court stated that;

“.....The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant’s right to his appeal and the right of the respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.....”

25. The applicants herein lay their claim in the estate of the deceased herein as children of the deceased daughters of the estate. As I stated earlier, the right of the grandchildren accrues upon the demise of their parents and step in to take the share of their deceased parent under the principle of representation. Their deceased parents were not provided for in the estate. Thus, and without saying much, distribution of the estate of the deceased will affect their rights. There is a letter in these proceedings by Geoland Surveyors that relates to the subdivision of the estate property. Accordingly, they will suffer prejudice unless stay is granted. Accordingly, an inhibition is also merited to preserve the estate property.

26. In order to balance the interest and rights of the parties herein, I find that the Applicants amended application dated 24th October 2018 has merit and is allowed in the following terms;

a. The applicants herein are granted leave to file appeal against the judgement of this Honourable Court dated 20th December 2018 within 30 days of today. They shall file appeal within thirty (30) days of today.

- b. A stay of execution is hereby granted pending the filing of appeal as ordered in (a) above.
- c. An Order of inhibition is hereby issued on L.R. No. Ntima/Igoki/4002 pending the filing of the intended appeal.
- d. As these proceedings involve close family members, I order each party to bear own costs.
- e. These orders shall lapse upon default in (a) above. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 3RD DAY OF OCTOBER, 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Ojiambo for applicant

Mwanzia for M/s Mwangi for petitioner

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F. GIKONYO

JUDGE