



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC SUCCESSION APPLICATION NO. 17 OF 2017

IN THE MATTER OF THE ESTATE OF M'MBURA M'NAIRUTI (DECEASED)

SABERA MAKENAAPPLICANT

-Versus-

DANIEL BARIU MUTEMBEI RESPONDENT

RULING

1. Before me is a Summons dated 11th July 2019 which is expressed to be brought pursuant to **Section 47, 50 and Rules 49 & 73 Probate and Administration Rules CAP 160 Laws of Kenya**. The significant orders sought are:

a. Inhibition restraining any dealings in Land Parcel number NJIA/BURIERURI/1591 or its subsequent sub divisions thereof; and

b. Leave to file appeal out of time against the ruling delivered on the 2nd May 2019 in Tigania PM's Court Succession Cause No. 82 of 2017.

2. The grounds upon which the application is premised are set out in the application and the supporting affidavit of Sabera Makena sworn on 11th July 2019. It is contended that the succession cause in the lower court was in respect of the estate of their deceased father which comprised of Land Parcel No. NJIA/BURIERURI/1591 measuring 1.729 Acres. In the application dated 1st November 2018 before the trial court they had sought for revocation of the grant for he had not involved the sisters, included a stranger and failed to distribute the estate equally and fairly. What's more is that the change of date for delivery of the ruling was not communicated to her or her advocate and the ruling was delivered in their absence. She argued further that the trial magistrate did not indicate the reasons for the change of the date and the failure to notify the parties of the change. This caused failure to lodge the appeal within time. She claims to have a strong appeal which if she is not allowed to file would mean she suffers irreparable damage and stands to be disinherited. She was apprehensive that the respondent is likely to execute the grant by the trial court and transfer the land or its subdivisions to 3rd parties.

3. The application was opposed vide the replying affidavit of Daniel Baabu sworn on 25th October 2019. He deposed that execution has been done and all concerned have their titles except the applicant. There were four (4) applicants in the lower court but they withdrew their objection except the applicant. The latter was given her share as the sisters were not interested. The applicant should not cry foul for it is the duty of the applicant to follow up the ruling thus, the delay was self-created.

ANALYSIS AND DETERMINATION

4. The issues for determination are:

a. Whether to grant leave to appeal out of time

b. Whether to issue inhibition on Land Parcel number NJIA/BURIERURI/1591 or its subsequent sub divisions thereof.

5. On the issue of leave, **Section 79G of the Civil Procedure Act** being the relevant the law provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

6. Case law has developed a number of factors which aid our court in exercising the discretion to extend time to file an appeal. Some of these factors were stated by the Court of Appeal in Mwangi v Kenya Airways Ltd [2003] KLR 486 to include:

...: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

7. In this application the applicant argued that the reason of the delay was the trial court’s failure to notify her of the date for delivery of the ruling in question. She argued that the trial magistrate unilaterally changed the date for the ruling without notifying them. According to her, the trial Magistrate set down delivery of the ruling on the application to be 23rd May 2019. However, she alleged that when they attended court on the appointed date, they learnt that the ruling was delivered on 2nd May 2019.

8. I have thoroughly perused the record but I cannot trace the proceedings to substantiate the allegation by the Applicant. In spite of this, if indeed the dates were changed and the applicant learnt of the ruling on 23rd May 2019 it is expected that she would have moved with speed to apply. The application before me is dated 11th July 2019. The latter delay was not explained.

9. The foregoing notwithstanding, the intended appeal concerns inheritance. The applicant claims that she was not involved, the respondent included a stranger and he failed to distribute the estate equally for he gave her a smaller share and did not cater for their sisters. The respondent declared that it is only the applicant who did not withdraw her objection that is why he gave only her a share. He exuded confidence that if she is not satisfied with her share she should state the size she wants. Let me see the veracity of these matters through evidentiary lenses.

10. On record is a letter dated 14/10/2019 addressed to the sitting judge from Pauline Kalayu and Regina Mwakiria, sisters to the applicant and respondent. They allege that they did not withdraw their objection as alleged. They stated that the respondent together with a stranger, Francis Kiliungu Ntonja, forged a letter stating that they had withdrawn their petition. It further states that the petitioner included a stranger in the distribution of the estate and excluded them despite being children of the deceased.

11. Consequently, there are grave matters which are arguable and deserve an opportunity to be evaluated in appeal. The court also recognizes the right of appeal is one of the important considerations in balancing the rights of parties in a suit. For this reason, the court is satisfied leave is merited and its grant will not occasion any prejudice to the Respondent. Accordingly, I hereby grant the applicant leave to file appeal.

12. On the second issue, since leave has been granted the estate of the deceased ought to be protected so as not to render the appeal nugatory. Hence, inhibition orders restraining any dealings with the Land Parcel number NJIA/BURIERURI/1591 or its subsequent sub divisions thereof are deserved and are granted.

13. Accordingly, the application is meritorious and the following orders are made:

a. Inhibition to be registered to restraining any dealings on Land Parcel number NJIA/BURIERURI/1591 or its subsequent sub divisions

b. The applicant is granted leave to file the appeal out of time against the ruling/orders delivered on the 2nd May 2019 in Tigania PM’s Court Succession Cause No. 82 of 2017

c. The draft memorandum of appeal annexed to the application is deemed as properly filed subject to payment of court fee.

d. Each part to cater for its own costs.

Dated, Signed and Delivered at Meru in open Court this 3rd day of December day of 2019

F.M GIKONYO

JUDGE

In presence of

M/S Godiogo for Ogoti for respondent

Kiogora for H. Gitonga for appellant

F.M GIKONYO

JUDGE