



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
SUCCESSION CAUSE NUMBER 53 OF 2016
(FORMERLY P&A CAUSE NO. 1058 OF 2005 – NAIROBI)

IN THE MATTER OF THE ESTATE OF CECILIA WANJIRU KIBICHE (DECEASED)

RULING

1. On 23/09/2016, Musyoka J. gave a ruling respecting the estate herein. She definitively determined the extent of the estate and the only persons who are entitled to benefit from the estate. Among those adjudged not to be beneficiaries to the estate are two widows of the deceased son of the Deceased. These are Alice Wamaitha and Jane Wanjiru Muigai. In the Probate Cause, Alice Wamaitha was a Co-Petitioner and Jane Wanjiru Muigai was a protestor. Both lost their bid to be beneficiaries. Musyoka J. found that only the five children of the Deceased's son were eligible beneficiaries.

2. Alice Wamaitha was dissatisfied with the decision of the Court. Jane Wanjiru Muigai not so much. This has spawned the two Applications before me today. The volume of

3. argumentation and contestation between the two Applications is an indication of the animosities of the parties rather than the complexities of the issues involved.

3. The first Application, an Amended Notice of Motion dated 20/03/2017 is brought by Alice Wamaitha. It seeks two substantive prayers:

a. THAT the Honourable court be pleased to grant leave to the applicant to lodge an appeal against the ruling delivered on 23rd September 2016.

b. THAT there be a stay of the ruling delivered on 23rd September 2016 and all consequential orders pending the hearing and final determination of the instant application and the intended appeal against the said judgment.

4. On the other hand, Jane Wanjiru Muigai has three substantive prayers as follows:

a. That this Honourable Court be pleased to authorize the Deputy Registrar to sign all the relevant documents necessary on behalf of the Respondent in order to give effect to the certificate of confirmation of the grant issued herein on 23rd September 2016.

b. That the Land Registrars be directed to dispense with the production of the Title Deeds in respect of all the properties listed in the confirmed grant and the Respondents passport size photographs, PIN Certificate or their identity cards while registering the transfer.

c. That the shares Registrar be directed to dispense with the production of shares certificates, the Respondents Passport size photographs, PIN certificates, the

Respondents Passport size photographs, PIN certificates or their identity cards while registering the transfer form.

5. At my direction, the parties argued the two Applications simultaneously and did so by way of Written Submissions.

6. After considering the copious arguments and authorities cited, I have rehashed the real issues for determination into three:

a. Is Alice Wamaitha entitled to be given leave to file an appeal out of time against the decision and consequential orders of Musyoka J. dated 23/09/2016?

b. Is Alice Wamaitha entitled to a stay of execution of the decision and consequential orders of Musyoka J. dated 23/09/2016?

c. Can Jane Wanjiru Muigai seek the orders regarding distribution of the estate of the Deceased that she now seeks in her Application dated 23/03/2017?

7. I will address each of those questions *in seriatim*.

8. The Application for extension of time is primarily predicated on section 7 of the Appellate Jurisdiction Act as well as Rule 72 of the Probate Rules. Section 7 provides as follows:

7: Power of High Court to extend time

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

9. The Respondent does not contest that the Court has jurisdiction to extend time but she argues that the Court should not do so on merit in this case. She argues that Alice Wamaitha is guilty of laches (6 months) as well as bad faith. The bad faith argument is based, in turn, on the argument that Alice Wamaitha filed an appeal straight at the Court of Appeal without first obtaining leave of the High Court. By the time they realized that leave was needed, precious six months had passed. Secondly, the Respondent argues that the appeal has no merit and is a waste of time.

10. Both parties have argued vigorously – as they did before Musyoka J. – about the viability of their legal claims. It is important to remember the procedure posture of the case: I am not sitting in review or appeal of Justice Musyoka’s decision.

Instead, what I am required to do is to determine if I should grant stay and leave to file the appeal out of time.

11. Before I answer the question of whether leave is needed, I should point out that although both parties proceeded from the position that such leave is indeed needed, I am not sure the legal position is that cocksure any more. Although the issue has become contested post-2010, at least part of the jurisprudence from the Court of Appeal suggests that a party requires leave of the High Court to file an Appeal in the Court of Appeal in succession matters since the right of appeal is not automatically given in the statute. See, for example, **Rhoda**

Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja and Salome Njeri Karanja, CA Civil App. NAI 69 of 2004

where it was held:

We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes. So, what is our determination in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.

12. For the contrary view, however, see, for example, **Peter Wahome Kimotho vs. Josphine Mwinyeria Mwanu Civil Appeal No. 52 of 2011 at Nyeri**. As the Court of Appeal remarked in the **Peter Wahome Kimotho Case**, there are significant doubts whether such leave is required anyway. In any event, I will treat the two questions together.

13. The factors that the Court of Appeal looks at in exercising its discretion under Rule 4 of the Court of Appeal Rules are the self-same factors that this Court considers in entertaining an Application under section 7 of the Appellate Jurisdiction Act as well as Rule 72 of the Probate Rules and Section 79G of the Civil Procedure Act. The test is also the same one this Court applies in extending time to file an appeal from the subordinate Courts under section 79G of the Civil Procedure Act. The Court of Appeal in **Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. NAI 332 OF 2004 (unreported)** stated the test thus:

The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.

14. These are the same factors this Court considers in deciding the merits of Applications under section 7 of the Appellate Jurisdiction Act and section 79G of the Civil Procedure Act. Indeed, our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be exercised judicially and on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

15. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

- a. The period of delay;
- b. The reason for the delay;

- c. The arguability of the appeal;
- d. the degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

16. I will now consider the Applicants' application for extension of time against these factors. The Administrators here have straightforwardly admitted that they were unaware that they needed leave from the High Court before proceeding to the Court of Appeal. As I observed above, it is now doubtful anyway whether such leave is needed. In any event, right from when the decision by Musyoka J. was rendered and the file transferred to Kiambu, the Administrators have diligently attempted to perfect their appeal and get a stay. It is stretching incredulity to claim that their decision to appeal is an afterthought.

17. The real question is whether the appeal is arguable. Jane Wanjiru Muigai says it is not. She has eloquently cited ***In re Estate of Gachara Gikonyo (Deceased) [2016]*** where the High Court decided, like Musyoka J. did in this case that daughters in law are not related to their parents in law by blood, but by marriage. They are therefore not recognized as survivors of the Deceased. Such eloquence might mute the fact that this was Jane Wanjiru Muigai's exact argument before Musyoka J. and is the argument that Alice Wamaitha will be pursuing at the Court of Appeal.

18. There is also a factual contestation that makes the appeal arguable: Alice Wamaitha argues that apart from being a daughter-in-law, she had become a dependant of the Deceased after her husband died hence entitling her to a share of the estate as such.

19. I therefore have little difficulty in finding that the appeal is arguable. In doing so, I note that all the Applicants have to show at this stage is arguability – not high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict.

20. Lastly, I must point out that the delay in perfecting the appeal in this case can squarely be placed at the doorstep of the Respondent's lawyer. As the Court of Appeal stated in ***Phillip Keipto Chemwolo & another V Augustine Kibende [1986] KLR 495*** where the Court stated that :

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of having his case determined on its merits.

21. Consequently, I will grant the Respondent Leave to Appeal against the ruling dated 23/09/2016 as well as Leave to file that Appeal out of time.

22. I will now turn to the Alice Wamaitha's prayer for a stay of execution. For a party to be entitled to a stay of execution, apart from showing that the appeal is arguable, she must demonstrate that her intended appeal will be rendered nugatory. In appropriate circumstances, she is also required to give such security as the court may order for the due performance of the decree which may ultimately be binding on her.

23. I have already concluded that the appeal is eminently arguable and that it was brought without undue delay. The question is whether it will be rendered nugatory if stay is not granted. I am not persuaded that it will be. The declared beneficiaries of the estate are all children of the deceased son of the Deceased – some of whom are children. Alice Wamaitha is one of the Co-Administrators of the estate of the Deceased. I do not see how her appeal will be rendered nugatory if stay is not granted. Indeed, most of the estate of the Deceased is not made up of land – and if she were successful on appeal she can always get her share of the land. On this score, I will deny Alice Wamaitha's request for stay.

24. Turning to Jane Wanjiru Muigai's Application, it requires, in my view little analysis to dismiss it. She

simply has no capacity to bring the Application. As an Objector, her claim to the estate of the Deceased was dismissed by the Court. She has no capacity now to bring an application seeking the enforced distribution of the estate of the Deceased. She would stand better ground if she were a beneficiary or an Administrator. She is neither. In what capacity, then, does she bring this Application? The fact that two of the beneficiaries who are adults are her children does not give her any legal standing to bring the claim she has done. Her Application simply has no legs to stand on and it must suffer the only fate it deserves: dismissal.

25. The disposal of the two Applications, then, is as follows:

- a. Alice Wamaitha and the other Administrators are hereby granted leave to appeal the ruling and consequential orders by Musyoka J. dated 23/09/2016.**
- b. Time for filing the appeal in (a) above is extended for seven days from the date hereof.**
- c. The prayer for stay of execution of the orders of Hon. Musyoka J. issued vide the ruling delivered on 23/09/2016 is hereby declined.**
- d. The Application dated 23/03/2017 by Jane Wanjiru is dismissed in its entirety.**
- e. Each party will bear its own costs.**

26. Orders accordingly.

Dated and delivered at Kiambu this 8th day of February, 2018.

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JOEL NGUGI

JUDGE