



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT SUCCESSION CAUSE NO. 354 OF 2015

(FORMERLY CHUKA SPM SUCCESSION CAUSE NO 95 OF 2015)

IN THE MATTER OF THE ESTATE OF ELIUD KAMUNDI M'MWIRABUA (DECEASED)

AND

MERCY KAAGIGE KAMUNDI.....PETITIONER

VERSUS

ELIPHAS MUGAMBI KAMUNDI.....1ST RESPONDENT

ELIPHEET MICHENI KAMUNDE.....2ND RESPONDENT

KAMUNDE KIMATHI MWIRABUA.....3RD RESPONDENT

MARYSTELLA GAKII MUTEGLI.....4TH RESPONDENT

RULING

1. Mercy Kagige Kamunde the administratrix/applicant herein has taken out summons for leave to appeal and a stay of execution of a judgment of this court delivered on 3rd November 2016. The applicant has invoked **Section 47** of the **Law of Succession Act**, **section 7** of the Appellate jurisdiction Act, **Rules 49, 63 and 73** of the Probate and Administration Rules in seeking the following substantive prayers namely:

i. That this honourable court be pleased to extend time for the petitioner/applicant to make an application for leave of this court to file an appeal in the court of Appeal against the order and judgment of this court dated 3rd November, 2016.

ii. That if prayer (i) above is granted, the applicant be granted leave to appeal against the judgment delivered in this court on 3rd November, 2016.

iii. That this honourable court be pleased to grant a stay of execution of the distribution of the estate of the deceased herein pursuant to the said judgment of this court dated 3rd November, 2016 pending the lodging and determination of an intended appeal from the judgment delivered.

iv. That costs of this application be provided for.

2. The grounds upon which this application has been brought are as follows;

- a) That the petitioner/applicant was aggrieved by the judgment delivered on 3rd November, 2016 in this court and intends to move to the court of appeal as demonstrated by a notice of appeal filed on 15th November, 2016 and the application of proceedings on the same date.
- b) That however owing to the mistake of her former counsel, she failed to apply for leave to appeal against the judgment within 14 days and hence need for the leave.
- c) That as decided in **Rhoda Wairimu Kioi & John Kioi Karanja -vs- Mary Wangui Karanja and Salome Njeri Karanja (Court of Appeal Civil Application No.NAI 69 of 2014)**, an appeal from this court to the court of appeal only lies with leave of this court.
- d) That the counsel's mistake is sufficient explanation for delay as held in **Murai -vs- Wainaina [1982] KLR 38**.
- e) That as held in **Sango Bay Estate & Anor -vs- Dresdner Bank [1971] EAI**, an application for leave must show that the intended appeal raises grounds that merit consideration and in her view the grounds raised by her in this application merit consideration.
- f) That the estate of **Mbiyu Koingange (deceased) [2015] eKLR** this honourable court held that in an application for leave to appeal an applicant need not demonstrate that her proposed appeal has an overwhelming chance or probability of success but rather he is merely required to show that she/he has an arguable and reasonable appeal.
- g) That the applicant right to appeal is guaranteed by Art. 48 of the constitution which guarantees all persons a right to access to justice as was held in **James Wangalwa & Anor -vs- Agnes Walhika Cheseto [2012] eKLR**.
- h) That this court has jurisdiction to grant conservatory orders pending the lodging, hearing and determination of an intended appeal.
- i) That this court should seek to balance the relative hardships of the parties in determining an application of stay of execution as was decided in **African Safari Club -vs- Safe Pentals Ltd (C.A NAIROBI Civil Appeal No.53 of 2013)**
- j) That the applicant will suffer substantial loss if the stay sought is not granted in that her right of appeal will be rendered nugatory as the estate will be distributed before her intended appeal is heard and determined and that properties vested in the beneficiaries may be divested and put beyond the reach of the applicant and this court.

3. This application is further supported by a ninety eight paragraph affidavit sworn on 23rd January, 2017 which this court does not wish to replicate but just to pick out the salient grounds as mentioned by applicant's learned senior counsel Mr Kamau Kuria is that the applicant contends that there is no law that allows distribution of the estate of a deceased person during the lifetime of a spouse and that distribution in his view can only happen as provided under section 35 (2) of Law of Succession Act or where appointment is done by the widow as per the cited section. The applicant has argued that she should not have been given life interest only in the 8 acres she was given but in her view she ought to have been given absolute interest so that could have financial security in her old age. She has further deponed that at her age she has gotten sickly and that she is being assisted financially only by three of her children and that she should not be depending on her children when she worked so hard in her youthful years. She has further deponed that because of her medical condition (diabetic) she may not get sufficient financial support if the orders given in the judgment are sustained.

4. The applicant has blamed her former advocates for not properly advising her on the need to obtain leave of this court 14 days after the delivery of the judgment and that was she notified on time or at all she could have sought leave. Mr Kuria has cited **MURAI -VS- WAINANA [1982] KLR** to buttress the applicant's contention that a mistake of an advocate on law should be considered a good reason why she

was not able to make her application on time. In the cited case, the court of appeal held inter alia that the mistake of a advocate or legal adviser may amount to sufficient reason for the Court of Appeal to exercise its discretion to extend time to file record of appeal out of time.

5. The applicant's counsel has further contended that he has 10 grounds listed on the face of the application now before court which the applicant's desires to be ventilated in the court of appeal. The grounds inter alia are:

i. Whether or not an estate of a deceased person can be distributed during the lifetime of a spouse in the absence of appointment under section 35(2) of L.S.A.

ii. Whether or not this court in its judgment misapprehended and misapplied the law and the principle in **Justus Thiora Kwigu & 4 others -vs- Joyce Nkatha Kugu & Anor [2015] eKLR**. The applicant has taken the position that this court had two options in the distribution of the estate of the late Eliud Kamande M'Mwirabua (deceased). The portions are:

i. Go by the provisions of sections 35 to 42 to the letter and let the widow get life interest in all the assets comprising the estate and the children get equal shares after the widow dies.

ii. Give all the beneficiaries to the estate a chance to agree to depart from the 1st option and let the surviving spouse have absolute proprietorship over part of the estate and let the children get their share instead of waiting for her to die.

6. The applicant has faulted the respondent's replying affidavit submitting that the respondents are trying to introduce new evidence to justify the distribution of the estate in this cause and that the greater part of the replying affidavit is inadmissible because this court is now functus officio. In her view the averments contained therein should be left out this stage to be canvassed at the Court of Appeal.

7. The Respondents have opposed this application through a 60 paragraph replying affidavit by Kamundeh Kimathi Mwirabua (3rd respondent) sworn on 23rd February, 2017. The respondents have accused the applicant of forging their signatures in the petition for letters of administration which she launched in this court and have pointed out that one Linus Njue who was deceased purportedly signed form Probate and Administration 5.

8. They have further deposed the applicant being the appointed administratrix had omitted to give a share to Mary Stella, Gakiri Mutegi and Danstan Kariuki leading to their protest and that the consent later adopted by this court was executed by all the beneficiaries including the applicant herein. They have therefore termed this application as frivolous and vexatious.

9. The respondents have contested the applicant's contention that she lacks financial security deposing that she is well off financially with multiple sources of income including 3 acres of coffee, 3 fish ponds, dairy cattle, sheep and goats in addition to 3 acres of bananas and eucalyptus trees. The respondents have further deposed that they have all been taking care of their mother (the applicant herein) by meeting all her medical & other requirements while taking her to various hospitals and paying for her NHIF card and putting up a house besides helping her develop her income generating projects.

10. The respondents have accused the applicant for dividing the family into two groups and allowing her favoured group to manipulate her. The respondents have contended that they have left the applicant to fully utilize parcel **No.Mwimbi/N. Mugumango/2052** to generate income for her upkeep and that this application is a pursuit of selfish and interior motives. They have deposed that the applicant should not try to go against the wishes of the deceased by trying to get ways to dispose off the parcel **No. Mwimbi/N. Mugumango/2052** as in their view the family agreed that she should simply utilize it to generate income for her upkeep which all the children have supported.

11. The respondent's learned counsel Mr Mwangi contended that extending time for the applicant herein will not do any justice because in his view the judgment of this court was on the basis of a consent of the

beneficiaries. Mr Mwangi further pointed out that the only property listed by the applicant in the petition (Form P & A 5) was **Mwimbi/N.Mugumango/2052** measuring about 8 acres and this in his view demonstrated that the applicant knew and acknowledged the fact that the deceased had already distributed other properties forming the estate to his children during his lifetime.

12. The respondents have further contended that the eight acres (**Mwimbi/N. Mugumango/2052**) was supposed to be for the applicant and the daughters of the deceased and that the 2nd respondent (Eliphelet Micheni Kamunde) in fact paid out a loan to redeem the said property in order to preserve and protect the wishes of the deceased who had in their view expressed his wishes that the plot should never be sold.

13. The respondents have contended that the applicant has not demonstrated special circumstances and serious points of law arising from the consent that this court adopted in its judgment and that the stay being sought should only be respect of the 8 acres (**Mwimbi/N. Mugumango/2052**) and not any other plot in view of the consent. Mr Mwanzi for the respondents contends that the provisions of Article 48 of the constitution protects interests of both the applicant and the respondents alike and that litigations must come to an end as prolonging this matter may lead to disintegration of the family.

14. I have considered this application and the long and winding affidavits of both the applicant and the respondents. I have also considered the authorities cited and the able submissions made by both counsels in this application. I wish to mention in passing that substantial parts of the affidavits from both sides were really not necessary in applications of this kind. The applicant is simply asking this court for an extension of time to apply for leave to appeal and be granted the leave to appeal. Both reliefs are discretionary in nature and all that the applicant was required to do was to simply lay basis as why she feels that this court should exercise its discretion in her favour and on the part of the respondent show why the applicant is undeserving of this court's discretion. It is an undeniable fact that the applicant herein expressed her dissatisfaction of this court's judgment delivered on 3rd November, 2016 by filing her notice of appeal on 15th December, 2016 after she had earlier on 10th November, 2016 applied for certified copy of the said judgment. In my view the merits or the demerits of such dissatisfaction should be substantially be canvassed in the Court of Appeal for the simple reason that this court has rendered a decision on what was contested in this cause.

15. Now going back to the grounds of this application is that the main ground in my view is the blame attributed by the applicant to her erstwhile counsel Njeru Itiga Advocate for not informing her on time or at all about the necessity to ask for leave to appeal against the decision of this court. I have considered the decision in **Murai -vs- Wainana (supra)** where the court of appeal found that a mistake of an advocate or a legal advisor may amount to sufficient reason for the court to extend time pursuant to rule 4 of the rules of that court. In that case an appellant's counsel had failed to include a decree from which he was appealing from in the record of appeal with the mistaken believe that a certified copy of the judgment would be sufficient to satisfy the requirements of rule 85 (1) (h) of Court of Appeal Rules. The Court of Appeal found among other things that a blunder by an advocate on a point of law can be a mistake and that; "a door of justice is not closed because a mistake has been made by a person of experience who ought to have known better." **Justice Madam, (J.A as he then was)** one of the judges in that bench further made the following observation in regard to a mistake by counsel;

" The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

In the present case the applicant failed to take the necessary step before filing the notice of appeal which I have cited above. It is obvious that the former advocates for the applicant misapprehended the provisions of section 50 of the Law of Succession Act which does not grant automatic right of appeal to an aggrieved party against a decision made by this court in the exercise of its original jurisdiction. Where this court is exercising its appellate jurisdiction, the decision is final and no right of appeal is given. However as I have said when the court is exercising its original jurisdiction a party aggrieved and wishing to appeal must seek leave to do so and granting the leave is a discretionary exercise (see **RHODA WAIRIMU KARANJA & ANOR -vs- MARY WANGUI KARANJA & ANOR [2014] eKLR** cited by the applicant.) There is no doubt therefore that the applicant's former counsel made a mistake which I

consider a genuine mistake. Is the mistake a sufficient cause for me to exercise discretion in favour of the applicant in this instance?

16. Before I answer the above question, let me consider the respondents' response in regard to this ground specifically. The respondents have contended that the application is made in bad faith as the applicant's proposed mode of distribution was adopted by the court to the latter and that this court followed the wishes of the applicant. The respondents have further faulted the applicant for delay in making this application and that allowing this application will greatly prejudice the respondents and wreck the family. This court notes that the judgment in this cause was delivered on 3rd November, 2016. The notice of appeal was presented on 15th November, 2016 together with an application for certified copy of the proceedings and judgment. The record I have shows that the proceedings and the judgment herein was typed and certified on 23rd December, 2016. It is not clear when the same was collected but the applicant appointed her present advocate on 21st January, 2017 when this application was also filed. So there was a delay of 21 days and bearing in mind that most firms normally close their offices for Christmas a week or two before and after Christmas, I do not consider that period to be inordinate in any respect. In my view taking the above prevailing circumstances into consideration, the applicant cannot be faulted for laches in this application and it therefore follows that her quest for justice in this application cannot be defeated merely on the question of delay in presenting this application.

17. The other important ground raised by the respondent in opposing this application is that the applicant does not have an arguable appeal having entered into consent with all her children and that this court in its judgment granted her her wishes. This ground in my view is moot as it normally leaves courts with a very thin line upon which to try and balance the scales of justice in the exercise of discretion without appearing like it is again re examining matters to which the court is functus officio after pronouncing itself. The respondents have pointed out that the court's judgment was on a basis of a consent but I have looked at the purported consent dated 18th July, 2016 and noted that the same was executed only by one party, the applicant's former advocates. Neither the firm of I.C Mugo & Co Advocate for the protestors nor protestors themselves appended their signatures. It is also true that not all the children of the deceased were a party to that consent. However it is also true that in their affidavits filed in court both sides were in agreement as to how all the properties comprising the estate were to be distributed save for plot **No.Mwimbi/N. Mugumango/2052**. The applicant in her own affidavit in support of confirmation of grant sworn on 22nd March, 2016 and further affidavit sworn on 8th June, 2016, she proposed that **L.R. No.MWIMBI/S/MUGUMANGO/2052** should be distributed as follows:

- i. Mercy Kagige Kamunde - 2.35 Ha
- ii. Dinah Wanja Kamunde 0.80 Ha
- iii. Kellen Mukwarama Kamunde - 0.40 Ha

18. From the above it can safely be argued that the applicant got her wishes in the judgment and therefore preferring an appeal may not take her far. I have looked at section 7 of the Appellate jurisdiction Act and the decision in the estate of **Mbiu Koinange (dcd) [2015] eKLR** and I have come to the conclusion that, in exercising its discretion pursuant to S. 7 of Appellate jurisdiction to extend time, this court unlike the Court of Appeal, the prospects of the success of the intended appeal is not a factor. The Court of Appeal is perfectly in order and competent to decline to extend time simply because the appeal look hopeless or in the alternative exercise their discretion because the chances for success of the appeal appears good and real. At this level, as observed in **Mbiyu Koinange's cause (supra)**, the applicant only needs to satisfy the court that the issues raised prima facie merit being considered in the Court of Appeal that is to say that the applicant must have an arguable appeal. How does this court determine that? As I have said above the court acts within a thin line in balancing the scales of justice in a manner that protects interests in accordance with the law and the constitution. In my view, the interpretation and application of Article 48 and 50 (1) of the constitution in this context should be robust enough to mean that a person's right of access to justice is not only guaranteed but to a large extent unfettered and a right to appeal is one of such rights.

19. The question as whether it was right or wrong for this court to partly adopt the mode of distribution the parties agreed and partly apply section 35 where there was disagreement in my view raises an arguable issue to be interrogated further in the court of appeal. There is also the question of whether it was appropriate for this court to invoke the provisions of Art. 159 of the constitution and distribute the estate of the late Njue Kamunde within the cause of the estate of Eliud Kamunde M'Mwirabua. Although this ground was not hotly canvassed, I consider that the same merits to be placed before the court of appeal for determination.

20. On the question of stay of execution the applicant has expressed the fear that the other properties vested to the children may be placed beyond her reach by the time the appeal is heard and determined. I am however, going by the submissions of both counsels herein, it is quite apparent that the applicant's main interest is in respect to the 8 acres comprised in **Mwimbi/S. Magumango/2052**. Having declared no interests in the other properties she has not persuaded me that she stands to suffer any prejudice even if the properties were to be sold or placed beyond her reach. The court's position is informed by the withdrawal of the applicant's application dated 4th March, 2017.

21. In the end this court finds merit in the application dated 22nd January, 2017 and allows the same in the following terms.

i. This court does allow the extension of time within which the applicant can make an application for leave of this honourable court to file an appeal in the court of appeal against the order and judgment of this court dated 3rd November, 2016.

ii. Having made a prayer for such leave in her application dated 23rd January, 2017, this court grant the petitioner/applicant leave of this court to file notice of appeal out of time and the appeal itself against the judgment delivered herein on 3rd November, 2016.

iii. I order and direct that an order of status quo obtaining as per today shall be maintained in respect to **Mwimbi/S. Mugumango/2052** pending the hearing and determination of the intended appeal.

iv. For avoidance of doubt, the applicant has 14 days from today to file notice of appeal and 30 days from today to file her appeal.

v. I make no order as to costs so each party shall bear own costs.

The above is the finding and the ruling of this court.

Delivered at Chuka high court this 11th day of May, 2017

R. K. LIMO,

JUDGE.

11.5.2017

Coram

Before

Hon. R.K. Limo - J

C/A Muriithi

Applicant - present

Respondent - absent

Kamau Kuria for petitioner

Gathiga Mwangi for respondent

Court

Ruling signed dated and delivered in the open court in the presence of Kamau Kuria for the petitioner/applicant and Gathiga Mwangi for respondents.

R. K. LIMO,

JUDGE.