REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 398 OF 2015

(FORMERLY MERU SUCCESSION CAUSE NO. 275 OF 2014)

IN THE MATTER OF THE ESTATE OF (ERASTUS MURIUNGI NGARUTHI (DECEASED)

BETWEEN

JANET MARI MURIUNGI …… PETITIONER/APPLICANT

VERSUS

GERALD KINOTI NGARUTHI…….OBJECTOR/RESPONDENT

FRANCIS RIUNGU NGARUTHI ……...OBJECTOR /RESPONDENT

R U L I N G

1. **JANET MWARI MURIUNGI** the Petitioner /Applicant herein has moved this court **Rule 49** of Probate & Administration Rules and **Section 7** of the Appellate Jurisdiction Act for the following orders namely:-

a) ***That the Honourable Court be pleased to grant the Applicant leave to appeal against the ruling of this court delivered at Chuka on 1st September 2016.***

b) That the Honourable court do further grant and issue orders of stay of any further proceedings pending hearing and final determination of the intended appeal.

c) That costs be in cause.

2. The grounds upon which the application is made are follows namely:-

i) That the applicant is aggrieved by the process (interlocutory) which gave the respondent, right to administer and inherit the estate.

ii) That the applicant is aggrieved for being denied the right to challenge a decision delivered in Meru High Court dated 23rd April 2015.

iii) That the application dated 18th August 2015 has been overlooked and has not been considered.

iv) That the applicant is aggrieved that this court overlooked the fact that the subject matter was out of the jurisdiction of this court.

3. The application is supported by the affidavit of Gatobu Muriungi sworn on 14th September 2016 where who has deposed that he has the authority of the applicant to swear the affidavit on her behalf as he is the son of the applicant. He has further deponed that the application dated 18th August 2015 has been overshadowed by subsequent orders of this court. He has further deponed the unspecified ruling of this court gives unfair advantage to the respondents herein and sees no justice being rendered by this court.

4. Mr Kioga learned counsel for the applicant contended that it was proper for Gatobu Muriungi to swear on Affidavit in support of the application now before court because in his view a mere fact of swearing an Affidavit does not make one a party and that an affidavit is a matter of evidence which can be adduced by anyone with credible evidence and information. He further submitted that this right of appeal is constitutional and that a party should not be impeded or blocked from seeking justice as doing so would violate his right to access justice as enshrined under **Article 48** of the Constitution.

5. The respondents have opposed this application through the Replying Affidavit of Gerald Kinoti Ngaruthi (1st respondent) sworn on 28th February, 2017. The respondents have contended that the applicant is a stranger in the proceedings herein and that until he (Gatobu Muriungi) is made a party , he cannot in their view have the capacity to bring this application. It is the contention of the respondents that the applicant besides this incapacity, has also not demonstrated that he has an arguable or reasonable grounds to appeal to warrant granting of leave to appeal.

6. The respondents have faulted the applicant for failing to prosecute her application dated 18th August 2015 and trying to blame the court for her indolence. It is further contended that the applicant is not being candid on whether, she wants to challenge the decision delivered on 23rd April 2015 or the ruling dated 1st September 2016 and that the applicant is just bent on protracting litigation.

7. The respondents through their learned counsel Mr. Kariuiki submitted that the conditions for leave to appeal has not been met by the applicant in the present application. Mr. Kariuki also faulted the applicant for venturing outside her pleading in this application contending that parties in court are bound by their pleadings.

8. Mr. Kariuki cited the decision in the case of RE the estate of **RONALD AUGUSTINE WHITTIGHAM [2015] eKLR** to support his contention that a primary consideration in granting leave to appeal is the existence of serious question of law or special circumstance. In his view, the applicant has shown none and the same shows that the applicant has no arguable appeal.

9. The respondent has further submitted that the decision by **Hon. Justice Makau** was not an issue or a subject of the ruling of this court dated 1st September 2016 and the same cannot be a basis of an appeal against the ruling of this court dated 1st September 2016. The respondents contend that the ruling of this dated 1st September 2016 was in favour of the applicant because the confirmation of grant was set aside and the court directed that the summons for confirmation of grant be heard afresh. It is the respondent's view that the only order that went against the applicant in the said ruling was the court declining to transfer the cause back to Meru and that the issue does not raise a serious point of law to warrant leave to appeal being sought in this court. The respondents have argued that they too have a right to a just and expeditious determination of matters in court and that the competing rights should be fairly balanced in the interest of justice.

10. This court has considered the application, the grounds upon which it is made and the oral submissions by Mr.Kioga learned counsel for the applicant. I have also considered the response made through the Replying Affidavit and both the oral and written submissions of Ms Mitheka and Kariuki Advocates. There are two main issues in this application which have been brought out for determination. They are:-

i) Whether an application such as the instant application can be supported or hinged on an

Affidavit by a person other than the Applicant.

ii) Whether leave to appeal is a matter of right or conditional.

1. <u>Competence of the application</u>

The applicant herein is named **JANET MARI MURIUNGI** but the Affidavits in support of the application is sworn by **GATOBU MURIUNGI** who describes himself as a son of the deceased and the applicant .What is however confusing is the body of the application where the applicant has stated that the application is premised on the four cited grounds and ***"other reasons and grounds contained in the Affidavit of the Applicant herein and further grounds to be adduced at the hearing" (sic)***. So looking at the Affidavit in support which is sworn by **GATOBU MURIUNGI**, the respondents are justified to conclude that the applicant is a stranger in the proceedings in this cause. He has not sought to be made a party though he had a legitimate right to so apply. Be that as it may the important legal question or issue here is whether an application can be rendered incompetent just because it is supported by an Affidavit by a person other than the Applicant. To decipher the issue lets look at the provisions of **Rule 59(b) of Probate &Administration Rules**. The rule provides as follows:-

> ***"Save as where it is otherwise provided in these rules there shall be filed with every application such affidavit (if any) setting out such material facts and exhibiting such documents as the applicant may think necessary".***

The above rule shows an application to court can be supported by an Affidavit by anyone so long as he/she confines himself/herself to such facts as he/she is able of his/her own knowledge to prove. A look at the provision of **Rule 63(1)** of **P&A** Rules further shows the provisions in the Civil Procedure relating to Affidavits (Order XV111 now amended Civil Procedure Rule **Order 19** in the current Civil Procedure Rule) do apply. To this extend I agree with the applicant's counsel contention that an Affidavit is a matter of evidence. This is because the law provides that a particular fact or facts may be proved by an Affidavit. This therefore means that an applicant may use whatever evidence available to him or her in support of her application and there is no rule that bars an applicant from adducing whatever relevant evidence he/she feels is necessary to support her claim. The application herein in that regard cannot be incompetent merely for the simple reason that the Affidavit in support has been sworn by a person who is not a party in the proceedings. The respondents have not cited any other irregularity in the Affidavit sworn by Gatobu Muriungi.

11.I have considered the Court of Appeal decision of ***RHODA WAIRIMU KARANJA and ANOR -VS- MARY WANGUI KARANJA [2014] eKLR*** cited by the respondents but having perused through the decision, it is clear that the court of appeal was considering a different issue of capacity of a child pursuing a cause on, behalf of a deceased parent without first obtaining Letters of Administration of the estate of deceased parent and the court observed correctly that an action brought by an intestate's intended administrator before the issuance of a grant of representation is incompetent. A different scenario obtains in the instant application because the Applicant has brought an application and supported it with an Affidavit sworn by a different person. That, as I have already observed does not violate any rule of procedure and the applicant is perfectly in order to adduce whatever material evidence she feels will assist her in the prayers sought in this application.

12. However a look at the provisions of **Rule 59 (1) & 4 of P&A** Rules reveal that the application before court is bad in law for want of form. The format adopted by the applicant clear does not conform with the above cited rules. The summons were supposed to be issued by the Deputy Registrar of this court as provided by the rules but the summon before is not and even if I was prepared to overlook this technical irregularity in the spirit and the letter of **Article 159** of the **Constitution of Kenya 2010** the application appears to be plagued by other legal hurdles that also torch on the merits of this application.

In the first place the applicant has not cited the process which may have been adopted by this court either sitting here or in Meru High Court which denied her, her right to challenge the Judgment of **Hon. Justice Makau** dated 23rd April 2015. She has impugned an unknown process because it is not indicated there

was a process in court that divested the estate to the respondent. The grant in this cause has not been confirmed because this court ruled that the earlier confirmation be set aside and the administrators were directed to move this court afresh for confirmation. This therefore means that the first two grounds upon which this application has been brought really do not hold any water. The applicant has not cited the ruling which is ***"giving unfair advantage to the respondent"*** and whether the unknown ruling would also be a subject to the intended appeal.

13. Secondly, the applicant has not demonstrated to this court through an Affidavit or otherwise reasons why she did not find it necessary to apply for leave to appeal against the ruling she feels aggrieved about when it was delivered and yet she was duly represented. She has also not stated why she has not taken any steps to prosecute her application dated 18th August 2015 if she was actually aggrieved by the decision of **Hon. Justice Makau** delivered on 23rd April 2015. From the tone of the applicant's counsel and the sentiments expressed at bar at the hearing of this application, it was quite apparent that the applicant's main grievance is not the ruling of this court dated 1st September 2016 and delivered by **Hon. Justice Mabeya,** but the Judgment delivered in Meru High Court by **Justice Makau** on 23rd April 2015. It is an abuse of court process and mischievous for an applicant to use a different application to attain the same desired result of an application which could be having serious legal flaws. This court finds that the Respondents description of the present application as nebulous in this regard is valid and justified.

14. The third and most significant hurdle faced by the applicant in this application is lack of merit which brings me to the 2nd issue for determination herein. It is important to note that an appeal from a decision of this court in succession matters is not appealable to the court of appeal as a matter of right. An intended appellant must obtain leave of court before pursuing any appeal from the High court. In this respect I am well persuaded by the cited decision of this High Court by Hon. **Justice William Musyoka** in ***RE ESTATE OF RONALD AUSTINE WHITTINGHAM (DECEASED) [2015] eKLR***. Without belabouring the point much, my interpretation of the provisions of **Section 50(1) and (2)** suggests that an appeal from this court to the Court of Appeal in Probate and Administration matters only lie with leave and therefore not automatic. Leave can be granted at the discretion of the court and it is by the above cited decision that leave is conditional and the first condition being that the applicant must satisfy the court that the intended raises serious question(s) of law. The applicant herein has not placed any material before this court in his application to demonstrate that he has an arguable appeal with any chance of success.

15. In the first place, the only grievance that the applicant has pointed out in his application in so far as the decision of 1st September 2016 is the refusal by this court to have this cause re-transferred to Meru High Court. The court granted all the other orders sought by the applicant. The confirmation of grant was set aside that is why the grant issued is now pending for confirmation before this court. I have considered the reasons that were advanced for re-transfer of this cause to Meru though I am guarded at reviewing the reasons underpinning the decision of **Hon. Justice Mabeya,** it is quite clear that the applicant herself for good reasons initially chose to file this cause here in Chuka Subordinate Court given that at the time this court had not yet been established. The applicant has just stated that the subject matter is outside the jurisdiction of this court but has not placed any evidence to demonstrate that fact. Infact through Affidavit in support of this application, the deponent is completely silent on this issue and yet in her view that is the primary reason why she is seeking leave to appeal to the Court of Appeal. Besides this the applicant herself has not sworn Affidavit to demonstrate what has possibly changed since she chose to file her petition in Chuka Subordinate Court. Certainly the subject matter should be placed in where it has before filing the petition unless of course she is now saying (and she is not) that the administrative boundaries in respect to the subject matter subsequently changed. The deponent of the Affidavit in support states that a ruling of this court has given unfair advantage to respondent and that justice is unlikely to be rendered by this court.

However going through the record herein, this court finds this statement strange, unjustified and outrageous because he has not demonstrated how:-

> ***1. The unspecified ruling of this court handed an advantage to the respondent when confirmation of grant was set aside.***

2. Justice cannot be rendered by a court whose impartiality has not been questioned.

The only conclusion this court can draw in the face of such wild allegations is that this application is certainly not made in good faith and is tainted with some mischief which is not out to promote due process of court and the interest of justice. If the application was in good faith the applicant would have specified the ruling if any, that gave ***"unfair advantage "*** to the respondents and which part of the ruling did so and if so whether she has taken action to seek redress.

16. This court in the absence of any material showing that the applicant has serious questions of law worth further propping in the Court of Appeal, is unable to find any basis to exercise its discretion and grant leave for the applicant to appeal. The application before me is devoid of any merit. The prayer for stay of execution was not even urged and I do not find any merit to grant it. I do agree that a party should not be impeded from accessing justice but justice is two way. The position of this court is that all parties to litigation in court have a right to have their disputes resolved expeditiously and in accordance with law. This position is informed by guiding principles under **Article 159(2) (b)** that justice shall not be delayed. The deceased in this cause, the late Erastus Murungi Ngaruthi died in 2003 and this cause has been pending in court since 2011. This court shall not entertain any unnecessary action or move that has to potential to unnecessary delaying this matter any further because litigation must surely come to an end to enable parties pick up the pieces of what is left in the estate and move on.

17. In the premises and for the above cited reasons the application dated 14th September 2016 is dismissed for lack of merit. The applicant shall pay costs to the respondents. I further direct that a date be taken for directions on the protest against confirmation of grant on priority in order to bring this matter to an end. Alternatively, if the parties are ready they can take directions forthwith. This court is ready to do so now.

Dated and delivered at Chuka this 20th day of July 2017.

R. K. LIMO

JUDGE

Ruling signed, dated and delivered in the open court in the presence of Mutani holding brief for Kaimba Advocate and Gerald M'inoti Francis Riungu and Patrick Gatobu.

R.K. LIMO

JUDGE

20/7/17