



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AY KITALE
SUCCESSION CAUSE NO. 173 OF 2007

IN THE MATTER OF THE ESTATE OF CHEPOKOKAI CHEPKILIM..... DECEASED

CECILIA CHESOS CHEPKILM1ST OBJECTOR/RESPONDENT

ESTHER CHEPTIREN MAIYA2ND OBJECTOR/RESPONDENT

VERSUS

VERONICA CHEPUNDON MAGAL..1ST PETITIONER/APPLICANT

JOYCE CHEMUSUNGU MAGAL.....2ND PETITIONER/APPLICANT

R U L I N G

By their application dated 1/8/2016 the applicants pray for the following reliefs

- a) Pending the hearing and determination of the intended appeal this court be pleased to issue orders of stay of execution of the ruling and all consequential orders herein.
- b) Leave be granted to the applicants to lodge an appeal out of time against the decree of this court.
- c) The notice of appeal filed herein be deemed properly on record.

The application is supported by the affidavit of the 1st applicant on her own behalf and that of her sister the second respondent.

Basically the applicants were dissatisfied with this court's decision of 15/2/2016 which revoked the grant issued to them. The estate according to the said ruling reverted to the deceased's name who was their grandfather. Their advocate then on record failed to file a notice of Appeal as advised and thus time lapsed. Meanwhile the respondents proceeded to tax their costs which certificate was issued by the Deputy Registrar.

From the evidence on record as well as the parties' submission it is also clear that the applicants have already filed an application at the Court of Appeal for extension of time. The same has not been prosecuted.

On its part the respondent filed a replying affidavit sworn on 13/9/2016 in which among others have argued that they did not stand to suffer any loss if this application is not granted and that this court does not have jurisdiction to grant orders sought especially prayers 4 and 5. That they are all in occupation of

the suit land and there is no prejudice to be suffered by either of them.

Having perused the said application and the able submissions by the parties, I propose to begin with whether this court should grant prayers (4) and (5) as requested.

Section 7 of the Appellate Judicature Act Cap 9 states as follows

Section 7 “ The High Court may extend the time for giving notice of intention to appeal from a judgement 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.”

Although the parties have some pending application in the court of Appeal, and since no declaration has been given on this question of extension I find that this court by virtue of the above donated powers has the jurisdiction to entertain the same.

Although the respondent argued that the time is inordinate I find the reasons given by applicants plausible. It was the fault of their advocate not to file the notice within a reasonable time. Further this being a probate matter equal footing and level playing fields ought to be granted to all the parties.

Having stated above the next issue is whether there ought to be stay of the proceedings pending the intended appeal. In my view, all that the judge did was to return the status of the estate to its original state. For the above prayer to be granted one ought to exhibit a loss that it stands to suffer.

It was found for a fact that both parties are grand children of the deceased. Currently they are in occupation of the suit property. What prejudice will the applicant suffer? None at all. Infact, and without prejudicing the decision of the appellate court, the parties will still have to decide their entitlement in the estate.

In the premises I do not see any prejudice they stand to suffer. By failing to grant any stay, the appeal shall not be rendered nugatory neither will the rights of the applicants to stake claim in the estate thwarted. They, that is, the applicant as well as the respondents have equal rights in the estate.

What of the taxed costs?

This was within the discretion of the trial judge. So as not to prejudice the intended appeal it would be better that the said costs be deposited in court pending the intended Appeal. Should the applicants succeed they will still have their money safe and intact. I find this so because it has not been demonstrated that the respondents will have the capacity to repay.

Conclusion

Based on the above observation I do order that;

- a) Leave is hereby granted to the applicant to file the notice of appeal out of time and that the said notice and served be filed, within 14 days from the date herein.
- b) The applicant do deposit in court the sum of Kshs 50,860 within the next 30 days from the date herein and in default execution to issue.
- c) Costs of this application in the cause.
- d) The earlier orders issued are hereby vacated.

Delivered this 5th day of December 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Teti for the Applicant

Kiarie for Respondent