



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 44 OF 2013

ABIDA KINA NJAGI.....APPLICANT

VERSUS

SICILY GICHUKU SAMUEL..... RESPONDENT

RULING

1. The Notice of Motion dated 4/4/2013 was brought under Section 1A, 1B, 3A, 63(e) and 79G of the Civil Procedure Act and Rule 49 and 73 of the Probate and Administration Rules under the Law of Succession Act for the following orders:-

(a) *Upon hearing this application ex parte this Court be is hereby pleased to issue a conservatory order restraining the Respondent either by herself, her agents, servants, accomplices or persons acting through her from doing any of the following acts or any of them that is to say further trespassing on, encroaching on, invading, occupying, developing, leasing, letting, selling or completing by conveyance or transfer of any sale or otherwise howsoever interfering with the Plaintiff's ownership of title to or interest in the said land known as KAGAARI/KANJA/7441 pending the hearing and determination of this application.*

(b) *Upon hearing this application inter partes, this Court be and is hereby pleased to issue a conservatory order restraining the Respondent either by herself, her agents, servants, accomplices or persons acting through her from doing any of the following acts or any of them that is to say further trespassing on, encroaching on, invading, occupying, developing, leasing, letting, selling or completing by conveyance or transfer of any sale or otherwise howsoever interfering with the Plaintiff's ownership of title to or interest in the said land known as KAGAARI/KANJA/7441 pending the hearing and determination of the intended appeal to be lodged.*

(c) *Upon hearing this application inter partes, this Court be and is hereby pleased to call for the lower court file in Runyenjes Succession Cause Number 102 pf 2010 - in the matter of the estate of SAMUEL NJAGI KABARIKI and proceed to issue orders staying all and/or any proceedings therein, pending the hearing and determination of this appeal to be filed.*

(d) *Upon hearing this application inter partes, this Court be and is hereby pleased to grant the Applicant leave to file an Appeal out of time against the Judgment of M.W. MUTUKI (PM) delivered on 19th January, 2012 in Runyenjes Succession Cause No. 102/2010.*

(e) *The costs of this application be provided for.*

2. The application was premised on the grounds on the face of the application and the Applicant's

affidavit.

3. In her affidavit she states that the appeal has high chances of success as the Court lacked jurisdiction to deal with the succession matter.
4. She further states that her former advocate's mistake in failing to file the appeal in time should not be visited on her.
5. She has annexed a copy of the memorandum of appeal to her application. She faults the lower court for distributing the estate among herself, co-wife (Respondent) and their children. She wanted the land to be inherited by her lone.
6. The Respondent opposed the application saying the trial Court heard the applicant's protest and dismissed it and equally distributed the land among the beneficiaries.
7. When this application came for hearing on 3/2/2014, counsels for both parties agreed to dispose of the same by way of written submissions. There was to be a mention on 17/3/2014 for submissions.
8. By 17/3/2014 no submissions had been filed nor served. Another mention was given for 12/5/2014. Still on this date the Applicant's counsel had not filed any submissions. A further mention date was given for 26/5/2014. Still the Applicant's counsel had not filed any submissions but counsel for the Respondent had filed hers.
9. There is also evidence of service of the notices for mention on the firm of Mr. Matwere.

10. The Applicant through Matwere filed this application under certificate of urgency. It appears that along the line the enthusiasm about the urgency faded away.

11. Ms. Muthoni in her written submissions has stated that the Appeal by the Applicant has no arguable grounds as the issues she raises in her appeal were never raised in the lower Court.

12. I have considered the application, the affidavits and the Respondent's written submissions plus the judgment by the trial Court.

13. The judgment complained of was delivered on 19/1/2012. The appeal ought to have been filed within 30 days. The application for leave to file appeal out of time was only filed on 8/4/2013.

14. The Applicant was a Protestor in the lower Court and the protest was heard by way of *viva voce* evidence before the Court delivered its judgment. This applicant was also represented by counsel in the said proceedings. She states that she delayed in filing her appeal because her former counsel delayed in releasing to her her file.

15. Annexed to her application is a copy of a letter releasing her file marked as "Annexure C". It shows that she received the file on 30/10/2012. By this time she knew well she was late in filing her appeal. Why did she take another five (5) months plus one (1) week to file this application seeking leave to file appeal out of time?

16. All in all she took about sixteen (16) months of unexplained delay to file this application. And even after filing the application she has failed to prosecute it.

17. My finding is that the delay is unexplained coupled with want of prosecution. Had the Applicant been serious she could have appeared with her counsel to argue her application.

18. And there being no good reason for the delay I find no merit in the application which I hereby dismiss with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JUNE 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Muthoni for Respondent

Njue CC