



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NKR. 46 OF 2019

BETWEEN

MARY CHEPKURUI RUGECHICH.....APPLICANT

AND

RAYMOND KIBET CHEPKWONY.....RESPONDENT

(Being an application for stay of execution of the Ruling of the High Court of Kenya at Kericho (Mumbi Ngugi, J.) dated 29th November, 2017

in

H.C. Succ. Cause No. 195 of 2014)

RULING

[1] This is an omnibus application by *Mary Chepkurui Rugechich* (the applicant). She is seeking an order of leave to file an appeal out of time against the Ruling dated 29th November, 2017 as well as an order staying execution of the same Ruling. The application is supported by the applicant's affidavit sworn on 22nd February, 2019 and the grounds stated thereon.

[2] Briefly, the High Court in Kericho, **Mumbi Ngugi, J.** determined a succession dispute between the applicant and **Raymond Kibet Chepkwony**, (respondent) over the distribution of the estate of the late **Kiplangat Arap Rugechich** (the deceased). The dispute over who the beneficiaries of the deceased were, and how to distribute his parcel of land known as **LR No. Kericho/Sosiot/539** measuring about 14 acres was determined vide a ruling delivered on 29th November, 2017. In it, the learned Judge awarded the applicant and her children who numbered 11 units, 7.9 acres and the house of her co-wife, **Anna Chesang** who had no biological children but had married **Chemutai Langat** in a woman to woman marriage were said to be 7 units and they were awarded 5.81 acres. The respondent represented the house of **Anna Chesang** in the succession dispute.

[3] The applicant claims that she was not aware of the Ruling until after more than one year had lapsed. She deposed in her affidavit that sometimes on 15th February, 2019 she visited the court registry to check on the status of the matter and was shocked to discover it was determined on 29th November, 2017. She further claims that her advocate on record did not notify her when the Ruling was delivered and did not also advise her of the steps to take so as to file an appeal against the same. The applicant states that her appeal is arguable, and she is apprehensive that unless an order of stay of execution of the distribution of the deceased estate is granted, the appeal would be rendered nugatory as the respondent was likely to dispose of the suit land. She therefore urged that we grant the orders of leave to allow her file an appeal and at the same time grant her an order staying the execution of the aforesaid ruling.

[4] An application seeking leave of the court to file an appeal is made before a single Judge. It is also necessary to state that an order of stay of execution cannot be granted unless the applicant is granted leave first and, thereafter, institutes a notice of appeal which is the foundation upon which an order of stay is granted. Of course the applicant has also to certify the criteria for granting the order. The order of stay is governed by the provisions of **Rule 5 (2) (b)** while an application for extension of time is governed by **Rule 4** of the Court of Appeal Rules.

[5] The instant application was heard virtually pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID 19 Pandemic. Although it was fixed for hearing before a full bench, the only prayer that could be determined first is the one seeking leave. In order to save judicial time, **Koome, JA** was requested to consider the issue of leave under **Rule 4** of the Court of Appeal Rules which states:

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorised or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

[6] I have considered the application against the established principles by this Court on when leave should be granted. I note the application was not opposed although there is evidence on record by the Deputy Registrar indicating that the respondent was duly served with the application in person and his advocate was served with a hearing notice which was nonetheless received under protest. Absence of a response does not lessen the duty placed upon me as I am required to exercise my discretion based on reasons. See the case of **Fakir Mohamed vs. Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR)** thus: -

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture 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 the 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.”

In this regard, I may also mention the duty imposed on the court under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** to ensure that the factors considered are in agreement with the overriding objectives in the administration of justice, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

[7] That said, I will now examine this application against the background of those principles. As regards the arguability of the intended appeal, my edit is circumscribed as the merit thereto is not within my province. However, a cursory look at the orders sought to be appealed against, the same cannot be said to be frivolous as it was a dispute over the distribution of the applicant’s late husbands’ estate between herself and children who were born in a woman to woman marriage by the applicant’s co-wife who was barren and married another woman to bear for her children.

[8] On issue of delay, this was inordinate as the Ruling was delivered on 29th November, 2017 and the instant application was filed in February, 2019 which is after more than a period of one (1) years. The reasons given for the delay by the applicant is that she was not aware that the ruling had been delivered and was shocked when she visited the court registry on 15th February, 2019 and found out. She also claims that her advocate did not inform her about the ruling. I am not able to tell from the scanty documents that form part of this application whether the Advocate who filed the instant application was the same one who represented the applicant before the High Court. Whether that is true or not, I will give the applicant a benefit of doubt and exercise my discretion in favour of giving liberty to her to exhaust her claim before this Court regarding her grievances with the impugned Ruling.

[9] Accordingly, I allow the application for leave and grant the applicant thirty

(30) days within which to file an appeal. Since the application was not defended, I make no order as to costs. I so order.

Dated and delivered at Nairobi this 5th day of February, 2021.

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR