



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), IN CHAMBERS)

CIVIL APPLICATION NO. 132 OF 2020

BETWEEN

PAMELA AKINYI OMONDI.....APPLICANT

AND

JANE ATIENO NYAMUTHE.....RESPONDENT

(Being an application under Rule 5(2)(b) and 39(b) of the Court of Appeal Rules for stay of execution

and further proceedings pending the determination of an intended appeal from the ruling

of the High Court of Kenya at Homa Bay (Karanja, J.) dated 30th October, 2019

in

H.C. Succ. Cause No. 889 of 2015)

RULING

Before me is an omnibus motion dated 24th October, 2020 wherein the applicant seeks *inter alia*, leave to file an intended appeal to this Court against a ruling of the High Court dated 30th October, 2019 in H.C. Succ. Cause No. 889 of 2015; stay of execution of the impugned ruling as well as stay of the proceedings in the said succession cause.

It is common ground that sitting as a single Judge of this Court, I lack jurisdiction to entertain an application under **Rule 5(2)(b)** of this Court's rules.

It is only the prayer for leave to file an appeal out of time which is anchored under **Rule 39(b)** of this Court's Rules, that, therefore falls for my consideration. The dispute in this matter revolves around the administration and distribution of the estate of James Omondi Jure (deceased) who died intestate. Unable to agree on who was to take out the letters of administration over the estate, the High Court, in a ruling dated 16th January, 2015 appointed both parties, being widows of the deceased, as administratrixes. Thereafter, the respondent, one of administratrix, took out summons for confirmation of the grant setting out her proposed mode of distribution of the estate. The applicant, the first widow, opposed that proposal arguing that, some of the properties listed in the summons for confirmation were her personal properties and did not form part of the estate; and secondly, that Kavirondo Hotel was obtained and developed by herself with the deceased way before the deceased married the respondent; and that, in the circumstances the respondent was not entitled to the same.

Karanja, J. in the impugned ruling, found that the properties in issue were part and parcel of the deceased's estate; that the deceased, having been in a polygamous union, the distribution of his estate was subject to **Section 40** of the Law of Succession Act; and that the ratio of distribution was 4:3 as between the applicant and respondent's households, respectively. The learned Judge also gave the parties an opportunity to mutually agree on the distribution of the estate based on the determined ratio; and directed that in the event they were unable to agree, the Public Trustee would take up that mandate and assist the parties.

Even with this, the stalemate persisted, resulting in the applicant filing a motion on 14th November, 2019 in the High Court praying for leave to appeal against the impugned ruling to this Court amongst other orders. However, by a ruling dated 13th October, 2020 the learned Judge declined to grant the prayer for the reason that the motion had been filed 1 day outside the prescribed time frame without leave of the Court

or reasonable explanation.

Unrelenting, the applicant, by the current motion, is praying to be allowed to file the intended appeal in this Court, on the basis that the intended appeal is arguable; that it would be rendered nugatory should the Public Trustee distribute the estate; and that the motion was filed without unreasonable delay.

Opposing the motion, the respondent maintained that the same was frivolous and an abuse of the court process; that the intended appeal had no chances of success since the learned Judge merely restated the applicable law; that the applicant has delayed, impeded and frustrated the administration and distribution of the estate since 2004 through multiple applications including the current motion; that on account of the applicant's conduct, the estate is not only wasting away due to the unwarranted expensive litigation, but the beneficiaries are also being denied benefits of the estate; and that the motion was not filed within the prescribed timeline under **Rule 39(b)** of this Court's Rules.

It is instructive to note, as was so noted in Zeinab Khalifa & 4 others vs. Abdulrazak Khalifa & Another [2016] eKLR, that the intention of **Rule 39(b)** is that a party who has applied to the High Court for leave to appeal to this Court and whose application has been refused, is free to make another application to this Court for leave to appeal, within 14 days of the refusal by the High Court. Furthermore, this Court's jurisdiction under that rule is an original jurisdiction, therefore, the current motion is not an appeal, or a reference, or application for review of the decision of the High Court.

As such, the computation of time, which was material to the motion before us, commenced when the High Court rejected the application in its ruling dated 13th October, 2020. It follows therefore, that the current motion dated 24th October, 2020 was filed within the prescribed time frame of 14 days.

Moving on, it is trite too that leave to appeal will normally be granted where *prima facie*, it appears that there are grounds which merit serious judicial consideration. See Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & Another [2014] eKLR. Having considered the draft memorandum of appeal annexed to the motion as well as the arguments advanced by the parties, I am not persuaded that the intended appeal meets the threshold of being arguable.

Without delving into the merits of the intended appeal, the manner in which an estate of a deceased person who was engaged in polygamy is distributed is clearly prescribed under **Section 40** of the Law of Succession Act. But of significance is the fact that the learned Judge gave the parties an opportunity to agree on the distribution, failing which, the public trustee was to step in. The applicant has not given the last option a chance.

4Accordingly, I find that the motion dated 24th October, 2020 is bereft of merit and is hereby dismissed with no orders as to costs, being a family matter.

Dated and delivered at Nairobi this 23rd day of April, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR