



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAL, JJA)**

**CIVIL APPEAL NO. 15 OF 2016**

**BETWEEN**

**SAMUEL NDEGWA WAITHAKA.....APPELLANT**

**AND**

**AGNES WANGUI MATHENGE.....1<sup>ST</sup> RESPONDENT**

**MARY NYOKABI KING'ORI.....2<sup>ND</sup> RESPONDENT**

**ANNE NJOKI WAWERU.....3<sup>RD</sup> RESPONDENT**

*(An Appeal from the Ruling of the High Court of Kenya at Nyeri (Mativo, J.) dated 2<sup>nd</sup> December, 2015*

in

***H. C. Misc. Appl. No. 50 of 2014)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The issue raised in this appeal is whether the learned Judge of the High Court (**J. M. Mativo, J.**) was correct in his decision to decline to grant leave to the applicant to appeal to the High Court from the decision of the Senior Principal Magistrate when he held that the appellant's intended appeal did not have overwhelming chances of appeal. The learned Judge excused the appellant for the delay in filing appeal against the judgment of the Senior Principal Magistrate (**Hon. S. Akato**) delivered on 19<sup>th</sup> October 2012 and held that after receiving the certified proceedings on 10<sup>th</sup> June 2014 and the certificate of delay on 16<sup>th</sup> June 2014, the appellant should have proceeded to lodge appeal because the period of delay between the date of application for proceedings and the date they were supplied was excluded under **Section 79G** of the **Civil Procedure Act**. However, instead of filing appeal upon receipt of the certificate of delay and the proceedings, the appellant filed Notice of Motion dated 26<sup>th</sup> June 2014 seeking leave to appeal out of time which took one year and five months to be heard and determined.

2. The learned Judge observed that counsel for the appellant may have “acted on the mistaken belief that he required the proceedings to file the appeal and perhaps never comprehended the nature, purpose and effect of the certificate of delay. It is not clear why the certificate of delay was obtained and not put to its intended use”.

3. The learned Judge proceeded to consider and determine the application on only one issue, namely, whether the intended appeal had overwhelming chances of success. The learned Judge stated in this regard:-

***“I have carefully studied the judgment of the lower court and the draft grounds of appeal and I am persuaded the intended appeal does not have overwhelming chances of success.”***

4. In the Memorandum of Appeal, the appellant has proffered 5 grounds of appeal in which he submits in grounds 1, 2, 3 and 4 having, abandoned ground 5 at the hearing, that the learned Judge “set the bar to appeal on a very high standard by stating that the intended appeal did not have overwhelming chances of success; instead of applying the test whether the intended appeal was arguable; that given the circumstances of the application, it should have been allowed.

5. The appeal came up for hearing before us on 27<sup>th</sup> November 2017 when learned counsel **Mr. S. K. Njuguna** appeared for the appellant and learned counsel **Mr. Muhoho Gichimu** appeared for the respondent.

6. To appreciate the argument on whether the intended appeal was arguable or whether it had overwhelming chances of success, some background as reflected in the record is called for. The record shows that the appellant sued the respondents in the Chief Magistrate court for recovery of dowry. The appellant is the uncle to the defendants who are daughters of the appellant's late sister, one Philomena Wanjiku. The appellant alleged in the suit that when Philomena Wanjiku got married, the full dowry was not paid under Kikuyu Customary Law and that the respondents as children of Philomena were obliged to pay to the appellant the dowry that was payable for their mother. He sought in the suit 160 goats, beer or one bull, 6 rams or one bull and 2 he-goats. The appellant alleged that before she died, Philomena had paid to him part of the dowry. The appellant's claim was for Kshs 318,000/= representing beer, 6 rams and 2 he-goats.

7. In the draft Memorandum of Appeal placed before the learned Judge, the appellant's contention was that the learned Senior Principal Magistrate erred in law and fact when he held that the appellant was seeking payment of the dowry from the estate of the respondents' father whereas the respondents had been sued in their capacity as daughters; that the claim for dowry was clear and that the amount claimed was proved; that it was an error on the part of the court to make a finding that the appellant's father could not have unilaterally fixed the number of goats payable and the marriage consideration paid for the appellant's mother.

8. The learned Senior Principal Magistrate in his judgment dated 19<sup>th</sup> October 2012 analyzed the evidence adduced by the appellant and observed and stated:

***“The Plaintiff (i.e. appellant) told the court that the defendants (respondents) must pay the balance of the dowry because their parents left for them all the wealth, among them shops and shambas.”***

The learned Senior Principal Magistrate concluded that

***“it follows that the plaintiff (i.e appellant) is seeking payment from the estate of the defendants' father but in the Law of Succession, Cotron writes-***

***“the muramati is the only person who may claim on behalf of an estate.....”***

The learned trial Magistrate proceeded to make a finding that the claim for dowry was a non-starter as no basis was laid on how the sum of Kshs 318,000/= was computed or was arrived at. The learned Magistrate observed from the Cotron's said book that:

***“there is no fixed amount of marriage consideration or dowry in Kikuyu custom and that the amount varies among the Kikuyu clans and is subject to negotiation between families and that as a general rule, the amount given for a girl is that given for the mother.”***

9. Mr. Njuguna, learned counsel for the appellant urged that if the learned Judge (J. M. Mativo, J.) had not erred in setting the bar too high by requiring that the appeal be shown to have overwhelming chances of success, the decision reached would have been different.

10. Mr. Gichimu, learned counsel for the respondents contended that the appeal had no reasonable grounds of success as the appellant had failed to show how the claim for Kshs 318,000/= was arrived at and that the claim being special damages, which was not supported by evidence, the appeal was doomed to fail. Moreover, the order sought for leave to file appeal was a discretionary one and as the court had exercised its discretion properly, there was no basis for attacking the decision of the learned Judge. Counsel referred us to the decision of this Court in **MRAO LTD versus FIRST AMERICAN BANK OF KENYA LIMITED & TWO OTHERS [200]eKLR**.

11. We have perused the record of appeal and duly considered of the submissions by both parties and the law. Did the learned Judge set the correct standard or was the standard that the appeal must have overwhelming chances of success too high? Was the appeal arguable and would the learned Judge's decision have been different if it was only required to be arguable as opposed to having overwhelming chances of success which connotes the likelihood of its succeeding? Did the discretionary nature of the order sought entitle the learned Judge to set any standard on the arguability of the appeal?

12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. In **H (Minors) [1966] AC 563 at pg 586**, Lord Nicholls explained that the test on the balance of probabilities was flexible. Said he,

***“When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.....”***

***.....Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”***

13. In the instant appeal, the learned Judge applied the test of “overwhelming chances of success”. “Overwhelming” is defined in Oxford Dictionary (International Student's Edition) to mean “*very great or very strong; so powerful that you cannot resist it or decide how to react.*” It is clear that the learned Judge set the bar a trifle too high. But would the learned Judge's decision have been different if he had applied a standard on the balance of probabilities? In the peculiar circumstances of this case, no information was laid for the claim of Kshs 318,000/=. For starters, the appellant did not indicate the amount of dowry negotiated in respect of the respondents' mother, nor when or where, neither did the appellant show the basis on which the respondents were legally liable. Moreover, dowry was payable by the husband of the respondents' mother, who had also passed on. It should have been paid to the parents of the appellant and in the latter's absence, to their sons who include the appellant. The appellant's claim seems to have been predicated on the fact that the respondents' parents were wealthy and that their estate could afford to pay. Dowry is not regarded as an ordinary debt which is how the appellant took it. In our view, the appellant's claim as pleaded, and on the basis of the evidence adduced at the Senior Principal Magistrate court, did not evince success on the balance of probabilities. It would have been futile for the court to grant leave to appeal if on the face of it the appeal was a non-starter. We hold the view that the learned Judge put the standard of proof higher than should have been the case but this did not lead to a wrong decision as the application could not succeed absent an arguable appeal. In our view, the decision of the High Court determined the appellant's application for leave to appeal was correct and the High Court correctly dismissed it for lack of merit. We uphold the decision and dismiss the appeal with costs to the respondent. It is so ordered.

*Dated at Nairobi this 20<sup>th</sup> day of December, 2017.*

**G. B. M. KARIUKI SC**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**