



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, MUSINGA & GATEMBU, JJ.A)

CIVIL APPLICATION NO. 22 OF 2015

IN THE MATTER OF INTENDED APPEALS

BETWEEN

JOYCE BOCHERE NYAMWEYA APPLICANT

AND

JEMIMA NYABOKE NYAMWEYA1ST RESPONDENT

PAUL NYAMWEYA 2ND RESPONDENT

(Application to strike out Notices of Appeal from the judgment and Decree of the High Court of Kenya at Kisii (Sitati J.) dated 17th December 2014

in

H.C.C. SUCCESSION CAUSE NO. 451 OF 1996)

RULING OF THE COURT

[1] On the 25th May 2015, Joyce Bochere Nyamweya (applicant) filed the instant notice of motion which is brought under **Rules 42, 43, & 84** Court of Appeal Rules and **Section 3A** of the Appellate Jurisdiction Act. The applicant is seeking to strike out the Notice of Appeal filed by Jemima Nyaboke, the 1st respondent on 9th January, 2015 and by Paul Nyameya the 2nd respondent, on 22nd December 2014. This is on the grounds that the respondents did not obtain leave of the High Court which ought to have been obtained within 14 days as per **Rule 39 (b)** of the Court of Appeal Rules; the said leave is supposed to be obtained 14 days from the date of the ruling being appealed against that is 22nd December 2014; without leave of the court, there is no legal basis for lodging an appeal.

[2] The application is supported by the affidavit of the applicant sworn on 22nd May 2015 which gives the entire background of the succession dispute before the High Court. Briefly stated, the dispute in the

High Court was in respect of the estate of the late James Nyamweya (deceased), who died on 25th September 1995. The deceased left a written will dated 3rd April 1991 and it named Jemima Nyaboke and Charles Ratemo as trustees and executors of the will. A grant of probate was issued by the High Court and was subsequently confirmed on the 27th November 2001.

[3] On 31st July 2013, the applicant, being dissatisfied with the way the estate of the deceased was administered/distributed, filed the summons, principally seeking revocation of the grant of probate in respect of the deceased estate and several restraining orders against the administrators of the estate of the deceased from dealing, alienating selling or transferring several properties that were listed in the said summons for revocation of the grant. The applicant filed the said summons in her capacity as the personal representative of her late mother's estate, that is, the widow of the deceased, the late mama Tabitha Moige Nyamweya. At the core of the applicant's complaint was the fact that she and her sisters, being daughters of the deceased, were disinherited from the estate of their parents; thus she posited, excluding the deceased's daughters as beneficiaries of the estate was discriminatory; that the estate of their late mother was not separated from that of their father and it was distributed as if it all belonged to the deceased.

[4] The learned judge was satisfied the applicant and her sisters were subjected to differential treatment which amounted to discrimination and was against the tenets of the Constitution. Also the court found, the written will of the deceased was altered by the deceased during a meeting of family members held on 17th July 1994, before the deceased died and this aspect was not taken into account. Moreover, when the grant of probate of the written will was issued, the judge found the applicant's mother owned properties, which were not taken into account and treated separately from those of the deceased. In a nutshell the record before us does not clearly show the format the hearing of the dispute took before the High Court; we cannot tell whether the hearing was by viva voce evidence or affidavit evidence. Nonetheless, by a fairly lengthy judgment rendered by Sitati J., and dated on 17th December 2014, the grant of probate confirmed on 26th May 2000 was revoked and the administrators of the estate were ordered to undertake fresh distribution of the deceased's estate as directed in the said judgment.

[5] This is what snowballed into the Notices of Appeal that the applicant seeks to set aside which were obviously filed with a view of filling an appeal against the aforesaid judgment. In further arguments in Court, Dr. Kamau Kuria, learned Senior Counsel appearing for the applicant, submitted that under **Rule 39** of the Court of Appeal Rules, the respondent was required to seek leave of the High Court. Counsel cited the case of; **Rhoda Wairimu Kioi & John Kioi Karanja v Mary Wangui Karanja and Salome Njeri Karanja**, CA Civil App. NAI 69 of 2004; where it was held;

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes. So, what is our determination in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.”

[6] Commenting on the respondent's replying affidavit, Dr. Kuria argued that although there are decided cases stating an application to strike an appeal or notice of appeal, under the proviso to **Rule 84** of the Court of Appeal Rules be made within 30 days from the date of filing the appeal; counsel urged us to adopt a liberal interpretation envisaged by the overriding objectives under **Section 3A** and **3B** of the Appellate Jurisdiction Act or the Constitution that gives the court discretion to administer substantive

justice while disregarding procedural technicalities. The notices of appeal sought to be struck out were lodged in the High Court on 9th January 2015 and 22nd December 2014, while the instant application was filed on 25th May 2015, way beyond the 30 days provided in the Rules.

[7] This application was vehemently opposed by a lengthy replying affidavit sworn by Jemima Nyaboke Nyamweya (1st respondent) on 15th January 2016. It is not necessary to restate the detailed exposition, however we will give a brief outline of the matters as parties took considerable time to address us and prepare the material before us. The 1st respondent has highlighted many issues that she intends to challenge in the judgement of the High Court by way of an appeal. According to her, the applicant proceeded with the hearing before the High Court *ex parte*, and now wants the appeal struck out on technicality so as to have her way in both Courts. As regards leave to appeal, she argues there is no provision in the Law of Succession Act, requiring a person seeking to appeal on a first appeal to obtain leave of the court; **section 50 (1)** provides that decisions of the High Court in its appellate jurisdiction are final and no second appeals lie to the Court of Appeal; section 75 of the **Civil Procedure Act**, and **Order 44** of the Civil Procedure Rules specify the appeals that lie automatically and with leave, however this is not one of the orders of the Civil Procedure Rules that is envisaged and applicable under Rule 63 of the Probate and Administration Rules; the Constitution of Kenya protects the right of access to justice and **Article 164 (3)** gives jurisdiction to the Court of Appeal to hear appeals from the High Court and any other court or Tribunal as prescribed by an Act of Parliament; in the absence of a prescription, the respondent enjoys a right of appeal.

[8] The 1st respondent has also given a lengthy exposition of the matters she is dissatisfied with regarding the merits of the judgment of the High Court and justifying her opposition to the present application so that those issues can be determined on merit through an appeal. These issues were; the manner in which the application for revocation was heard *ex parte*; the application was made after 12 years after the grant of probate was issued and 18 years after the applicant became aware of the deceased will; the judgement did not set aside the will of the deceased; the applicant made the application, ostensibly on behalf of her sisters whom she alleged were subjected to a differential treatment, when in actual fact the said sisters refused to be drawn in the controversy and swore affidavits to that effect.

[9] In his address to us, Mr. Naeku, learned counsel holding brief for Judy Thongori for the 1st respondent, reiterated the above issues raised in the replying affidavit. He argued that the application was filed out of time, moreover, there is no evidence to prove leave was not sought informally in the High Court; according to counsel, an informal application for leave to appeal was made when judgement was delivered but the relevant proceedings were not availed in this application. Commenting on the decided cases, counsel submitted that the jurisprudence is clear; an application to strike out an appeal or notice of appeal shall not be brought after the expiry of 30 days from the date of the service. The following cases were cited:

Edward Njuguna Kangethe vs. Joel Kilemi Mutinda & another [2015] e KLR.

Municipal Council of Mavoko vs. Aristocrats Concrete Co. Ltd [2015] e KLR

In both cases a bench of this Court differently constituted held that an application to strike out an appeal or notice of appeal which was filed contrary to the provisions of the Rules was itself incompetent.

[10] We have considered the instant application with considerable anxiety as the appeal raises a serious point of law, nay perhaps the interpretation of **Article 164 (3)** of the Constitution regarding the Court of Appeals' jurisdiction over first appeals from the High Court on succession matters. Do appeals in succession matter require leave of the High Court? It is obvious from decided cases; there are two schools on this aspect, one as postulated in the case of;- **Rhoda Wambui Kioi** (supra) that appeals require leave of the High Court and the other school holds all decisions from the High Court are appealable unless provided otherwise by statute. See the case of; **Peter Wahome Kimotho vs. Josphine Mwinyeria Mwanu** Civil Appeal No. 52 of 2011 Nyeri (unreported). This Court was considering the same issue on whether or not an appeal lies with leave and made the following conclusion in a pertinent part of the

judgment;-

“There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Sections 66 or 75 of the *Civil Procedure Act* are not automatically imported into the *Law of Succession Act*. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the *Constitution of Kenya 2010* that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an *Act of Parliament* was operational. Under the *Constitution*, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.”

[11] However our view is that it is not opportune for us to determine that aspect in the instant application because we have to first address ourselves to the fate of the instant application which was lodged outside the period provided under the Court of Appeal Rules. Should the instant application be struck out for being incompetent? It is paradoxical that learned Senior Counsel for the applicant urged us to disregard the proviso to **Rule 84** while embracing the liberal overarching objective in the administration of justice. On the same breath counsel urged us to disregard the liberal interpretation of **Article 164 (3)** of the Constitution which gives jurisdiction to the Court of appeal to hear appeals from the High Court unless where limited by a statutory underpinning.

[12] What we have before us is an application under **Rule 84** which provides as follows;-

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the Notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of the service of the notice of appeal or record of appeal as the case may be.”

[13] It is not at all in dispute that this application was filed outside the period of 30 days after the notices sought to be struck out were lodged and served. The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of **Gichuki King'ara & Co Advocates v AL Jalal Enterprises Ltd & Others**, Civil Appl. No. NAI 211 of 2012(unreported)

where this Court stated in reference to **Rule 84** as follows;

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

[14] The instant application is on all fours with the above case and so many others that were referred to in this matter. In the circumstances we find this application is incompetent for reason that it was filled outside the stipulated time. The same is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Kisumu this 19th day of May, 2016.

M. K. KOOME

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR