In re Estate of Owuor Omollo alias Didacus Owour Omollo (Deceased) (Succession Cause 1187 of 2013) [2023] KEHC 26786 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26786 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE 1187 OF 2013

MS SHARIFF, J

DECEMBER 21, 2023

BETWEEN

HARUN OMOLLO WACHIRE ..... PETITIONER

AND

BENEDETTE ONDORO OMOLLO ..... 1ST OBJECTOR

SIPROSA AJWANG OKWIRI ..... 2ND OBJECTOR

JUSTINA AJWANG OMOLLO ..... 3RD OBJECTOR

RULING

1. The application before court is the one dated April 27, 2023 filed by the Petitioner Harun Omollo Wachire (hereinafter the Applicant), seeking the twofold prayers of leave to appeal the ruling of the April 24, 2023 and stay of execution of the said ruling pending hearing and determination of the intended appeal.

2. The basis of the application is that the ruling revoked the grant issued to him, thereby occasioning a risk of loss of title to land parcel no. South Nyakach/Dianga East/887. It is his contention that there are properties situate on the land hence he would be greatly prejudiced. Additionally, he avers that the application has been brought timeously and the intended appeal raises pertinent issues with high chances of success.

Applicant's case:

3. In his submissions dated October 19, 2023 the applicant outlined the following issues for determination;

    1. Whether the Applicant has raised sufficient reasons to be granted leave to appeal;

    2. Whether the intended appeal has high chances of success.

4. On the first issue the Applicant contended that as per the provisions of section 50 of the *Law of Succession Act* it is only through leave that an appeal lies from the High Court to the Court of Appeal. He buttressed this assertion by relying on the high court case of *Mary Wangui Karanja & anor* [2014]eKLR and the Court of Appeal case of *Rhoda Wairimu Karanja & anor vs Mary Wangui Karanja & another* [2014]eKLR in which the common thread was that there was no express right of appeal from the High Court to the Court of Appeal in succession matters.

5. As regards the second issue, the Applicant submitted that the appeal had high chances of success due to the fact that revocation of title is the preserve of the Environment and Land Court.

Respondent's case:

6. In response to the application the 1st objector/respondent filed a replying affidavit dated June 22, 2023 and submissions dated November 15, 2023. In the replying affidavit sworn by the 1st Objector she deponed that the Applicant was not deserving of stay since he had approached court with unclean hands, having obtained the grant through concealment of facts.

7. In her submissions the 1st Objector outlined the following issues for determination;

    1. Whether this court has jurisdiction to grant the orders sought

    2. Whether there is a competent appeal

    3. Whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited

    4. Who should bear the costs of the application

8. On the first issue the 1st Objector contended that this court lacks jurisdiction to handle the application as presented. It was her argument that the provisions of the *Civil Procedure Act* and Rules relied upon by the Applicant don't hold sway in succession matters. She submitted that the *Law of Succession Act* is a standalone statute guiding probate and administration matters. She urged this court to take into consideration rule 63 of the *Probate and Administration Rules* as to the provisions of the Civil Procedure Rules applicable in succession matters.

9. To buttress this assertion, she relied on the Court of Appeal case of *Josephine Wambui vs Margaret Wanjiru Kamau & another* [2013] eKLR in which it was held that the *Law of Succession Act* is a self-sufficient Act with its own rules of procedure. Additionally she aligned herself with the sentiments of Hon. Mativo J in *Josiah Mwangi Mutero & another vs Rachel Wagithi Mutero* [2016]eKLR in which he stated as follows;-

> " Onyancha J was more explicit in Shah vs Shah where he stated that where any proceedings are governed by special legislation, the provisions of the *Civil Procedure Act* and rules do not apply unless expressly provided by such special legislation, and the position remains the same even if the special legislation is silent about it and does not exclude the *Civil Procedure Act* and Rules.....
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> Rule 63 (1) of the *Probate and Administration Rules* provides that: -
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> > "Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely orders V, X, X1, XV,

XV111, XXV, XL1V, and XL1X, together with the *High Court (Practice and Procedure) Rules*, shall apply so far as relevant to proceedings under these Rules."

From the above, it is clear that the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time."

10. In view of the foregoing she urged this court to strike out the application for want of jurisdiction.

11. On the second issue the 1st Objector submitted that there could be no competent appeal in the absence of leave. She argued that the intended appeal was flawed for failure to lodge a notice of appeal as stipulated by section 75 of the *Appellate Jurisdiction Act*. In support of this contention she cited the case of *University of Eldoret & Another vs Hosea Sitienei & 3 others* [2020]eKLR where the Supreme Court stated as follows:

> "We echo our previous position that filing of the Notice of Appeal is a jurisdictional prerequisite. The prevailing circumstances specific to this case make it very difficult for the Court to evaluate any satisfactory reasons that excuse the applicants from this apparent non-compliance. Moreover, as we noted in Nicholas Salat case, the purported filing of a Notice of Appeal and Petition of Appeal without the requisite leave cannot be sanctified by the Court, notwithstanding that a case number was issued to the applicants. The alleged Notice of Appeal and Petition of Appeal therefore have to be struck out from the Court record for having been 'filed' without Court sanction and out of time. The Notice of Appeal not having been filed on time, the Court cannot resuscitate anything in this matter."

12. On the third issue she reiterated that the principles guiding stay of execution as stipulated in order 42 rule 6(2) of the *Civil Procedure Rules* must be adhered to. She stated that the Applicant could not claim substantial loss yet he had no beneficial interest in the deceased's estate being a half-brother. It was her further contention that the mere fact that execution had occurred or was likely to occur did not amount to substantial loss. Additionally, she submitted that the Applicant had not sufficiently demonstrated substantial loss in his supporting affidavit. In conclusion, she argued that the Applicant could not claim substantial loss yet he was not an heir, beneficiary or even a dependant.

13. In further support of her case she maintained that the Applicant had failed to provide or demonstrate capability to offer security for the due performance of the decree.

14. With respect to the fourth issue she urged this court to grant her costs of the application as guided by section 27 of the *Civil Procedure Act* to the extent that costs follow the event and are a discretion of the court.

Analysis and Determination

15. Having carefully considered the application, supporting affidavit, replying affidavit and the submissions the main issues for determination herein are; -

    1. Whether the applicant should be granted leave to appeal to the Court of Appeal.

    2. Whether the applicant has met the threshold for grant of stay of execution pending the intended appeal.

16. In support of their prayer for leave the Applicant relied on Section 50 of the *Law of Succession Act* and the Court of Appeal case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another*

[2014] eKLR in which it was stated that under the Succession Act there is no express or automatic right of appeal to the Court of Appeal.

17. A cursory look at section 50 of the *Succession Act* clearly shows that it is with respect to decisions of the magistrate's court. The decision the Applicant seeks to appeal is from this court. That section therefore clearly doesn't apply.

18. Apart from acknowledging the fact that the *Succession Act* is silent on the issue of leave to appeal to the Court of Appeal the court in the *Rhoda Wairimu case* (*supra*), also highlighted the conditions for grant of leave. It stated that leave should be granted where prima facie it appears that there are grounds which merit serious judicial consideration. The question that arises therefore is whether the applicant has presented a prima facie case capable of success.

19. The Court of Appeal case of *Mrao Ltd. v. First American Bank of Kenya Ltd & 2 others* [2003] KLR defined a *prima facie* case as follows:

> " In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant's case upon trial. That is clearly a standard, which is higher than an arguable case."
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> The court then went ahead to state that: We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Appellants need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed."

20. Additionally, in the Court of Appeal case of *Rhoda Wairimu Karanja and Another vs Mary Wangui Karanja and Another*, Civil Application No. 69 of 2014 it was stated that: -

> " Leave to appeal will normally be granted where *prima facie* it appears that there are grounds which merit serious judicial consideration".

21. In view of the foregoing it is important to interrogate the ruling being appealed and the draft memo of appeal attached to the application. It is not in dispute that my ruling of the 24th of April 2023 revoked the grant on the grounds of concealment of material facts. In the draft memorandum of appeal the Applicant called into question my appreciation of the evidence in reaching that conclusion. Ground 1 of the draft memorandum of appeal states thus: - "The learned Judge completely misunderstood the

evidence before her, wrongly analysed the evidence and therefore came to the wrong conclusions of law."

22. If I were to delve deeply into this, I would ruin the risk of sitting on appeal on my own ruling. The question of whether I misunderstood the evidence and thereby arrived at the wrong conclusion is a serious ground which merits consideration by the Court of Appeal. For the above reason I grant the Applicant leave to appeal.

23. Turning to whether the Applicant is deserving of stay pending the intended appeal, order 42 rule 1 and 2 are instructive. Rule 2 specifically provides that no order for stay shall be made unless the court is satisfied that substantial loss may result to the applicant if the order is not made and that the application has been made without unreasonable delay; such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

24. The Applicant avers that he will suffer irreparable loss as he will lose his only parcel of land including all the properties therein. The 1st Respondent on her part submitted that the Applicant being a half-brother could not supersede blood relatives in the order of consanguinity, therefore allowing him to inherit from the estate would be akin to disinheriting the Respondents.

25. It is not enough for the Applicant to merely allege substantial loss. He should also demonstrate it to the satisfaction of the court. In the present case the Applicant has not described the nature of the properties on the land that if lost would occasion him substantial loss. The nature of the loss he is likely to suffer has not been quantified. I therefore find that the Applicant has not proven the issue of substantial loss to the required standard.

26. Regarding the issue of the application being filed timeously, I note that the same was filed 14 days after delivery of the impugned ruling. This cannot be said to amount to unreasonable delay. I therefore find that the application was filed timeously.

27. On the totality of the facts I am therefore of the opinion that the grant having been revoked there is no order capable of being stayed. Additionally, there is no order attached to the application that is capable of being stayed.

28. Accordingly, I do grant the Applicant leave to file an appeal within 14 days hereof. The prayer for stay of execution of the ruling is denied.

29. Costs of the application to abide by the outcome of the appeal.

DELIVERED, DATED, SIGNED AT KISUMU THIS 21ST DAY OF DECEMBER 2023.

MWANAISHA. S. SHARIFF

JUDGE