



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO. 28 OF 2017

(FORMERLY NKR. SUCC. CAUSE NO. 329 OF 2013)

IN THE MATTER OF THE ESTATE OF THE LATE IGNATIUS NDIRANGU KAMAU (DECEASED)

PETER KAMAU NDIRANGU.....APPLICANT

-VS-

ZACHARY NGANYE NDIRANGU.....1ST OBJECTOR/RESPONDENT

STEPHEN MWANGI NDIRANGU.....2ND OBJECTOR/RESPONDENT

RULING

1. By application dated 5th November, 2020, the Applicant seeks stay of execution of judgment/decree herein pending hearing and determination of the appeal.

2. The application is supported by the affidavit of **Peter Kamau Ndirangu** sworn on 27th October, 2020.

3. In response to the same, the Respondents have filed a preliminary objection dated 18th November, 2020.

4. The parties were directed to canvass application and preliminary objection via submissions.

APPELLANT'S CASE AND SUBMISSIONS:

5. The applicant submits that the issue for determination before the Honorable Court ***Whether the Applicant has locus standi to seek stay of execution of judgment against orders made on 11th June, 2020.***

a) Whether the Applicant has met conditions for grant of stay of execution of decree.

b) Whether there is a pending appeal against the Honorable Court.

a. Whether the Applicant has locus standi to seek stay of execution of judgment against orders made on 11th June, 2020:

6. That the Applicant has locus standi to stay execution of the judgment and orders made on 11th June, 2020. The Applicant is beneficiary to the estate of the deceased by virtue of being the son of the deceased and the Petitioner, Josephine Wamwathi.

7. The Applicant has brought this application under ***Rule 49 and Rule 73 of the Probate and Administration Rules.***

8. ***Rule 49*** provides:

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported if necessary by affidavit.”

9. ***Rule 73*** further provides that:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the court process.”

10. The Applicant herein approached the court to prevent abuse of court process by the objectors. The certificate of confirmation of grant in regards to the estate of the deceased was made to **Zachary Nganye Ndirangu and Stephen Mwangi Ndirangu ‘PKN3’** despite the judgment of the court delivered on 11th June, 2020 ordering the grant of letters of administration be issued to Zachary Nganye and the Petitioner, Josephine Wamwathi. It is also worth noting that the certificate of grant was confirmed on 11th June, 2020 before letters of administration intestate were granted on the 29th September, 2020 ‘PNK4’.

b. Whether Applicant has met conditions for grant of stay of execution of decree:

11. Principles of granting stay of execution pending appeal are well enumerated under **Order 42 Rule 6(2) of the Civil Procedure Rules**. The conditions are:

(a) Application is made without undue delay.

(b) That substantial loss may result to the Applicant unless orders sought for are made.

(c) That the Applicant provides security as may be ordered by court for due performance of the decree or order.

a) Application is made without undue delay:

12. The Petitioner died on 29th August, 2020 without having prosecuted the appeal. The application herein was filed on the 9th November, 2020. This cannot be equated as undue delay.

b) That substantial loss may result to the Applicant unless orders sought for are made:

13. Substantial loss will be occasioned to the Applicant if orders sought are not granted. The orders of the court are that the deceased’s property to be shared equally between two houses. There is a danger that the land may transmit to the beneficiary who would be at liberty to deal with the land as they deem fit. There is a real danger that should the appeal go in favour of the Applicant the appeal will be rendered nugatory.

14. In the case of ***Re Estate of late Wambui Njeru (deceased) 2018 eKLR*** while the court dealing with issue of stay involving parcel of land held:

15. In the case of ***Mugah v Kunga [1988] KLR***, the Court of Appeal stated;

“The practice of the Court of Appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court, the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined.” (emphasis added)

c) That the Applicant provides security as may be ordered by court for due performance of the decree or order:

16. The Applicant has deponed in his affidavit sworn 27th October, 2020 that he is willing to abide by any condition set by the Honorable Court for the grant of the orders sought herein.

c. Whether there is a pending appeal against the Honorable Court:

17. There is a substantive appeal against the judgment of the Honorable Court delivered on 11th June, 2020. The Petitioner, Josephine Wamwathi being dissatisfied with judgment delivered on 11th June, 2020 filed a notice of appeal dated 18th June, 2020 against the whole of the said decision.

18. **Order 42 Rule 6(4) of the Civil Procedure Rules** provides:

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

19. The Petitioner lodged the notice of appeal on 22nd June, 2020 within prescribed timeline. The Appellant/Petitioner passed on 29th August, 2020 without having prosecuted the said appeal.

20. The Applicant prays for the preliminary objection dated 18th November, 2020 be dismissed and application dated 5th November, 2020 be allowed as prayed.

RESPONDENTS' CASE AND SUBMISSIONS:

21. The Applicant brings the application as a beneficiary of the deceased's estate which comprised of two houses.
22. The court appointed the 1st Objector/Respondent and one Josephine Wamwathi as co-administrator of the deceased's estate to represent each house and a grant was issued to the two accordingly.
23. Josephine Wamwathi subsequently died on 3rd September, 2020 after filing a notice of appeal against the said judgment and as such no substantive appeal was filed within the requisite sixty (60) days under **Rule 82 of the Court of Appeal Rules**.
24. There is no evidence that the Applicant herein or any other person has been appointed as a legal representative of the deceased/intended Appellant of that an appeal was instituted on behalf of her estate pursuant to **Rules 85(1) of the Court of Appeal Rules**.
25. Under **Rule 83 of the Court of Appeal Rules**, if a party who has lodged a notice of appeal fails to institute and appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on an application by any party make such order. It is however not mandatory to move the court for such an order.
26. This kind of scenario obtained in the case of ***Dismas Ombongi T/A Kamili Dog Farm v Inter Security Services Limited [2016] eKLR*** where an application for stay of execution was dismissed on the grounds that no appeal had been filed in compliance with **Rule 83 of the Court of Appeal Rules**.
27. The Applicant has not brought himself within the principles considered under **Order 42 Rule 6 of the Civil Procedure Rules** in granting a stay of execution in that:
- i. He has not demonstrated that substantial loss may result to him unless the order is made.*
 - ii. The application has been made without unreasonable delay. The delay of five (5) months has not been explained.*
 - iii. He is ready and willing to offer such security as the court orders for the performance of such decree or order as may ultimately be binding on him. No such security has been offered in this case.*
28. The Applicant has also not demonstrated that he has any pending appeal against the judgment and in absence of such an appeal, it would be preposterous to allow an application for stay when there is no pending appeal.
29. In any event, under **Section 50, of the Law of Succession Act, Cap. 150, Laws of Kenya**, there is no automatic right of appeal to the Court of Appeal except with leave of this court. No leave has been granted in the instant proceedings to any party to appeal against the honorable court's judgment (see Court of Appeal decision in ***Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR*** at page 416).

ISSUES AND DETERMINATION

30. After going through the application, affidavits, P.O and parties' submissions, I find the issues are;
- (a) whether the application is fatally defective for want of leave to appeal, want of locus standi and want of filing of appeal within time?*
 - (b) if above in negative, does the application have merit?*
 - (c) what are the appropriate orders?*
31. On the first issue, it is important to interrogate whether there is a right of appeal against the decision of the High Court sitting as a probate court on matters under the purview of the Law of Succession Act, CAP 160. The provision on appeals under the Law of Succession Act is section 50 which states thus:
- “(1) An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.***
- (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”***
32. The provisions of **section 50** do not however provide for an appeal against the original decision of the High Court sitting as a Probate Court. A wholesome reading of both the Law of Succession Act and the Probate and Administration Rules reveals that they have no provision for a right of appeal against the decision of the High Court exercising original jurisdiction in matters of Probate and Administration.
33. In ***Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another (supra)***, the Court of Appeal (Musinga, Ouko & Gatembu, JJ.A.) while deliberating on the import of section 50 opined thus:

“But section 47 of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter’s original jurisdiction. Decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of Makhangu vs. Kibwana [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJ.A), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal <http://www.kenyalaw.org> - Page 4/6 In re Estate of Dancun Kariuki Kinyanjui (Deceased) [2021] eKLR does lie to the Court of Appeal from the decision of the High Court in probate matters; that under section 47 of the Law of Succession Act, the High Court has jurisdiction on hearing a matter to pronounce decrees or orders; that any order or decree made under this section is appealable under Section 66 of the Civil Procedure Act, either as a matter of right if it falls within the ambit of Section 75 of the Civil Procedure Rules or by leave of the Court if it did not. It has been said in criticism of this decision that the Law of Succession Act is a complete code with its own rules and that there would be no justification to import into it provisions of the Civil Procedure Act and Rules unless expressly permitted under Rule 63 of the Probate and Administration Rules. In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. 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 the probate and administration dispute. So what is our decision in this application...leave of the High Court to appeal to this Court in succession matters is necessary in the former’s exercise of its original jurisdiction.” (emphasis mine).

34. 28. I also find refuge in the decision in John Mwita Murimi & 2 others vs. Mwikabe Chacha Mwita & another [2019] eKLR in which the Court of Appeal (Makhandia, Kiage & Otieno – Odek, JJ.A.) stated:

“It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu-v-Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another -v- Mary Wangui Karanja & another [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held 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 it is refused, with leave of this Court. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981). In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit.”

35. 29. From the foregoing, it emerges that it is a requirement to seek leave to appeal decisions of the High Court exercising original jurisdiction in succession matters, and failure to obtain such leave is fatal, as it would lead to the striking out of the record of appeal.

36. In the instant case, the decision which the Protestors/Applicants intend to appeal against arises out of a succession cause, and the judgment in the cause was delivered by the High Court exercising its original jurisdiction. It is therefore a requirement that the Applicants seek leave to appeal before filing their intended appeal. Additionally, the application for leave would grant the Court an opportunity to determine whether there are grounds which may require consideration by the Court of Appeal.

37. Thus the court finds application fatally defective and thus no need to consider other grounds. Thus court the orders;

(i) *The application is struck out with no orders as to costs.*

DATED AND SIGNED AT NYAHURURU THIS 27TH DAY OF JANUARY, 2022.

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CHARLES KARIUKI

JUDGE