



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION NO. 131 of 1986**

**IN THE MATTER OF THE ESTATE OF ESTATE OF HEZRON KIMANI KIRARA (DECEASED)**

CATHERINE NJERI KIRARA.....1<sup>ST</sup> OBJECTOR

BEATRICE WAIRIMU KIRARA.....2<sup>ND</sup> OBJECTOR

KEVIN KIRARA.....3<sup>RD</sup> OBJECTOR

HILDA WANGARI.....4<sup>TH</sup> OBJECTOR

VERSUS

PETER KIMANI KIRARA .....1<sup>ST</sup> RESPONDENT

HARISON MBURU KIRARA.....2<sup>ND</sup> RESPONDENT

RULING

1. Before me for consideration is an application dated 26.10.21 in which the Harrison Mbaru Kirara (Harrison) seeks the following orders:

1. *Spent.*

2. ***THAT this Honourable Court be pleased to grant leave to the Applicant to appeal against the Judgment delivered by the Hon Justice Thande on the 13<sup>th</sup> October, 2021.***

3. *Spent.*

4. ***THAT this Honourable Court be pleased to stay the Orders issued by the Hon Justice Thande on the 13<sup>th</sup> October, 2021 pending the hearing and determination of the intended appeal to be filed by the Applicant herein.***

5. ***THAT the costs of and incidental to this application do abide the result of the said appeal.***

2. The Application is premised on grounds that Harrison is dissatisfied with the “judgment” delivered by the Court on 13.10.21; that he has an arguable appeal which raises serious questions of law and fact; that if the orders sought are not granted, irreparable harm will be occasioned and the intended appeal will be rendered nugatory; that he has moved diligently and expeditiously and undertakes to lodge the intended appeal and record of appeal expeditiously within such time as the Court may order upon leave being granted; that no prejudice will be occasioned if the orders sought are granted. Harrison exhibited a draft memorandum of appeal.

3. The Application is opposed by Catherine Njeri Kirara (Catherine) in her replying affidavit sworn on 16.2.22. Catherine averred that 13.10.21 was the date fixed for the hearing of the application dated 7.6.21 seeking revocation of grant made on 2.9.86; that the then administrator, Peter Kimani Kirara informed the Court that he wished to cease to act as administrator of the estate, whereupon the Judge revoked the Grant and appointed Catherine and Harrison as administrators representing each house of the deceased; that the administrators were obligated to provide for the widow of the deceased pursuant to the order of 8.6.21; that there has been intermeddling with and wastage of the estate of the deceased and disinheriting of rightful heirs which Harrison has been party to; the maintenance orders remain in force as the application to set the same aside has not been prosecuted. To Catherine therefore, the Application is intended to protract the matter

further, to the disadvantage of the beneficiaries.

4. The matter before this Court relates to the estate of Hezron Kimani Kirara, deceased. An order made by the High Court under the Law of Succession Act is not appealable to the Court of Appeal as of right. Leave must be sought and obtained. Rule 39 of the Court of Appeal Rules provides:

**39. In civil matters-**

**(a) where an appeal lies with the leave of the superior court application for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;**

**(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused within fourteen days of such refusal.**

5. The jurisdiction of the Court of Appeal to hear appeals from this Court is derived from the Constitution of Kenya, 2010. Article 164(3) provides:

**The Court of Appeal has jurisdiction to hear appeals from—**

**(a) the High Court; and**

**(b) any other court or tribunal as prescribed by an Act of Parliament.**

6. The jurisdiction of the Court of Appeal to hear appeals from this Court does not however, translate to an automatic right of appeal. While considering the jurisdiction and right to appeal from this Court to the Court of Appeal, in the case of Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal [2015] eKLR, Kiage, JA had this to say:

***I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as „where a right of appeal arises? It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself.***

7. In the present case, leave to appeal was not sought when the decision of 13.10.21 was made. However, Rule 39 of the Court of Appeal Rules allows a party to apply for leave within 14 days of the decision. The decision was made on 13.10.21 while the Application for leave is dated 26.10.21. The application seeking leave to appeal was thus filed within the stipulated time. Having met the limitation set by statute, the Applicant may now exercise his right of appeal.

8. I now turn to the prayer for stay of execution. Harrison has filed the Application under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. These provisions are not among those imported into the Law of Succession Act by virtue of Rule 63 of the Probate and Administration Rules which provides:

***(1) Save as is 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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.***

9. The Law of Succession Act does not contain specific provisions regarding stay of execution. The jurisdiction of this Court to hear and determine the Application herein, is derived from Section 47 of the Act which gives the Court wide powers as follows:

***The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.***

10. Rule 73 of the Probate and Administration Rules goes on to provide:

***Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.***

11. The Court has inherent powers to grant an order for stay of execution. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. When exercising its discretion, the Court must do so judicially as this is necessary for the ends of justice. In the case of James Karanja Chege & 3 Others v Eunice Wanjiku Chege [2011] eKLR, Ouko, J. (as he then was) stated:

***In any civil proceedings, the court has inherent power ex debito justitiae to order a stay of execution pending appeal. It is a power that can be invoked under section 3A and more recently Sections 1A and 1B of the Civil Procedure Act. In succession matters, despite Rule 63 aforesaid, it is available under Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. When a court is called upon to exercise a discretion in any dispute, it must do so***

***judicially to ensure the ends of justice are met and justice is done to both parties.***

12. The decision of the Court that Harrison is aggrieved by, was made on 13.10.21. His Application seeking stay of execution is dated 26.10.21. I am satisfied that the Application was brought without undue delay.

13. Harrison claimed that he will suffer irreparable loss if the orders sought are not granted. Harrison is required to demonstrate that he will indeed suffer irreparable loss and the nature and extent thereof. In the case of Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR, Warsame J. (as he then was) had this to say on the obligation placed on a party claiming that irreparable loss would be occasioned if stay is not granted:

***It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.***

14. In the present case, Harrison merely stated that if the orders sought are not granted, irreparable harm will be occasioned and the intended appeal will be rendered nugatory. It is not enough for Harrison to merely put forward allegations of irreparable loss without substantiating the same. For the Court to look favourably upon his assertions, Harrison was required to place before the Court empirical and documentary evidence to support the same. He failed to do so. Accordingly, the Court will not consider mere assertions of irreparable loss without any evidence being placed before it.

15. It is noted that the circumstances of this case are that Peter Kimani Kirara was the sole surviving administrator of the estate of the deceased. It is noted that on 13.10.21, when the matter came up for hearing, the Court was informed that Peter Kimani Kirara was renouncing his role as administrator. The Court was further also told that attempts to join Harrison as administrator had not been successful. To avoid a situation where the estate would remain without an administrator, the Court then revoked the Grant and appointed Harrison and Catherine as administrators to representing both houses of the deceased. To stay the orders of 13.10.21 as sought by Harrison will result in harm being suffered by the estate as the estate will remain without an administrator, given the renunciation by Peter.

16. On the claim that the intended appeal will be rendered nugatory if the orders sought are not granted, again Harrison just made the mere assertion without substantiation. In Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR the Court of Appeal, in a ruling in respect of an application for stay, described the term “nugatory” as follows:

***ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.***

***x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.***

17. The question this Court asks is whether the appointment of Harrison and Catherine as administrators of the estate of the deceased if not stayed will be irreversible? No evidence was placed before the Court to demonstrate that this would be irreversible. Should the intended appeal succeed, the appointment of the 2 administrators will simply be revoked and any act done by them in that capacity may be nullified if necessary. Accordingly, I am not satisfied that the intended appeal will be rendered whether the orders sought are declined. Taking all factors into account therefore, including the interests of the estate and of the beneficiaries, the balance tilts in favour of declining the orders for stay of execution.

18. In the result and in view of the foregoing, I make the following orders:

- i) Leave is hereby granted to appeal against the decision of 13.10.21 on terms that the appeal shall be filed within 21 days and in default, the leave so granted shall lapse.
- ii) The prayer for stay of the orders issued on 13.10.21 is hereby declined.
- iii) This being a family matter, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25TH DAY OF MARCH 2022**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Objectors**

..... for the Respondent

..... Court Assistant