



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO 84 OF 1998**

**IN THE MATTER OF THE ESTATE OF EDWARD AKELO NYANGO'R- DECEASED**

**HARRISON OUMA AKELO.....1<sup>ST</sup> ADMINISTRATOR**

**VERSUS**

**ROBERT ACHAPA AKELLO.....OBJECTOR**

**AND**

**HERINE AKINYI AKELO.....2<sup>ND</sup> ADMINISTRATOR**

**EMMANUEL OMONDI AKELO.....3<sup>RD</sup> ADMINISTRATOR**

**RULING**

1. In his Notice of Motion application dated and filed on 27<sup>th</sup> November 2020, the 1<sup>st</sup> Administrator sought leave to appeal against the Judgement that was delivered by Cherere J on 21<sup>st</sup> October 2020, an order for stay of execution of the said Judgement and a temporary order of injunction to restrain the Respondents from dealing, disposing and/ or interfering with the “contested” property being L.R No. 1148/1059 (hereinafter referred to as the “subject property”) that belonged to Edward Akelo Nyango’r (hereinafter referred to as the “deceased”) pending the hearing and determination of the intended appeal. The application was supported by his Affidavit that he swore on 27<sup>th</sup> November 2020.
2. He stated that he was dissatisfied with the aforesaid decision of the Learned Judge and wished to appeal against the same. He was emphatic that his draft Memorandum of Appeal had raised weighty legal and factual issues. His Notice of Appeal dated 28<sup>th</sup> October 2020 was filed on 3<sup>rd</sup> November 2020. He pointed out that he had also applied for proceedings and judgement.
3. He urged this court to grant the prayers sought since the right to appeal in succession matter was not automatic.
4. In response to the said application, on 27<sup>th</sup> January 2021, the Objector filed an Affidavit that he swore on 14<sup>th</sup> December 2020. He swore the said Affidavit on his own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators herein.
5. The Objector and the 1<sup>st</sup> and 2<sup>nd</sup> Administrators herein termed the present application unmerited and an abuse of the supervisory powers vested in the High Court. They averred that the 1<sup>st</sup> Administrator had proposed how the contested property was to be sold and it was therefore not true that they had embarked on scouting for a purchaser with a view to selling or disposing it because the procedure of how the property was to be sold was indicated in the judgment. They were emphatic that he was not keen on complying with the court’s directions. They also accused him of blocking them from accessing rents from tenants and not depositing all the rental proceeds.
6. They thus urged this court to dismiss his present application.

**LEGAL ANALYSIS**

7. The 1<sup>st</sup> Administrator submitted that having filed a Notice of Appeal as required under Rules 75 of the Court of Appeal Rules and having applied and sought for proceedings as required by law, then these are the first essential steps expected of a prospective appellant as it is the entry point to the Court of Appeal. In this regard, he relied on the cases of **Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja Nairobi CA NO 69 of 2014** and **Joyce Nyamweya vs Jemima Nyamweya Kisumu CA NO 22 of 2015** (eKLR citations not

provided).

8. He further submitted that he had an arguable appeal which raised substantial issues of law which was for the Court of Appeal to determine the question whether a court can disinherit a child from inheriting his deceased father's property.

9. The court did not deem it necessary to analyse the submissions relating to the question of whether or not to grant the 1<sup>st</sup> Administrator leave to appeal for the reason that the Objector and the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators had no objection to the 1<sup>st</sup> Administrator's application to be granted leave to appeal being granted.

10. Notably, both parties did not submit on the question of a stay of execution being granted and/or injunction pending the hearing and determination of appeal. It was not clear to this court if the 1<sup>st</sup> Administrator had abandoned these prayers. Hence, the court could not grant the same *suo moto*.

11. In any event, the 1<sup>st</sup> Administrator did not demonstrate that he had met the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which was that an applicant must demonstrate that he will suffer substantial loss in the event that an order for stay of execution pending appeal is not granted, that he has filed his application without delay or that he is willing and ready to furnish security for the due performance of the decree or order.

12. Further, he did not show that he had met the criteria that had been set out in the case of **Giella vs Cassman Brown Company Limited [1973] E.A. 358** which is that an applicant must demonstrate that he has established a *prima facie* case with a probability of success, that he will suffer irreparable loss in the event the interlocutory injunction was not granted or that if the court was in doubt, then it should grant an interlocutory injunction on a balance of convenience.

### **DISPOSITION**

13. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> Administrator's Notice of Motion dated and filed on 27<sup>th</sup> November 2020 be and is allowed in terms of Prayer No (2) therein. The 1<sup>st</sup> Administrator be and is hereby granted leave to lodge his Appeal within fourteen (14) days from the date of this Ruling. For the avoidance of doubt, the court did not find the remaining prayers to have been merited. Costs of the application to be in the cause.

14. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JUNE 2021**

**J. KAMAU**

**JUDGE**