



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2237 OF 1997

IN THE MATTER OF THE ESTATE OF DANCUN KARIUKI KINYANJUI (DECEASED)

JOHN MBUGUA KARIUKI.....1ST ADMINISTRATOR/RESPONDENT

BETH WAMBUI KARIUKI.....2ND ADMINISTRATOR/RESPONDENT

VERSUS

PETER KIIRU KARIUKI.....1ST PROTESTOR/APPLICANT

EMILY MARURA KINYANJUI.....2ND PROTESTOR/APPLICANT

ANN WANGUI KARIUKI.....3RD PROTESTOR/APPLICANT

RULING

1. On 27th May, 2020, this court delivered a judgment in which it confirmed the Grant of letters of Administration Intestate of all of the deceased's estate to John Mbugua Kariuki and Beth Wambui Kariuki, and distributed the deceased's net estate amongst his beneficiaries. Being dissatisfied with the judgment, the Protestor/Applicant filed a Notice of Appeal on 8th June, 2020 and thereafter filed the instant application dated 10th June, 2020.

2. The instant application was brought by way of a Notice of Motion under the provisions of **rules 59, 63, and 73** of the **Probate and Administration Rules** seeking *inter alia* an order of stay of execution of the judgment pending the hearing and determination of the intended appeal. The application is predicated upon the grounds on the face of it and supported by the affidavit of 10th March, 2020 sworn by Ann Wangui Kariuki, the 3rd Protestor on her own behalf and on behalf of her co-applicants. There was however nothing to show that Ann had the authority of her co-applicants to depone the affidavit on their behalf. There is also on record a further affidavit dated 26th June, 2020 sworn by Ann Wangui Kariuki.

3. Learned Counsel Ms. Morara filed written submissions dated 26th May, 2020 on behalf of the Protestors/Applicants. Counsel proposed three issues for determination:

- a. whether the order of stay of execution of the judgment should be granted;
- b. whether the beneficiaries' proceeds should be deposited in the joint account of the parties' advocates; and
- c. who should bear the costs of the application.

4. Ms. Morara submitted that in an application for stay of execution pending appeal, it is imperative for the applicant to satisfy the court that he stands to suffer substantial loss, the application had been made without unnecessary delay and such security as the court orders for due performance of such decree has been given. To buttress her case, Counsel cited the decision in **Butt vs. Rent Restriction Tribunal [1982] KLR 417** in which the Court of Appeal acknowledged that the power of the court to grant or refuse an application for stay of execution is a discretionary power while urging that the discretion should be exercised in such a way as not to prevent an appeal.

5. It was Counsel's contention that the Protestors/Applicants are exercising their undoubted right of appeal and the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. Counsel asserted that the Protestors/Applicants stand to suffer substantial loss if the Administrators/Respondents proceed to transfer and dispose of assets of the estate as they have now been issued with the confirmed grant thus paving way for them to dispose of the properties of the estate. She urged that the Administrators/Respondents have continued accumulating wealth for themselves by intermeddling with assets of the estate to the prejudice of the Protestors/Applicants.

Further that the Administrators/Respondents have never paid to the Protestors/Applicants their monthly allowances despite there being orders to this effect.

6. Ms. Morara asserted that the Protestors/Applicants were vigilant and moved the court with speed. That the instant application was filed on 10th June, 2020 and was therefore brought without undue delay. She however contended that the issue of security does not apply since the **Civil Procedure Rules** are not applicable to a succession matter such as this.

7. The case of the Protestors/Applicants was that they did not need to seek leave as their intended appeal emanates from a decree. Further that they were not obliged to attach a memorandum of appeal or disclose their grounds of the intended appeal given that their application is for stay pending appeal. Counsel cited the Court of Appeal decision in **Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 others [2013] eKLR** to show that the Protestors/Applicants were not required to seek leave before filing an appeal. The relevant section of the decision relied upon is where the Court observed as follows:

“It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the Law of Succession Act, the provisions of such an Act must be strictly construed and applied...therefore, what is in the Law of Succession Act is what was intended to be therein in the manner and the extent it is there. What is not therein expressly is what was intended not to be there by the legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court.”

8. On this basis, Ms. Morara urged that **section 47** of the **Law of Succession Act** grants the Court power to make such orders as may be just and expedient. That the right to appeal to the Court of Appeal is not only expedient but protected under the Constitution particularly under **Article 48** which guarantees access to justice. Further that there is a thin line to be drawn between whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. That upon dismissal of the application for revocation, the grant was confirmed thereby resulting in a decree.

9. On the second issue, Ms. Morara asserted that in order to prevent the Administrators/Respondents from exclusively enjoying and/or misusing the estate at the expense of the beneficiaries, the proceeds from the estate ought to be deposited in a joint account held by the Advocates on record for the Parties. Counsel urged that this was especially so since the Administrators/Respondents have always denied the Protestors/Applicants their allowances and further failed to account for the proceeds from the assets of the estate over the years.

10. In opposition, learned Counsel Mr. Mulinge filed written submissions dated 17th July, 2020 on behalf of the Administrators/Respondents in which he relied on the replying affidavit sworn by John Mbugua on 22nd June, 2020.

11. First, Counsel invited the Court to consider whether the Notice of Appeal filed without the leave of this court is competent. Counsel contended that the Protestors/Applicants cannot appeal against the decision of this court before seeking leave pursuant to **section 50** of the **Law of Succession Act**. Therefore, that the Notice of Appeal filed without the leave of this court is incompetent and contra **section 50**.

12. According to Mr. Mulinge, the question of whether an appeal can lie as a matter of right in succession matters against decisions of the High Court exercising original jurisdiction is well settled. That the right of appeal from the High Court to the Court of Appeal only lies with leave of this court as held in the persuasive case of **Mary Wangui Karanja & Another vs. Rhoda Wairimu Karanja & Another [2014] eKLR** and affirmed by the Court of Appeal in **Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another [2014]**. Counsel urged that the legal requirement is desirable for expeditious disposal of probate matters in order to bring the dispute to an end and enable families move on. Therefore, that this court can be prompted to grant leave and where leave is declined, a party is at liberty to seek leave from the Court of Appeal.

13. Mr. Mulinge submitted that the Protestors/Applicants herein had deliberately failed to seek leave to appeal against the order by this court. He contended that without leave, an order of stay would be in vain since the application for leave to appeal in succession matters is central to an application for stay. He cited the decision in **Curryian Okumu vs. Perez Okumu & 2 others [2016] eKLR** to support his argument. Counsel urged that since the Protestors/Applicants had not prayed for leave, it was clear that they had no intentions to appeal and the application would therefore only serve to clog the judicial system and hinder the administration and distribution of the deceased's estate. On this premise, he invited the court to reach the conclusion that the application is without merit and decline to exercise discretion in favour of the Applicants and thereby dismiss the application with costs.

14. Mr. Mulinge took issue with the supporting affidavit of Ann Wangui Kariuki, noting that it was sworn on 10th March, 2020 before the court's determination, delivered by a judgment dated 27th May, 2020. Further that the deponent is not a party to the suit, and has never been a Protestor as far as the record is concerned. That while the deponent purports to prosecute this suit on behalf of the Protestor, she has no valid authority or *locus standi* to do so. Contrary to Counsel's assertions, the record shows that Ann Wangui Kariuki is a beneficiary of the deceased's estate by virtue of being the deceased's daughter. Further that she was one of the Protestors to the confirmation of grant.

15. Counsel also took issue with the provisions under which the application has been brought. He contended that an applicant is required to move this court by way of summons as provided under **rule 59** of the **Probate and Administration Rules** but the Protestors/Applicants chose to move this court by way of a Notice of Motion under the wrong provisions of the law. Counsel asserted that while the omission may not be fatal by dint of **Article 159(2)(d)** of the **Constitution**, parties should adhere to the rules of procedure provided by law to avoid unnecessary side shows.

16. On the issue of whether all liquid generating assets of the estate be deposited in the joint accounts of the Advocates on record, Mr. Mulinge submitted that this prayer was *res judicata*. That this court heard the parties on this issue and made a ruling during the proceedings in which it directed that each party collect rent from the properties that are generating income. Therefore, that this court pronounced itself on the issue for which reason it cannot be relitigated. Counsel urged that even if the Protestors/Applicants were dissatisfied with that finding, the dissatisfaction cannot be addressed through the present application which also seeks for orders of stay pending appeal but rather on appeal to

an appellate court. That the said prayer is therefore untenable and cannot be sustained.

17. It was further submitted that holding the estate's liquid generating assets in joint Advocates' accounts would greatly inconvenience the majority of the beneficiaries who solely depend on the proceeds of the estate for their livelihood and to educate their children. Counsel contended that the Protestors/Applicants were only out to frustrate the beneficiaries with endless litigation, noting that this matter has been litigated for over 23 years. Counsel maintained that the present application was only geared to ensuring the Protestors/Applicants continue to enjoy the status quo to the detriment of other beneficiaries.

18. Mr. Mulinge urged that the principles applicable in an application of this nature were laid out in **Machira T/A Machira & Co. Advocates vs. East African Standard, Nairobi HCCC No. 612 of 1996**. He asserted that while considering an application of this nature, the court has to examine whether the applicant has demonstrated that substantial loss would result if the order is not made; that the application has been made timeously and that the applicant has offered security for due performance of the decree.

19. On the test of substantial loss, it was Counsel's submission that the onus of proving that substantial loss would occur unless stay is granted rests upon and must be discharged accordingly by the Applicants. He asserted that it is not enough to merely state that loss will be suffered, an applicant ought to show the substantial loss that will be suffered in the event the orders sought are not given. That in the instant case, the Applicants had failed to so do. Counsel urged that the Applicants had merely stated that there is a risk that the subject land will be sold without stating what action the Respondents had taken towards executing and/or selling the land. Counsel cited the decisions in **Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR** and **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** to this end. Therefore, that the Applicants had not proved any loss and the prayers sought should not be granted. That in any event, the Applicants had not provided security or intimated intentions of providing security as may be ordered by the court for due performance of the decree to demonstrate their commitment to prosecuting the intended appeal.

20. According to Mr. Mulinge, the gist of this suit is the distribution of the estate of the deceased. In his view however, the Protestors/Applicants have not told the court how the distribution of the estate is unfair or informed the court of the basis of their apprehension. That as such, it can be stated that the only fear the Applicants have is that they will no longer be collecting the rents due. Counsel urged that the Applicants had not laid a basis for the inhibitory orders sought and as such, the orders sought cannot issue.

21. It was Counsel's contention that the key requirement herein is whether the intended appeal is arguable. That the Applicants ought therefore to have attached a draft memorandum of appeal to the application. He urged that other than the Notice of Appeal, the Applicants had not produced any formal documents from the forum to which the intended appeal would be preferred. To this end, Counsel relied on the decisions in **Kenya Railways Corporation vs. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012**; **Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others, Civil Appeal No. NAI 256 of 2013**; **Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR**; **Trust Bank Limited and Another vs. Investech Bank Limited and 3 others, Civil Application No. NAI 258 of 1999** (unreported); **Amina Shiraz Yakub vs. David Baburam Jagatram [2017] eKLR** and **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 others, Civil Application No. 327 of 2009**.

22. Mr. Mulinge further submitted that in determining the instant application, this court must satisfy itself that the application does not have as its main object to frustrate the Administrators/Respondents of the benefits of the outcome of this suit. Counsel cited the decision in **M/S Port Reitz Maternity vs. James Karanga Kabia, Civil Appeal No. 63 of 1997** and stated that the right of appeal must be balanced against an equally weighty right; that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. To further buttress his point, Counsel cited the decisions in **Board of Governors, Moi High School Kabarak & Another vs. Malcolm Bell & others, SC Petitions No. 6 & 7 of 2013** and **Equity Bank Limited vs. West Link MBO Ltd, Civil Appeal No. 78 of 2011**.

23. Notably, the instant application was erroneously brought by way of a Notice of Motion and not by way of summons as provided under **rule 59** of the **Probate and Administration Rules**. This error is however not fatal and does not oust the jurisdiction of this court to entertain the instant application. This is by dint of **Article 159(2)(d)** of the **Constitution** which enjoins this Court to administer justice without undue regard to procedural technicalities. I will therefore proceed to determine the application on its merits.

24. Having carefully analyzed the pleadings filed by the parties hereto and the rival written submissions on record, I frame two issues for determination:

- a. Whether the Protestors/Applicants were required to seek leave before lodging a Notice of Appeal and, the consequences of the failure to seek such leave.
- b. Whether the Applicants have made out a case to warrant the grant of the orders for stay pending appeal.

25. 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.”

26. 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.

27. 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 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).

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.”

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. 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 Protestors/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.

30. It is not lost on this court that a party may seek leave to appeal after filing a Notice of Appeal but before the filing of the memorandum of appeal. In the instant case, it emerges that the Protestors/Applicants approached this court seeking an order for stay pending appeal, when they had not in fact sought leave to appeal, and as indicated in their pleadings have no intention to obtain such leave. As demonstrated above, failure to obtain leave to appeal would result in the striking out of the record of appeal. The instant application is therefore tantamount to asking this court to act in vain because without an appeal, there is nothing on which an order of stay pending appeal can stand.

31. It did not help that the Protestors/Applicants did not demonstrate that they have an arguable appeal or that they had met the requirements for the grant of an order of stay. It is curious that the Protestors/Applicants argued that they were not required to attach a draft memorandum of appeal or to disclose the grounds of their intended appeal when it is only by examining the memorandum of appeal or interrogating the grounds of the intended appeal that a court would be able to assess whether the intended appeal has a probability of success to warrant the grant of an order for stay pending appeal.

32. Failure to attach a draft memorandum of appeal is however not fatal to an application so long as there is demonstration through supportive evidence that the intended appeal is arguable. (See – **Vishva Stones Suppliers Company Limited vs. RSR Stone** [2006] Limited [2020] eKLR) and **Attorney General vs. Charles Otok Oliech** [2021] eKLR.).

33. In the instant case however, all that the Protestors/Applicants did was state that they would be occasioned substantial loss if the assets of the estate were disposed of without more. They did not specify which assets of the deceased’s estate were in danger of being disposed of or

demonstrate what occasioned this danger. Nothing in their pleadings or submissions demonstrates that they have an arguable appeal or that if the orders of stay sought are not granted, the appeal will be rendered nugatory. In any event, the grant of an order of stay is a discretionary power.

34. It therefore appears that the Protestors/Applicants have failed in two respects. First, they have not sought leave to appeal, and it is evident that they have no intention of seeking such leave before lodging their appeal. Second, they failed to annex a draft copy of the memorandum of appeal or to disclose the grounds of their intended appeal or otherwise demonstrate through supportive evidence that they have an arguable appeal and that they have satisfied the requirements for the grant of the stay orders sought. It was not enough for the Protestors/Applicants to state that the Administrators/Respondents have obtained a confirmed grant and that they would as a result suffer substantial loss. This is especially so since this cause has spanned over 23 years and there is a need to bring an end to litigation. In the circumstances, the court cannot exercise its discretion to grant the order of stay execution sought. The Protestors/Applicants did not also adduce cogent evidence in support of the prayer for an order that the beneficiaries' proceeds be deposited in the joint account of the parties' advocates.

35. The upshot of the foregoing is that the application dated 10th June, 2020 fails and is hereby dismissed for want of merit. Costs shall be borne by the Protestors/Applicants. It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF JULY, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Protestors/Applicants.

In the presence ofAdvocate for the Administrators/Respondents.