



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 5 OF 2018**

**IN THE MATTER OF ESTATE OF FRANCIS WAITHANJE MUNAITHAGA alias**

**WAITHANJE MUNAITHAGA (DECEASED)**

**NANCY MUTHONI JAMES.....ADMINISTRATRIX/RESPONDENT**

**VERSUS**

**JUNIUS NJUE WAITHANJE .....ADMINISTRATOR/APPLICANT**

**RULING**

1. The applicant has moved the court by way of the application dated 24/06/2021 wherein he seeks for leave to file appeal against the judgment delivered on 11.07.2019; for stay of proceedings herein until the appeal is heard and determined; and that the costs of the application be provided for.
2. The grounds upon which the application is premised are that the applicant upon the delivery of the impugned judgment, he instructed his advocates to lodge an appeal and to request for certified copies of the proceedings which has been done and a notice of appeal served upon the respondent. That he believed that his former advocates on record filed an appeal but none was filed. Further that he has been advised by his advocates on record that there should neither be stay of execution nor security for costs but rather stay of proceedings barring the respondents from getting the title or dealing with it in any way pending hearing and determination of the intended appeal.
3. That the deceased having died more than 25 years ago, the beneficiaries have adult children and some even have gotten grand-children and it is inconceivable that the estate can be distributed without causing serious upheavals nor should some of the beneficiaries get preferential treatment as in actual sense, the respondent herein is not a beneficiary of the estate of the deceased. As such he deserves leave to appeal to the court of appeal and further the proceedings ought to be stayed pending the hearing of the appeal.
4. When the parties appeared before me on 28.06.2021, Ms. Muriuki informed the court that she had been served with the instant application and prayed for more time so as to file a response. The court gave directions that the respondent to file response within 7 days and thereafter the parties to file and exchange written submissions. The matter came up for mention on 26.07.2021 and wherein the respondent did not appear. The applicant confirmed having filed his submissions and the court gave a ruling date. I have analyzed the above for the reasons that there is no response to the application nor submissions by the respondent. As such the application is unopposed.
5. The applicant proceeded to file his submissions and wherein he submitted that he has explained the reasons for delay in filing the appeal and the reason being that his former advocates on record failed to lodge the appeal despite him issuing instructions on the same. He submitted that the reason is sufficient and reliance made on the case of **APA Insurance Limited –vs- Michael Kinyanjui Muturi (2016) eKLR**. Further that it is in the interest of justice that this court does invoke its inherent powers under Rule 73 of the Probate and Administration Rules. On the stay of proceedings, it was submitted that the same is discretionary and which is exercised under the principles as were set out in **Global Tours & Travels Ltd –vs- HCWC No. 3 of 2000**. He submitted that since the grant is already in place and has been filed for confirmation, the immediate sequence of confirmation of the grant is the execution and distribution of the estate and thus if the court does not grant stay of proceedings, the intended appeal will be rendered nugatory. He further submitted that the estate ought to be preserved pending the hearing and determination of the appeal and invoked the doctrine of *lis pendens* in that, the estate needs to be preserved.
6. As I have already indicated, the respondent did not oppose the application herein. However, this does not mean that the application ought to be allowed for this reason. This court is bound to consider the application and see whether the same is merited.
7. The applicant seeks leave to appeal against the judgment of 11.07.2019 and also for stay of proceedings in this cause pending the hearing and determination of the intended appeal. It is my considered view that the main issue for determination is whether the said application is merited.

8. In determining the merits of the application, I will start by determining the issue as to whether the applicant ought to be granted leave to appeal to the Court of Appeal. The applicant deposed that his former advocate filed a notice of appeal but did not file the substantive appeal.

9. The question as to whether an appeal lies to the Court of Appeal as a matter of right in succession causes against the decisions of the High Court exercising its original jurisdiction has been moot. One school of thought is to the effect that leave is required to file an appeal to the court of appeal. The Court of Appeal in the case of **Francis Gachoki Murage v Juliana Waindi Kinyua & another Civil Appeal No. 139 of 2009** held thus:

***“We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal, an aggrieved party wishing to appeal is enjoined to seek leave. Granting of leave is within the discretion of a judge. In this case, the appellant is appealing against an order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus following the dicta in the Makhangu v Kibwana (1996-1998) 1 E.A 168 case, the appellant can be said to have an automatic right of appeal.”***

10. The second school of thought is that leave to appeal to this Court on matters of succession is required. In the case of **Rhoda Wairimu Kioi & Ano. Vs Mary Wangui Karanja & Ano. (2014) eKLR**, the Court of Appeal stated:

***“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 its original jurisdiction with the leave of the High Court or where the application for leave is refused, leave with 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 probate and administration disputes....that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this Court.”***

11. However, the courts have analyzed the above and applied the same and the unanimous conclusion is that indeed, there is need and indeed legal requirement that appeals from the High Court to the Court of Appeal in succession causes lie with the leave of the High Court. Such leave, as was held in the **Rhoda Kioi case (supra)** was desirable for purposes of expeditious disposal of succession causes in order to bring disputes to an end and allow families to settle.

12. It is with this requirement for leave that I will decide on this application presuming that the applicant seeks leave to file his appeal out of time and having appreciated that such leave is indeed a prerequisite for any appeal to the Court of Appeal against the decision of the High Court (where the High Court is exercising original jurisdiction in succession matters).

13. However, from the reading of the application herein and despite the applicant seeking leave to appeal from the judgment of this court, the grounds in support of the application and the submissions thereon seems to support an application for leave to file an appeal out of time. An appeal to the Court of Appeal being not automatic in the circumstances of the case, the applicant ought to have provided grounds in support of the prayer for leave to appeal to the Court of Appeal.

14. If at all the applicant wanted to seek leave to appeal to the court of appeal, he ought to have brought facts in support of such prayer. If he intended to file an application for extension of time to file an appeal, the grounds in support of the same ought to have been clear. As it is, this court is not able to understand what the applicant is seeking. The same prayer ought to be struck out.

15. However, this court has inherent jurisdiction by virtue of Rule 73 to make orders for ends of justice to be met and to avoid abuse of the court process. Further, under section 7, this court has jurisdiction to determine any dispute in relation to administration of the estate of a deceased. I will invoke this jurisdiction and determine the application herein and taking it to be an application for leave to appeal to the court of appeal.

16. The Court of Appeal in the case of **Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR** made the following observations: -

***“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 consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”***

17. Though the applicant did not annex to the application the draft memorandum of appeal, I note that in the earlier application dated 7.08.2019 seeking stay of execution of the ruling by Muchemi J, the applicant attached a draft memorandum of appeal. From the said draft memorandum of appeal, it appears prima facie that there are grounds which merit serious consideration. As such the applicant deserves leave to appeal to the court of appeal. As such, prayer (1) of the summons herein is hereby allowed.

18. As to the prayer for stay of proceedings, it is trite that this court has discretion to stay the same pending appeal. The discretion is exercised after due consideration of the merits of the case and the likely effect on the ends of justice. **Ringera J in Global Tours & Travels Limited (supra)**.

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed***

*from is a matter of judicial discretion to be exercised in the interest of justice .....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”*

19. In Halsbury’s Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 it was stated that; -

*“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.*

*This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.*

*It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case. (emphasis mine)”*

*(See In re Estate of Leah Nyawira Njega (Deceased) [2021] eKLR).*

20. At the preliminary, I note that after the delivery of the judgment by Muchemi J on 11.07.2019, the applicant filed an application dated 7.08.2019 and wherein he sought stay of execution pending appeal. The said application was allowed by the orders of 14.11.2019 and the applicant ordered to deposit Kshs. 300,000/- as security. Instead of complying with the said orders, he filed an application dated 6.12.2019 seeking variation of the said order to the extent that the security ordered be substituted with a title deed for LR Kyeni/Kigumo/2144. The said application was dismissed vide the orders of 28.01.2020. It is clear that the applicant has never complied with the orders requiring him to deposit the security of Kshs. 300,000/- neither has he ever appealed against the same or filed for review of the same. He now comes seeking stay of proceedings in this cause pending the hearing of the appeal. In my view, such a prayer is made in bad faith and the same ought to be disallowed.

21. It is trite that he who comes to equity must come with clean hands. The stay of proceedings in this cause will have the effect of staying the pending application for confirmation of grant and which in my view was filed after the applicant failed to comply with the order as to deposit of security within the time frame provided. As such, it will be tantamount to staying the execution of the orders of Muchemi J on 11.07.2019 (which ordered that the parties do file for confirmation of grant). In the circumstances of this case, the said prayer is not made in good faith and it’s an abuse of the court process. Orders of the court ought to be complied with and a party cannot come to court seeking equitable reliefs before he complies with the court orders earlier issued.

22. For the applicant to have the orders of stay of proceedings, he ought to comply with the earlier orders which were issued pursuant to an earlier application for stay pending appeal and which he has not complied with. In my opinion, ordering stay of proceedings herein will be tantamount to reviewing the orders of Muchemi J on depositing security as a condition for stay pending appeal.

23. In the end therefore, the applicant has made a case for grant of leave to appeal to the court of appeal. However, as for the stay of proceedings before this court, the applicant ought to comply with the orders of 14.11.2019. Prayer (2) of the application is hereby disallowed.

24. As to the costs, since this is a succession cause involving a brother and a sister-in-law, each party shall bear his/ her own costs.

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent