



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

SUCCESSION CAUSE NO. 8 OF 2019

IN THE MATTER OF THE ESTATE OF PENINA TERIKI CHEPKURGAT (DECEASED)

PAUL CHEPKWONY CHEBUNGEL.....APPELLANT

=VERSUS=

MUSA KIPRUTO BUTUK.....1ST RESPONDENT

NEDDY KABAN KIPSAMBU.....2ND RESPONDENT

RULING

[1] Before the court is an application for substantive orders as follows:

“1. THAT this Honourable Court be pleased to order for stay of execution of the execution of the Ruling and Certificate of Confirmation of the Grant dated 18th June, 2019 and the Ruling and order delivered on 23rd July, 2019 in Eldama Ravine PMCC Succession Cause No. 57 of 2018 and still consequential orders pending hearing and determination of their Appeal.

2. THAT the Appellant be granted leave to introduce new documentary evidence in This Appeal.

[2] The application before the court seeks principally the stay of execution of the Certification of Confirmation issued by the trial court for the subdivision of the estate asset in equal shares among her children, two sons and a daughter. The applicant is one of the sons who contends that the members of the family of the deceased had on two occasions agreed, and he seeks leave of court to admit additional evidence of the minutes of the said meetings, that the asset be distributed in equal shares of 14 acres for each son and the daughter to inherit 5 acres of the said asset, a parcel of land ***Lembus/ Lembus/32.***

[3] The respondent’s case is simply that she is entitled to inherit the estate of her deceased in equal shares as her brothers, as shown in her replying affidavit as follows:

“RESPONDENTS REPLYING AFFIDAVIT TO THE APPELLANT/APPLICANT APPLICATION DATED THE 7TH AUGUST, 2019

7 THAT I am advised by my counsel on record which advise I verily believe it to be true that it is trite law that the property of the deceased is to be shared equally among the children of the deceased without any form of discrimination based on gender or otherwise.

8 THAT I am entitled to the equal share of the estate of my deceased mother.

9 THAT the minutes sought to be introduced does not overtake the law and the Constitution of Kenya which dictates in clear and unequivocal terms that no form of discrimination to be practiced based on gender or otherwise.

10 THAT a Court of law was entitled to inquire if the mode of sharing was acceptable something I said it was not acceptable as I was entitled to the equal share.

11 THAT I did not and cannot sign to violate the law and any such minutes are unconstitutional as it seek to violate my right to equal treatment before the law and equal inheritance.

12 **THAT** those minutes were not confirmed or validated by any Court of law.

13 **THAT** I am advised by the respondents' counsel on record which advise I verily believe it to be true that under **Rule 73 of the Probate and Administration rules** it states that 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.

14 **THAT** a Court of justice will not rubberstamp an illegality or an unconstitutionality. The succession Court was right in upholding the law and equally sharing the estate."

[4] The trial court herein was satisfied of the heirs and the shares and interests of the heirs, which she held to be equal for the two male heirs and one female heir. While the one male heir was contented with the position of the Court, the other male appealed the decision urging that the family of the deceased had in two meetings the minutes whereof he attached to an application for admission of additional evidence on appeal and in a prior review application before the trial court.

[5] Counsel for the parties then filed written submissions the substance whereof, respectively is to challenge the trial court's finding which ignored the minutes of family meetings resolving to distribute the estate in uneven shares, on the one hand and to support the court's equal distribution between the two male and one female children of the deceased as a legal imperative of the Law of Succession and the Constitution.

[6] Excerpts from the written submissions by counsel for the parties are set out below.

"APPELLANT/APPLICANT'S WRITTEN SUBMISSIONS

Brief summary of the case

Your Lordship, the grounds for the above prayer are well canvassed on the summons and the sworn affidavit of the Appellant dated 7th August, 2019.

In brief, we shall summarize some of the **grounds** as follows:

THAT the appellant is dissatisfied with the Rulings of the Honourable trial Court and the consequential orders arising therefrom;

THAT the Respondents are in haste to execute the Ruling of the trial Court by subdividing and transferring their respective portions of the suit land Lembus/Kiplombe/32 as per the certified of confirmation of the Grant;

THAT if orders for stay of execution are not granted and the Respondents proceed to subdivide and transfer the suit property, then the Appeal will be rendered nugatory;

THAT the Honourable trial Court failed and/or ignored to record and consider the Appellants oral submissions that both the Respondents and himself had prior to the Rulings entered into an agreement on the mode of distribution of at a ratio of 14:5:14 acres and that there were valid minutes executed by all the Parties concerned:

THAT the Honourable trial Court arrived at its decision based on its own opinion under the head "Discrimination" without any facts or basis whatsoever. There are no such facts or submissions in the proceedings to warrant such a bias conclusion.

THAT the trial failed to give its reasoning in the Ruling of 23rd July, 2019.

THAT base on all the foregoing grounds, the Appellant has high chances of success.

Issues for Determination

1. Whether the orders of stay of execution pending appeal can be granted as prayed?
2. Whether the Appellant should be granted leave to introduce new documentary evidence being minutes for the meetings held on 25th August, 2019 and 24th April, 2019 respectively?
3. Whether the Respondents should bear the costs of this application.

1. WHETHER THE ORDERS OF STAY OF EXECUTION PENDING APPEAL CAN BE GRANTED AS PRAYED?

The question is, has the Appellant met the threshold provided by Order 42 Rule 6 of the Civil Procedure Rules, Cap 21 Laws of Kenya?

a) Whether the Appellant will suffer substantial loss unless the order is made?

On this ground, we submit that the Appellant has proved that he will suffer substantial loss in the sense that should the mode of

distribution be effected as per the confirmed grant, then the appeal itself will have been rendered nugatory. The reason is, once the parties have subdivided the suit land and registered their respective portions in their names, then pursuing the Appeal will be in vain as the property will have changed ownership from the Deceased's name to the beneficiaries names. And as submitted by the Respondents in the case of **James Wnagalwa & Another Vs Agnes Naliaka Cheseto Misc. Appl. No. 42 of 2011 (2012) eKLR**, the execution of the confirmed grant will irreparably affect or negate the very essential core of the Applicant as a successful party in the Appeal.

Should the parties proceed with the execution and the Appeal succeeds, then it will be costly on the part of all the parties to subdivide the suit property afresh and have it transferred in their respective names. If the appeal succeeds, which is likely in this case, then the acreage will reduce and increase in the ratio of 14:5:14 hence affecting the subdivision and registration of title accordingly. It would be prudent that the merits of the main appeal be dealt with expeditiously to avoid the back and forth process. We urge this Honourable Court to consider that parties ought not incur double costs whereas the same can be prevented by simply preserving the estate in the best interest of all the parties.

We therefore humbly submit that the Honourable Appeal Court in the spirit of preventing a substantial loss, it proceeds to preserve the status quo simply because the loss as described above, will render the appeal nugatory.

a) Whether the application was made without unreasonable delay?

We submit that the application was filed on 7th August 2019 whereas the Ruling dismissing the application for review was delivered on 23rd July 2019 whereas the Ruling dismissing the application for review was delivered on 23rd July 2019. The time of filing of this application was prompt and within the classification of reasonable time.

This ground is not challenged by the Respondents and we urge the Honourable Court to hold that the summons was filed without unreasonable delay.

b) Whether the Appellant is willing to deposit security?

We submit that the Appellant in his grounds in support of the Summons and further in his sworn supporting affidavit, committed himself to abiding by any such security terms as the Court will deem fit to order. In essence, this ground will be pegged on the discretion of the Honourable Court and we pray that should the order such security to be deposited, it be fair and reasonable.

2. WHETHER THE APPELLANT SHOULD BE GRANTED LEAVE TO INTRODUCE NEW DOCUMENTARY EVIDENCE BEING MINUTES FOR THE MEETINGS HELD ON 25TH AUGUST, 2019 AND 24TH APRIL, 2019 RESPECTIVELY?

The only issue for determination is whether the applicant has on a balance of probabilities satisfied the conditions for grant of the orders sought for leave to be granted to him to adduce additional evidence on appeal.

The substantive law relating to adduction of additional evidence on appeal is the provisions of section 78(1) (d) of the Civil Procedure Act whereas the procedural law is Order 42 Rule 27 of the Civil Procedure Rules. Under section 78 (1) (d) of the Civil Procedure Act.

78 (1) subject to such conditions and limitations as may be prescribed, an appellate Court shall have power

- a. To determine case finally;
- b. To remand a case;
- c. To frame issues and refer them for trial;
- d. To take additional evidence or to require the evidence to be taken;
- e. To order a new trial”

Order 42 Rule 27 of the Civil Procedure Rules provide that:

27 (1) the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court to which the appeal is preferred; but if

- a. The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted.
- b. The Court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined

(2) wherever additional evidence is allowed to be produced by the Court to which the appeal is preferred the Court shall record the reason for its admission.

These minutes form the main argument in the Appeal. As elaborated in the supporting affidavit, the same were never produced nor did they form part of the proceedings in the trial Court. The 1st Respondent; as the administrator, concealed the fact the beneficiaries herein had entered into a mutual consent by way of minutes in a family meeting wherein they willingly agreed on the mode of distribution of the estate of the Deceased.

The said minutes were in the custody of the Respondents as at the time of confirmation of Grant and could not be availed by the Appellant on the date of hearing of summons of confirmation for two reasons; the 1st Respondent was the custodian of the minutes and the Appellant could not access them; secondly, the 2nd Respondent ambushed the appellant when she disputed the mode of distribution on the material date of hearing of the summons. There was no way the Appellant could have suspected foul play.

The trial Court on the other hand refused to admit the minutes despite an application for review having been placed before it for determination on merits. The same was dismissed without consideration of the concealed material facts. We urge this Honourable Court to cure that mistake by admitting the minutes as evidence and proceed to determine the case on merits.

It is necessary to introduce new documentary evidence, which are the minutes marked as “**PCC 1a, 1b and 2** for this Honourable Court to arrive at an informed decision.

Our submission is, had the minutes be included as evidence in the trial Court and even if the 2nd respondent had upon production of those minutes dispute the contents therein, the Honourable trial Court would have made an informed decision. The authority of **Re Estate of Elizabeth Wanjiru Waweru (2017) eKLR** bears the holding that:

“The best that meeting could have achieved would have been to strike an agreement on distribution which would if all parties consented be adopted by the Court in the confirmation stage.”

The 2nd Respondent does not dispute having knowledge that the summons for confirmation had been drawn in line with the mode of distribution as per the minutes, which she duly consented to by appending her signature. She is arguing that the same cannot be enforced by the Honourable Court because they amounted to intermeddling of the estate of the Deceased.

However, in the above case of Re Estate of Elizabeth, the Court was clear that as long as the agreement was consented to by all the parties, then the Court should have adopted it.

In **LADD V Marshall [1954] 1 WLR 489 page 491** Lord Denning stated (and as approved in **K. Tarmohammed V Lakhani [1958] EA 567** – that:

“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:

First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

Secondly, the evidence must be such that if given, it would probably have been an important influence on the result of the case, though it need not be decisive;

Thirdly, the evidence must be such as presumably to be believed or in other words, it must be apparently credible though it need not be incontrovertible.”

The Court further stated that:

“...except on grounds of fraud or surprise, the general rule is that an appellate Court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available.....”

The Respondents have not denied having been the custodians of the said minutes. They have not also denied the fact that the Appellant could not have obtained the said minutes for use at the trial Court. These minutes could have been an important influence on the results of the case and the same even now are to be believed as they are not denied. At least the **contents** of the same have not been controverted. Meetings were held and the parties herein consented to the mode of distribution. As such, we submit that the Appellant has fulfilled the above conditions for this Court to allow adduction of new or additional evidence and it is essential for this Honourable Court to grant the Appellant leave to produce the said minutes for the meetings held on 25th August, 2019 and 24th April, 2019 respectively so that on dispensing with the main appeal; the Court is able to make an informed decision.

From the foregoing and especially on the strength of the above authority, we believe that the Appeal has an arguable appeal with high chances of success and the Appellant should not be denied the chance of ventilating his case on merits.”

[7] For the respondents it was submitted:

“1ST AND 2ND RESPONDENTS WRITTEN SUBMISSIONS ON THE APPELLANT/APPLICANT APPLICATION DATED 7TH AUGUST, 2019

2 The application is opposed by the respondent putting reliance on the affidavit of **Neddy Kabon Kipsambu**, the gravamen of which

is that the trial Court had rendered a reasonable ruling and shared the deceased property equally as follows:

- i) Musa Kipruto Butuk - 11 acres
- ii) Neddy Kaban Kipsambu - 11 acres
- iii) Paul Chepkwony Chebungei - 11 acres

3 This is to be found in annexure “**NKK 1**” “**a**” and “**b**” to the affidavit of **Neddy Kaban Kipsambu**, that is the copy of the **ruling** and the **certificate of confirmation of grant** respectively. In a nutshell the respondent averred that in law the property of the deceased is to be shared equally among the beneficiaries/children of the deceased without any form of discrimination based on gender or otherwise. That background is necessary so that a “**peep**” in to the appellant appeal and though exercising his undoubted right of appeal, whether such appeal can succeed in the future or is it “**death on arrival**”. Put differently is the appeal or intended appeal a gratuitous one? But more fundamentally and this is really the test in an application in the nature of the one before Court being mainly an application for stay of execution pending the hearing and determination of the application and pending the hearing and determination of the appeal. The relevant law is order 42 rule 6 of the Civil Procedure Rules. At any event we do not intend to re-invent the wheel on dealing with the foundation of staying executions pending appeal. We put our reliance in the provision of Order 42 Rule 6 of the Civil Procedure Rule Cap 21 Laws of Kenya which provides that:

“.....an applicant who is seeking a stay of execution pending appeal must demonstrate the following:

1. **Substantial loss may result to the applicant unless the order was made;**
2. **The application was made without unreasonable delay; and**
3. **Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.....”**

4 To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent. In case of **James Wangalwa & Another v Agnes Naliaka Chesetomisc Application No 42 of 2011 [2012] eKLR (Gikonyo J)** stated that:

“...The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein Vs Chesoni [2002] 1 KLR 867**, and also in the case of **Mukuma Vs. Abuoga** quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5 (2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory....”

5 From the above two cases it is crystal clear that for an applicant to succeed in an application for stay of execution pending appeal the applicant must demonstrate the following:

- i) Substantial loss may result to the applicant unless the order was made.
- ii) The application was made without unreasonable delay.
- iii) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding upon him has been given by the applicant.

6 The above are conditions under order 42 rule 6 of the Civil Procedure Rules. What about the case law? Few conditions are germane;

i) That whereas there is a need to preserve the subject matter so that the rights of the appellant who is exercising his or her undoubted right of appeal are safeguard and the appeal if successful is not rendered nugatory. That right has to be weighed against the right of successful litigant not to be deprived of the fruits of his or her judgment. In the instant case all the three beneficiaries were successful in the judgment of the trial Court and each got an equal share of the estate. In our submissions with greatest respect such an appeal even if successful will not be rendered nugatory. The appellant and the respondents, all of them have the fruits of the judgment equally. None of them has been denied or discriminated against.

ii) The applicant is also required to establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The issue of substantial is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal.

7 In the instant application and the appeal before Court the applicant main ground alludes to the existence of meeting of elders, the family members and parties themselves which minutes could not have been produced before the confirmation of grant. But even a glance at the said minutes marked as "PCC2" to the applicant affidavit it shows that Neddy Kaban Kipsambu (sister) was to get 5 acres while each of the two brothers each gets 14 acres but what happened in Court is that Neddy Kaban Kipsambu objected to the mode of distribution arguing that she was entitled to an equal share as her brothers and the Court upheld the objection and distributed the estate equally among the beneficiaries.

8 It is refreshing to note that the trial Court grappled with that issue and rendered a decision in accordance with the law and the Constitution of Kenya and the question remains what is this substantial loss that the applicant will suffer and needs to be prevented? If it is that Neddy Kipruto Butuk should be prevented from enjoying her equal share then such a request would to say the least without giving a conclusion view unconstitutional and discriminatory to say the least.

9 By way of recapitulation this is the position as we understand;

That the 1st respondent applied for the letters of administration intestate in the Estate of Penina Teriki Chepkurgat and was issued with a grant of letters of administration intestate on the 5th February, 2019 and the same was confirmed by Hon. J.N. Nthuku on 18th June, 2019 in Eldama Ravine PM Succ No 57 of 2018. The deceased had died intestate leaving behind two sons and a daughter and an estate by L.R Reference LEMBUS/KIPLOMBE/32 measuring approximately 13.60 Ha (33.60633 acres).

10 That during the confirmation of the grant the second respondent rejected the mode of distribution and during hearing of the application for confirmation; she stated that she wanted to receive equal shares as her brothers. The Court vide a ruling delivered on 18th June, 2019 ordered that each beneficiary to get 11 acres each. The applicant herein aggrieved by the Court's decision appealed against the orders."

Issue for determination

[8] The twin issue for determination in this application is whether the appellate will grant the stay of execution of the order of trial court on confirmation of Grant pending appeal and whether it shall grant leave to adduce additional evidence on appeal.

Determination

Stay of execution

[9] The court accepts that the application for stay was brought without delay in accordance with the applicable provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules.

[10] The determination of the trial court which is sought to be appealed from decreed that the three heirs of the deceased, 2 males and 1 female share the estate of their deceased mother equally each taking 11 acres, that is in the ratio of 11: 11: 11 of parcel of land ***Lembus/Lembus/32.***

[11] If stay is not granted all that will happen is that the applicant shall be given 11 acres of the parcel of land as his two siblings. If eventually successful, he shall with his brother get additional 3 acres each to make the alleged agreed ration of 14:5:14. If the respondent has, in the meantime, sold all or any of the portion of her share, an account and compensation may be ordered. The loss of 3 acres when he has already received 11 acres as with everyone else is not a substantial loss.

[12] Moreover, the scheme of distribution for intestate succession in accordance with the Law of Succession Act, 1981 is equal shares among the children regardless of sex. See section 38 thereof providing significantly as follows:

"38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

[13] Prima facie, there cannot be substantial loss occasioned by distribution of estate in accordance with the law. The applicant must demonstrate to the contrary, and in this case, I do not find that he has shown substantial loss on account of any previous benefits to the respondent from the estate, which may justify differential sharing within the terms of section 42 of the Law of Succession Act.

[14] It has also not been shown that the necessary adjustment of the acreages of the respective heirs shall raise any difficulties in the re-surveying and excision of the additional portions as necessary to complete the total adjudged acreage for the applicant, or in any prohibitive cost thereof. The same procedure of surveying and registration of the parcel of land with correct acreage as is done on any transfer of land upon subdivision of land by transmission upon death of the registered owner shall be undertaken.

[15] The allegation that the respondent has threatened to sell her portion to third parties is not demonstrated by evidence to warrant intervention by the court and the mere fact of sale of the property does not make the appeal nugatory for irreparability, as the court may order recompense if the applicant was successful on appeal. When weighed against the interests of the respondent to enjoy her inheritance, the applicant's fear of loss by sale of the land, which loss is not irreparable must give way.

Whether to admit additional evidence

[16] The principle of due diligence in application for admissions of additional evidence on appeal, that the evidence was not available to the

party seeking to use it at the trial or that reasonable diligence would not have made it so available is central to grant of leave. See *Tarmohammed v. Lakhani* (1958) EA 567 cited by the applicant, where it was held that –

“i. Except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.”

There is no evidence that the evidence sought to be adduced was not available at the trial court.

[17] The evidence by way of two agreements upon family meetings on distribution is already before the court by way of annexures to the unsuccessful application for review before the trial court, as well as in the application for leave to adduce additional evidence in this court. The record of the family meetings of 25/8/2017 and 24/4/2019 are, in any event, conceded by the Respondent as shown in the Affidavit set out herein and in Counsel’s submissions before this court.

[18] The trial court’s ruling of 18th June 2019 even notes that the application for confirmation sought an uneven distribution of 14 acres for the applicant; 14 for his brother and 5 acres for their sister but that ***“Nelly objected to the mode of distribution arguing that she is entitled to an equal share as her brothers. The petitioner’s response was that he has no problem with that the court can distribute the estate equally among the three of them but Paul Chepkwony objected saying the lady should not get an equal share as the men....”***

[19] Indeed, the Respondent’s replying Affidavit set out in paragraph [3] herein above does not deny the existence of the minutes of the family meetings, it rather challenges the legality of the position taken in the Minutes.

[20] *The nature of the additional evidence is known with the respondents admitting he Minutes and challenging their legal position and indeed the proposed distribution of the Estate was filed as a schedule to application for confirmation of Grant.*

[21] The dispute before the trial court and in this appeal lies not in the fact of Minutes of agreement to share the estate property in the manner set out in the Minutes but in the legality and impact of the distribution proposed in the said Minutes as against the Law of Succession Act. It is an appeal on a matter of law rather than of fact.

[22] As the record of the trial court, and the original file, in which the alleged agreement Minutes are attached shall on appeal be availed before this court there is no warrant for the formal production of evidence of the Minutes.

[23] Moreover, it is not technically a fact in issue as defined in section 3 of the Evidence Act as *“any fact which, either by itself or in connexion with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding necessarily follows.”*

[24] The dispute is not whether the parties or the larger family of the deceased had met and agreed on the distribution prior to the application for confirmation. It is whether the family members could agree to distribute intestate estate in such a manner, that a child heir receives a lesser share, unequal with other children without her consent.

[25] No useful purpose, therefore, shall be served by an order for the taking of additional evidence of the minutes which are already before the court in various annexures and which the trial court has adverted its mind to in its ruling subject of this appeal. It will only delay the fair determination of this appeal.

Duty of court to hear application for confirmation of Grant

[26] To be sure, the authority cited by the applicant in *Re Estate of Elizabeth Wanjiru Waweru – Deceased* [2017] eKLR does not hold that as urged by counsel for the applicant that ***“as long as the agreement was consented to by all the parties, then the court should have adopted it.”***

[27] The full text of the paragraph in the judgment of A. K Ndungu, J., from which the applicant derives support is as follows:

“14. In the same vein, in our instant case, the beneficiaries who purported to distribute the estate herein in a meeting had no authority so to do under any written law, nor did they have a grant of representation. The best that meeting could have achieved would have been to strike an agreement on distribution which would if all the parties consented be adopted by the court in the confirmation stage. That meeting and the outcome was not binding.”

It is clear that the court was underlining the low value of distribution agreement by intermeddlers to an estate. In the present case, it is common ground that at the stage of hearing the application for confirmation, the female beneficiary did not agree to the proposed distribution giving a lesser share to the estate.

[28] The trial court is under a duty to hear and determine an application for confirmation in accordance with Rule 41 of Probate and Administration Rules. The succession court has a duty to hear an application for confirmation of Grant of representation under Rule 41 of the Probate and Administration Rules as follows:

“41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the Court shall first read out in the language or respective languages in which

*they appear the application, the grant, **the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.***

*(2) The Court may either confirm the grant or refer it back for consideration by the applicant **or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.***

[29] On the hearing an appeal from such a determination the court is entitled to look at the evidence presented before the trial court and make its own decision. In the interests of justice the application for production of additional evidence which is already before the court by annexures to various applications in this court on the application for additional evidence and the trial court on the application for review before it which will only delay the fair determination of the dispute which does not relate to the existence or otherwise of the minutes but to the legal effect thereof, must be declined.

[30] I do not find any merit in the application for admission of addition evidence before this court, and the request for leave therefor is rejected.

Conclusion

[31] The court has considered the application on the principles of substantial loss, that the appeal if successful shall be rendered nugatory. The court is not persuaded that the applicant shall suffer substantial loss that is irreparable as to make the appeal, if successful, nugatory.

[32] On request for leave to admit evidence on appeal, the court is not persuaded that the evidence sought to be adduced could not be presented at the trial court with due diligence. Indeed, it is the view of this court that the said evidence was considered by the trial court in its ruling from which this appeal is preferred. The request for leave to adduce evidence on appeal is declined.

ORDERS

[33] Accordingly, for the reasons set out above, the application for stay of execution and admission of additional evidence made to this court by Summons dated 7th August 2019 is dismissed.

[34] The costs of the application shall be costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF JANUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kipruto Gitau & Co. Advocates for the Appellant.

M/S Arusei Co. Advocates for the Respondent.