



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MERU

SUCCESSION CAUSE NO 308 OF 2010

IN THE MATTER OF THE ESTATE OF M'IMIRONGO M'UTHAKA....DECEASED

ANDREW MURIUKI M'UTHAKA.....1ST PETITIONER

PATRICK KAMENGU.....2ND PETITIONER

JOHN MUTUMA ROBERT.....3RD PETITIONER

VERSUS

SUSAN NKATHA.....1ST OBJECTOR

DAVID MUGAMBI.....2ND OBJECTOR

LUCY KAMAMI.....3RD OBJECTOR

FREDRICK KABERIA.....4TH OBJECTOR

RULING

1. Before this court is an application dated 5th May 2020 brought under certificate of urgency pursuant to Section 3 A, 75 ,78,79G of the Civil Procedure Act and Order XLI(4) Rule of the Civil Procedure Rules and all enabling provisions of the law seeking for stay of execution of the ruling delivered on 27th day of April 2020 pending the hearing and determination of the application and pending the hearing and determination of the intended appeal .The applicant also sought that orders issue stopping the OCS Laare Market from evicting the tenants in Plot No .3 Laare Market and from issuing illegal verbal notices with illegal threats in an attempt to execute the ruling which was delivered on 27th April 2020.The Application is supported by the grounds set on the face of the application and on the undated supporting affidavit of Patrick Kamencu
2. The Applicant was ordered to serve the application on the Respondents and have the same heard on 11th May 2020 by way of written submissions.
3. When the file was transmitted to me in Nairobi by EMS on 13th of May 2020, the written submissions had not been filed and there was nothing to show that the Respondents had been served.
4. In the supporting affidavit of the Applicant it is claimed that if stay orders are not granted pending intended appeal the intended appeal will be rendered nugatory and the Applicant is unlikely to recover damages in the event he succeeds and stands to suffer.A notice of appeal dated 29th April 2020 is annexed to the Applicant's supporting affidavit.
5. By a notice dated 11th March 2020 the Applicant had withdrawn an earlier notice of appeal dated 21st February 2019 before filing the application dated 27th February 2020 .
6. Although there is no written submission filed by the Applicant and although there is no evidence that the Respondents in this matter were served, I have considered the Applicant's application and find that although he is seeking for stay of execution of the orders made on 27th April 2020 that application is not accompanied by an application for leave to appeal against the orders of the High Court to the Court of Appeal .

7. In CurryianOkumu Vs Perez Okumu and 2 Others Mombasa HC Succession No.46 of 2014 ,Thande J held that 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.

8. If this court were to grant orders of stay without the Applicant having obtained leave to appeal against the orders made herein it would be an exercise in futility and court orders should not be made in vain.

9. Similarly in **RE Estate of Solomon Mwangi Waweru 2019 eKLR**, Justice A.K Ndungu held that an application for leave to appeal in succession matters is central to application for stay and that without leave an order for stay would be in vain.

10. The Court of Appeal in **Rhoda Wairimu Karanja & Another –vs- Mary Wangui Karanja & Another** while citing with approval its earlier decision in **Francis Gachoki Murage –vs- Juliana Wainoi Kinyua & Another** stated inter alia;

“We think we have said enough to demonstrate that under the Law of Succession Act, there is not 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 probate and administration disputes.”

11. Guided by the above authorities as well as the law of succession I do find that without the Applicant applying for leave to appeal against the order of this court within the stipulated period her application for stay is rendered incompetent.

12. The application dated 5th of May 2020 is therefore dismissed with no orders as to costs.

HON.A. ONG’INJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 28TH DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONG’INJO

JUDGE