



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 100 OF 2004

IN THE MATTER OF THE ESTATE OF GITUCHA MAGOCHI ALIAS KANJA MJUGUNA (DECEASED)

STEPHEN MWATHA KANJA.....APPLICANT

VERSUS

PETER KIARIE NJUGUNA

BETH MIRIGO.....RESPONDENTS

RULING

1. This ruling relates to the amended Notice of Motion dated 19th of June, 2019 which in essence seeks for two substantive prayers to wit

- **Stay of execution of the orders made by learned Judge on 29th of August 2017 and subsequent orders of 13th September 2018 and**
- **A temporary injunction restraining the respondents from interfering with the suit property pending hearing and determination of an intended appeal.**

2. The application is predicated on grounds that the Applicant being aggrieved and dissatisfied with the decision of this court has preferred an appeal and that the rental income received from Plot No. 6 in Gatundu market is in danger of being interfered with.

3. The application was objected to on grounds that the respondents are not aware of any appeal preferred following the ruling of the court and no stay orders had been applied for; the application was filed too late in the day and is an attempt now to derail the matter.

4. In his submissions counsel for the Applicant submits that all the necessary ingredients for stay orders to issue have been met and the Applicant is ready to offer security. Counsel urges that the ruling having been delivered on 13th September 2019, the appeal was filed on 5th December, 2018 and application for stay made on 18th of March, 2019 and which application was amended on 21st June, 2019. Secondly, unless the order is issued the Applicant's right of appeal will be taken away from him and he is likely to suffer irreparable loss. Thirdly he is ready to provide security.

5. As for the injunction, the property was gifted to his mother and pending the appeal there is need to preserve the same.

6. In opposing the application counsel for the Respondents urges that the Applicant moved to court 2 years after Ougo J delivered her judgment yet the court was moved on 19th of June, 2019. An application seeking for stay ought to be made without undue delay.

As to whether there is likelihood of loss, counsel urges that no threat, danger or loss has been exhibited as a joint bank account has been opened to avoid the Estate going to waste.

Counsel also argues that no leave to file an appeal was ever sought.

7. The Applicant exhibited an application filed in the Court of Appeal dated 4th December 2018 seeking the prayer for an injunction in similar terms as the one in this application. Should the Applicant seek to present the same prayer in two courts? I think not Further nothing was said of what became of the said application filed under Certificate of Urgency in the Court of Appeal.

8. Section 56 of the Law of Succession Act sets the parameter of preferring appeals as follows:

i. **“Appeal shall be to the High Court in respect of any order or decree made by resident magistrate in respect of any estate and the decision of the High Court shall be final.**

ii. **An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi in respect of the estate of a deceased mother and with prior leave thereof in respect to any part of Muslim law, to the Court of Appeal”**

9. The impugned judgment by Ougo J was as a result of the decision of the Chief Magistrate Thika in Succession Cause No. 205 of 2001 where the court faulted the magistrate’s decision.

There is no application oral or in writing by the applicant seeking for leave to appeal, either in this court or even in the Court of Appeal. And is there right of appeal?

10. The Respondent’s counsel urged that leave is necessary. In **Rhoda Wairimu Karanja and another vs Mary Wangui Karanja & Another 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 be 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, was 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 a good practice that ought to be returned in order to promote finality and expedition in the determination of probate and administration disputes.”

11. In this instance, the court was reviewing an order of the Chief Magistrate’s Court and not exercising its original jurisdiction and if this is in doubt, in any event, an appeal without leave in a succession matter is a nonstarter. Thirdly, both the initial application and the amended one were filed inordinately late with no explanation as to the cause of delay. Lastly, the parties have opened a joint account so that the 2nd prayer has been taken over by the events.

12. From the foregoing the application is declined and costs awarded to the Respondents.

DATED DELIVERED AND SIGNED THIS 11TH DAY OF JUNE, 2020.

.....

ALI-ARONI

JUDGE