



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

P & A CASE NO. 99 OF 2015

IN THE MATTER OF THE ESTATE OF ATEKA KIAGE.....DECEASED

BETWEEN

JOHN ATUTI ATEKA.....APPLICANT/PETITIONER/PROTESTOR

=VRS=

MORAA ATEKA.....OBJECTOR/RESPONDENT

RULING

Before me for determination is the Notice of Motion dated 30th March 2020 which seeks orders: -

“(a) THAT this application be certified as urgent and the same be heard ex-parte on priority basis.

(b) THAT this Honourable Court be pleased to order that pending the hearing and determination of the instant application an interim order of stay of execution and/or implementation of the Judgement/Decree dated 19.12.2019 and/or grant an interim order of status quo, barring and inhibiting the registration Certificate Confirmation of Grant herein.

(c) THAT this Honourable Court be pleased to order that pending the hearing and determination of the intended appeal and order of stay of execution and/or implementation of the judgement/decree dated 19.12.2019 and/or to grant an order of status quo, barring and inhibiting the registration of Certificate of Confirmation of Grant herein.

(d) THAT leave be granted to the Petitioner/Protestor to file an appeal to the Court of Appeal of Kenya against the judgement/Decree of this Court dated 19.12.2019.

(e) Costs of this application do abide the Appeal.”

The gist of the application is that an appeal against the judgement/decree of this court to the Court of Appeal only lies with the leave of this court; that the applicant has already filed and served a Notice of Appeal and that unless stay of execution of the certificate of confirmation herein is granted the substratum of the intended appeal shall be rendered nugatory. Further, that there is also a likelihood of the assets being transferred to third parties which is impossible to reverse in light of Section 93 of the Law of Succession Act; that the applicant stands to suffer irreparable/substantial loss if the order of stay is not granted and that it is in the interest of justice that the application be allowed. The application is supported by the affidavit of John Atuti Ateka, the applicant/protestor sworn on 30th March 2020.

In opposition the respondent filed a replying affidavit sworn by herself on 11th May 2020 in which she deposes that the Notice of Appeal lodged in the Court of Appeal is incompetent as it was filed by an Advocate who was not previously on record in this cause; that the consent signed by the Advocate previously on record does not come to the aid of the applicant; that once a notice of appeal has been filed this court ceases to have jurisdiction in this cause and that it was incumbent upon the applicant to seek the leave of this court before filing the Notice this being a probate cause. The respondent further deposes that time within which to lodge the appeal is limited to sixty days and has lapsed and cannot be extended by this application. She deposes that even were leave to be granted the appeal lodged would be for striking out as the petitioner has not sought an order for extension of time yet the judgement/decree was issued six months ago. She states that the appeal has no chances of success and is only calculated to delay the resolution of the dispute; that the delay in filing the appeal is unreasonable; that the application has no merit as the applicant has not demonstrated irreparable/substantial loss or that the appeal would be rendered nugatory if stay is not granted. The respondent points out that whereas the Notice of Appeal was lodged on 9th January 2020 this application was filed 120 days later; that moreover the application is incompetent as there are no provisions for a Notice of Motion in the Law of Succession Act and that this court has no jurisdiction to grant the orders sought and further that the application is an abuse of the court process and it ought to

be struck out forthwith.

The application was canvassed by way of written submissions. On the issue of the application having been filed by an Advocate other than the one who was on record for the applicant in the cause, Counsel for the applicant submitted that the Advocate filed a Notice of Change of Advocates and a consent executed by the Advocate previously on record and hence the application is competent and so is the Notice of Appeal. Counsel cited **Order 9 Rule 5 of the Civil Procedure Rules** to support his submission that a party is at liberty to take up or instruct a new advocate at the appeal stage without necessarily seeking leave to do so.

On whether this court has jurisdiction to grant the leave sought, Counsel cited **Section 7 of the Appellate Jurisdiction Act** which states: -

“The High Court may extend the time for giving notice of intention to appeal from a judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.....”

Counsel contended that under the above provision this court has power to extend time for filing an appeal and that in succession causes an appeal from a decision of this court to the Court of Appeal only lies with leave. To buttress this submission Counsel cited the decision of the Court of Appeal in **John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR** where he submitted it was held that: -

“..... Under the law of Succession Act, there is no express automatic right of Appeal 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.....” (sic).

Counsel argued that the applicant has filed this application in order to exercise his constitutional right; that the succession cause involved two parcels of land and the parties herein are not agreeable to the mode of distribution of the estate. He contended that the respondent stands to suffer no prejudice should the application be allowed and that justice requires that the status quo be maintained until the intended appeal is heard and determined. He contended that the delay in bringing the application is not inordinate and the application should be allowed.

For the respondent, it was submitted that the applicant did not demonstrate he stands to suffer irreparable loss; that the delay of six months has not been explained yet the applicant’s advocate was present when judgement was delivered; that there is no automatic leave to the Court of Appeal in succession causes and it behoved the applicant to seek leave yet he went ahead and lodged a Notice of Appeal without first obtaining leave and as such the notice is improperly before the court. Further that the said irregularity is incurable and there is no appeal on which the instant application is premised. Counsel for the respondent further submitted that the application has not been made in good faith but is only intended to deny the respondent the fruits of her judgement. Counsel also contended that the discretion of this court ought to be exercised judiciously and that as the applicant has failed to establish he is entitled to the orders sought this application should be dismissed with costs. In support of the above submissions Counsel cited the following cases: -

- **Kungu Muthua v James Icharia Kungu [2015] eKLR.**
- **In re estate of Sarastino M’chabari M’kubai (Deceased) [2019] eKLR.**

I have considered the application, the grounds thereof, the replying affidavit, the rival submissions and the law and in my view the issues that call for determination are: -

- 1. Whether the application and the Notice of Appeal are competent.**
- 2. Whether the application is properly before this court and whether this court has jurisdiction to hear and determine the same.**
- 3. Whether the orders sought are merited.**

Issue No. 1 – Whether the Notice of Appeal and Application are competent.

The contention here is that the Notice of Appeal lodged herein on 19th January 2020 and the instant Notice of Motion are incompetent for being filed by an Advocate other than the one who represented the applicant in the cause. It is my finding however that the Advocate now on record having filed a Notice of Change of Advocate and the previous Advocate having consented to the Advocate coming on record, nothing turns on that issue. A party after all has a right to be represented by an Advocate of his choice and **Order 9 Rule 5 of the Civil Procedure Rules** and **Rule 23 of the Court of Appeal Rules** also recognise the right of a party to change their Advocate. In any event **Article 159 (2) (d) of the Constitution** prohibits this court against giving undue regard to such procedural technicalities.

Issue No. 2 – Whether the Application is properly before this Court and whether this Court has jurisdiction to dispose of it.

My finding is that the Notice of Motion is properly before this court and that this court has jurisdiction to hear and determine the same. It is trite that in succession matters, appeals from the decisions of the High Court to the Court of Appeal only lie with the leave of the High Court. This position was reiterated by the Court of Appeal in the case of **John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR** where the court held: -

“9We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another

[2014] eKLR and Josephine Wambui Wanyoike – v- Margaret Wanjari Kamau & another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. 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 the application for leave 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).

11. 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. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant.”

It is my finding therefore that the application is properly before this court.

As to the contention that the filing of the Notice of Appeal ousts the jurisdiction of this court **Rule 75 (1) & (2) of the Appellate Jurisdiction Act** state:-

“75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

It is thus clear from the record that the Notice of Appeal herein was filed in compliance to **Rule 75 (1) and (2) of the Court of Appeal Rules (2010)**. Further, **Rule 75 (4)** provides that where leave is required such leave need not have been obtained before the Notice of Appeal is filed. Sub-rule 4 states: -

“75 (4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

A party therefore may first lodge the Notice of Appeal and then proceed to obtain leave and the Notice of Appeal does not oust the jurisdiction of the High Court to entertain the application. Such applications are provided for in **Rule 39 (a)** which states: -

“39. Application for leave to appeal in civil matters –

In civil matters—

(a) where an appeal lies on certification by the superior court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision.....”

Rule 39 (a) provides that the application may be by motion or chamber summons according to the practice of this court and so nothing turns on the issue raised by Counsel for the respondent that it is bad for being brought by way of Notice of Motion. Further, whereas the rule requires that the application should, if not made informally at the time of making the decision, be made within fourteen days, **Section 7 of the Appellate Jurisdiction Act** expressly cloths this court with power to extend the time when it states: -

“7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

I believe I have said enough to demonstrate that the application is properly before this court and that this court has jurisdiction to hear it.

Issue No. 3 – Whether the orders sought are merited

The intended appeal arises from the decision of this court as to the mode of distribution of the deceased’s estate. The beneficiary who is aggrieved has a right to appeal as only once a final determination is made and the matter is finally settled shall peace prevail in the family of the deceased. Other than the procedural technicalities, Counsel for the respondent has not demonstrated any prejudice that would befall his client should the application be granted. The estate shall remain intact after all. I am also not persuaded that the delay in bringing this application is inordinate given the circumstances we find ourselves in due to the Covid-19 pandemic and the Notice of Appeal having been lodged in good time. Accordingly, **leave to appeal is granted** and so as to preserve the estate and to protect the rights of the beneficiaries, **an order for stay of execution of the Certificate of Confirmation issued by this court on 19th December 2019 shall also issue pending the hearing and determination of the appeal.** The costs of this application shall abide the appeal. It is so ordered.

Signed, dated and delivered at Nyamira this 24th day of September 2020.

E. N. MAINA

JUDGE