



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 167 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE HARON LITABA AKHABELE- (DECEASED)**

**SELLAH KHABELE LITABA.....1<sup>ST</sup> PETITIONER**

**MARGARET AYOMBA ANGUKO.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSES**

**JAPHET OSILU LITABA.....1<sup>ST</sup> OBJECTOR/RESPONDENT**

**MARGARET MUSARI LITABA.....2<sup>ND</sup> OBJECTOR/RESPONDENT**

**RULING**

1. The Applicant's application dated 9<sup>th</sup> July 2020 prays for the following reliefs;

**(a) That there be stay of the judgement of this court dated 5<sup>th</sup> May 2020 pending the determination of this application.**

**(b) That this court be pleased to grant leave to the 2<sup>nd</sup> Petitioner to appeal to the Court of Appeal from the judgement herein dated 5<sup>th</sup> May 2020.**

**(c) That the Notice of Appeal lodged on the 11<sup>th</sup> May 2020 be and is hereby deemed to have been properly filed with the leave of the court.**

**(d) That there be stay of execution of the judgement dated 5<sup>th</sup> May 2020 and the decree thereof pending the hearing and determination of the intended appeal.**

**(e) Costs of this application.**

2. The application is supported by the 2<sup>nd</sup> Petitioner's affidavit sworn on the same date as well as the grounds on the face of the application.

3. Basically all that the Applicant is stating is that she should be given a chance to test the judgement of this court dated 5<sup>th</sup> May 2020 at the Appellate Court. She says that there are weighty legal issues which she feels that this court failed to address itself and therefore a chance should be given to her to ventilate them at the said upper court.

4. For the above reasons, there is need to seek the leave of the court as there is no automatic leave to appeal to the Court of Appeal without leave from this court. Earlier on, the Applicant had filed a notice on 11<sup>th</sup> May 2020 but the same was wrong as it did not seek the leave as required from this court. In the premises, she prays that the same be deemed filed within time.

5. The Applicant further prays that the impugned judgement and the resultant decree be stayed pending the determination of the intended appeal. She says that if implemented she stands to suffer serious loss and damage especially if Land Parcel number **Kakamega /Mabusi/18** is subdivided and transferred to the beneficiaries.

6. On his part the 1<sup>st</sup> Respondent has sworn a replying affidavit dated 17<sup>th</sup> July 2020 in which he states that the application is unmerited as it has failed to comply with the relevant provisions of the law and that this court did not have jurisdiction to entertain the same. He said that the applicant has not demonstrated what loss she stands to suffer if the judgement is implemented.

7. The position of this court regarding an appeal in succession matters was well stated in the case of **RHODA WAIRIMU KIOI & ANOTHER VERSES MARY WANGUI KARANJA & ANOTHER C. A. NAI 69 OF 2014** where the Court of Appeal rendered itself as follows;

*“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 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.”*

8. Taking cue from the above quotation, it's clear that the Applicant has no option but to seek the intervention of this court. The Applicants then counsel on record had already filed a notice of appeal within the requisite time. It shows that the Applicants had the intention of failing an appeal despite the wrong procedure applied.

9. This court despite the averments by the Respondent is seized with the relevant jurisdiction to grant leave to a party such as the Applicant. The application has been made within a reasonable time in the circumstances. The only issue is whether in allowing this prayer the Respondents stands to suffer any harm or loss. There is no evidence of any harm they may suffer. The Applicants must be granted their constitutional right of appeal.

10. Apparently the Applicant as at the time of arriving at the decision of this court was enjoying the usage of the land namely **Kakamega / Mabusi/18** whereas the Respondent was staying in Kisumu. This court does not find any grounds to believe that the Applicant stands to suffer any loss. The rest of the beneficiaries including the church must be allowed to enjoy the usage of the estate.

11. At any rate the appellate court has the liberty to make such far reaching orders should it find this court's judgement untenable.

12. In the premises the application is hereby allowed as follows;

**(a) The Applicant is hereby granted leave to file the notice of appeal within 14 days from the date hereof and the main appeal out of time.**

**(b) The Applicant's prayer for stay of execution pending appeal is rejected.**

**(c) Costs of this application to the Respondents.**

**Dated, Signed and Delivered at Kitale this 27<sup>th</sup> day of October 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**27/10/2020**