



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 49 OF 2016

(FORMERLY MERU H.C SUCC. CAUSE NO. 191 OF 1996)

IN THE MATTER OF THE ESTATE OF GEOFFREY KIRICHO MBOGORI (DECEASED)

JANE KAGIGE GEOFFREY.....1ST PETITIONER

KARIMI KIRICHO.....2ND PETITIONER

VERSUS

WALLACE IRERI NJERU.....INTERESTED PARTY

BRAZON MUNENE KIRICHO.....1ST OBJECTOR

CHARITY KAIMURI GEOFFREY.....2ND OBJECTOR

R U L I N G

1. Before me is an application by way of summons dated 22nd February 2019 brought pursuant to **Rules 73 and 49 of Probate and Administration Rules**. Wallace Ireri Njeru (the Applicant herein) has invoked this court's inherent powers under the cited rules for the following order/relief:-

i. This honourable court be pleased to certify this application urgent (prayer spent).

ii. This honourable court be pleased to stay the implementation of certificate of grant herein pending the hearing and determination of this application.

iii. That this honourable court be pleased to stay the implementation of the certification of confirmation of grant issued herein pending the hearing and determination of the appeal preferred by the applicant.

iv. Costs of this application.

2. The grounds upon which this application has been brought are listed as follows:

a. That a judgment has been delivered by this court and distribution of the estate has been determined as per the certificate of confirmation of grant.

b. That the Applicant was aggrieved by the decision of this court and has preferred an appeal.

c. That the appeal has high chances of success as the Applicant's claim was not disputed by the family of the deceased.

d. That the Applicant may stand to suffer if the subject matter change hands to 3rd parties.

e. That the appeal may be rendered nugatory in the event that he succeeds when the Suitland has changed hands.

f. That the Applicant stand to be evicted from the estate where he has developed and therefore occasioned him great loss.

g. That unless the orders sought are granted, the grant shall be implemented and the appeal presented by the Applicant may be overtaken by events if 3rd parties occupy the land.

h. That it would be in the interest of justice to grant the orders sought as it would not prejudice any party.

3. In his Supporting Affidavit, the applicant has reiterated the above grounds adding that he occupies about 4 1/2 acres of the estate.
4. In his written submissions through Mitheka and Kariuki Advocates, the Applicant has contended that the provisions of **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** does apply in succession matters and that a party must prove that substantial loss may result unless stay is granted and that the application has been made with some expediency. He contends that he stand to suffer substantial loss owing to the fact that he has substantially developed the portion he occupies and that he stands to lose the developments in the portion he occupies if stay is not granted.
5. The Applicant has submitted that prior to the determination of this cause, an order of *status quo* had been issued on 13th December 2016 after the Applicant sought to restrain the Respondent from interfering with the portion he had purchased. He has faulted the Respondent for acting in bad faith when he denies that the Applicant is in occupation of 4 1/2 acres.
6. The Applicant contends that the Respondents has not demonstrated what prejudice or loss they would suffer if the stay is granted. The Applicant has urged this court to preserve the substratum of the appeal and the support this contention he has cited the decision in ***Re Estate of the late Wambui Njeru (deceased) 2018 eKLR*** where the court held that if the estate transmitted to beneficiaries they would be at liberty to deal with the land as they deem fit and that should the appeal go in favour of the Applicant, there would be no land. He has further relied on the following authorities in urging this court to order for a *status quo*.
 - i. **Mugali -vs- Kunga (1988) KLR**
 - ii. **Re Estate of George Kagimbi Mbote (Deceased) [2017] eKLR**
 - iii. **Re Estate of Zakayo Kipkoech Kirui (deceased) [2014] eKLR**
7. The applicant further contends the present application was filed promptly as it was filed on 25th February 2019 when the Judgement was delivered on 19th December 2018.
8. The 1st Objector/Respondent has opposed this application through a Replying Affidavit sworn on 4th April 2019. He states that this application is meant to cause delay and derail enjoyment of fruits of Judgment.
9. The Respondent further avers that the Applicant has not developed or occupy any part of the estate. He has insisted that the Applicant did not purchase any portion from the deceased and is not a beneficiary and his claim in his view cannot succeed even on appeal as it lacks merit.
10. In his written submissions done through Charles Kariuki and Kiome Associates, the Respondent contends that the Applicant does not occupy the estate in the first place and as such he cannot talk about eviction.
11. The Respondent has urged this court to exercise its discretion judiciously in determining this application. He contends that on substantial loss, the applicant stands to suffer no substantial loss as he has not proprietary interests on the estate. In his view, the Applicant cannot suffer a substantial loss for something he do not own or occupy. He has termed as lies the Applicant's claim that he is in occupation of 4 1/2 acres of the estate.
12. The Respondent has further faulted the Applicant's offer for security for the prosecution of the appeal, arguing that the same is merely meant to delay the process of transmission of the estate to the rightful beneficiaries. He further avers that the Applicant is merely out to frustrate that process in order to delay the fruits of judgment to the rightful beneficiaries.
13. This court has considered this application and the response made by Brazon Munene Kiricho, one of the beneficiaries of the estate herein. It is true that an order of stay of execution is a discretionary matter which can be issued by a court in the exercise of its inherent power under **Rule 73 of the Probate and Administration Rules** and **Section 47 of the Law of Succession Act**. I am not persuaded that **Order 42 Rule 6 of the Civil Procedure Rule** strictly apply in succession matters since as by construction, that order is not one of the rules applicable under **Rule 63(1) of the Probate and Administration Rules**. I am nevertheless persuaded that the principles enunciated under **Order 42 of the Civil Procedure Rule** can be applied whether a stay of execution of a certificate of confirmation should be granted.
14. This court in the exercise of inherent powers under **Section 47 of Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** is required to make any such orders that promotes expediency and meets the ends of justice. Now looking at the application before me, the Applicant states that he was dissatisfied/aggrieved by the decision of this court and has either appealed or intends to appeal. What is however clear from the record is that the Applicant has never sought leave to appeal against the decision of this court.
15. It is true that unlike civil cases where a right of appeal is automatic in certain instances, as enumerated under **Order 43 of the Civil Procedure Rules**, the Law of Succession Act under **Section 50** provides that right to appeal from this court to the Court of Appeal lies with leave. This subject has been litigated in other instances and the position to the best of my knowledge has not changed. In ***Re Estate of***

Mbiyu Koinange (deceased) [2015] eKLR, an intended Appellant had sought for stay of execution, on the strength of a notice of appeal filed with leave and the court held that leave of court to appeal is required in probate matters. The court citing Makhanu - vs- Kibwana (1996- 1998) 1 EA 16 observed that the Court of Appeal in several decision had settled that though the **Law of Succession Act, Cap 160**, does not specifically provide for appeals from the original decisions of the High Court to the Court of Appeal, the appeal does lie with leave to the Court of Appeal.

16. This Court's position is further embolded by the Court of Appeal decision in **RHODA WAIRIMU KARANJA & ANOTHER -VS- MARY WANGUI KARANJA & ANOTHER [2014] eKLR** where the Court of Appeal belaboured the need for an aggrieved party in the High Court to seek leave in order to appeal particularly when the High Court is exercising its original jurisdiction over a matter as in this instance. The court stated as follows:-

"We think we have said enough to demonstrate that under 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 considerations. 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."

17. The Applicant in this application has stated he intends to expeditiously pursue his appeal but I have noted from the record that he applied for proceedings on 23rd January 2019 and though the proceedings have been typed, the Applicant has not come to collect them. There is no doubt therefore that he has not filed his appeal and his position is legally precarious because as I have observed above, he has not sought leave to appeal. It is not tenable therefore to say that he stands high chance to succeed because any such expedition without leave is doomed to fail.

18. I have also noted besides the above that the Applicant's contention that he has carried out developments on 4 1/2 acres and stands to suffer substantial loss has been denied in equal measure by the Respondent who has stated on oath that one the Applicant does not occupy any part of the estate and two, he has not carried out any development. The Applicant should have filed another affidavit to contest the averments by the Respondent rather than respond through written submissions as he has done.

In the end, I find no merit in the application dated 25th February 2019. For the afore said reasons the Applicant has not shown any basis to persuade me exercise my discretion in his favour. This application therefore is disallowed but I shall not make any order as to costs.

Dated, signed and delivered at Chuka this day of 24th July, 2019.

R. K. LIMO

JUDGE

24/7/2019

Ruling dated, signed and delivered in the open court in presence of Kariuki for Interested Party/Applicant and in the absence of Mwanzia for Petitioner and Kiome for Objector.

R. K. LIMO

JUDGE

24/7/2019