



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NO. 57 OF 2015**

**IN THE MATTER OF THE ESTATE OF JOHN MACHARIA NGETHE (DECEASED)**

**JANE MUTHONI NJOGU.....PETITIONER**

**AND**

**VIRGINIA WANGARI KAMAU.....OBJECTOR**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mureithi for the Petitioner**

**Mr. Mwaure for the Objector**

**RULING**

This an application by Virginia Wangare Kamau in which she seeks two orders of this court. The first being leave to appeal against the decision of the court dated 15<sup>th</sup> October, 2019. That pursuant to prayer No. (1) stay of execution of the judgement and decree arising as a consequence of the decision pending the hearing and determination of the appeal.

The factual background of case are to be deduced from the pleadings, evidence, submissions by both counsel and final judgement of the court. In proceeding to determine the notice of motion filed in court on 29<sup>th</sup> October, 2019, I need not labour the point on the salient issues and this court is appreciative of the dispute as ventilated by the parties.

**Analysis**

The central issue can be distilled into two:

1. Firstly, whether the applicant has satisfied the criteria to approach this court for special leave to appeal to the Court of Appeal against the judgement dated 15<sup>th</sup> October, 2019.
2. Secondly, corollary to issue No. (1) whether the circumstances demand a stay of execution as of right and on the basis of the applicable principles.

**Issue No. 1**

It is plain from the provisions of Section 50(2) of the Law of Succession, an appeal to the Court of Appeal is founded on prior leave being granted and on a point of Law. The special feature identified by the section to warrant such special leave to appeal is on such an error of law on the matter if left intact is likely to occasion substantial injustice.

In the instant motion the applicant arguments are such that the court's interpretation on mode of distribution of the Estate erred in not taking into account that special circumstances existed not to apply the doctrine of equal share in terms of Section 35, 38 and 40 of the law of succession.

I accept that the applicant feels aggrieved that it would be a terrible injustice and unconscionable, though I am not sure that she has an arguable case on the merits albeit academic to me I am persuaded to grant leave to have the issue heard and determined on appeal.

With regard to stay under Order 42 Rule 6 of the Civil Procedure Rules, the grounds adduced by the applicant in her affidavit that to the best of her information and belief that she has good chances of success on appeal persuades me to exercise discretion to grant stay of execution of the judgement that would otherwise render the appeal nugatory. Therefore the applicant's notice motion dated 28<sup>th</sup> October, 2019 is hereby allowed.

**RULING READ AND DELIVERED IN OPEN COURT AT MALINDI THIS 23<sup>RD</sup> DECEMBER, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of: -**

Mr. Gekanana for Mr. Mureithi