



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2270 OF 2001**

**IN THE MATTER OF THE ESTATE OF NJOROGE GITAU (DECEASED)**

**RULING**

1. On 5<sup>th</sup> May 2017, Muigai J. delivered a judgment herein, which I had signed and dated on 3<sup>rd</sup> May 2017. On 16<sup>th</sup> May 2017, Peris Wanjiru Njoroge, lodged a letter, dated 15<sup>th</sup> May 2017, in court requesting to be supplied with certified copies of the proceedings, judgment and decree in respect of the judgment delivered on 5<sup>th</sup> May 2017, with an eye to appealing against it. She followed that up with a notice of appeal, dated 16<sup>th</sup> May 2017, which was lodged at the registry on 17<sup>th</sup> May 2017.

2. The application that I am called upon to determine is a Motion dated 30<sup>th</sup> May 2017, which seeks stay of the judgment that was delivered on 5<sup>th</sup> May 2017 pending appeal. In the supporting affidavit Peris Wanjiru Njoroge states that she is aggrieved by the judgment and evinces an intention to appeal against it hence the steps that she had taken as recited in paragraph 1 of this ruling.

3. The other side, Raphael Maina Gitau, upon being served filed a notice of preliminary objection and replying affidavit. The preliminary objection is founded on Order 42 Rule 6 of the Civil Procedure Rules, on grounds that the applicant has not demonstrated that she would suffer substantial loss and that she had not offered security for due performance of the decree. He raises the same arguments in the replying affidavit.

4. Directions were given on 14th June 2017 that the Motion be disposed of by way of written submissions. The parties complied with the directions and filed their respective written submissions, inclusive of the authorities that they proposed to rely on. I have read through the submissions and authorities and noted the arguments made therein.

5. The applicant was party to the proceedings that culminated in the judgment of 5<sup>th</sup> May 2017. She is within her rights to be dissatisfied with the said decision and to appeal it. I note that she moved with speed to request for typed copies of the proceedings and judgment, as well as filing and serving a notice of appeal.

6. The respondent urges me to dismiss the application as the applicant had not complied with the provisions of Order 42 of the Civil Procedure Rules, for not demonstrating that she would suffer substantial loss and had not offered security. The provisions of the Civil Procedure Rules that apply in probate and administration practice are imported by rule 63 of the Probate and Administration Rules. Rule 63 does not include Order 42 or the provision relating to appeals. Indeed, the Law of Succession Act, Cap 160, Laws of Kenya, does not even provide for appeals to the Court of Appeal from the High Court. An application, such as the instant one, which seeks stay pending appeal cannot therefore be said to be wholly founded on Order 42 or its equivalent. I do not therefore feel bound by the provisions of Order 42.

7. I am satisfied that the applicant has moved with speed to request for typed copies of the proceedings and judgment, and to file and serve notice of appeal. She is entitled to her day in court at the Court of Appeal for a second opinion on her case. I shall accordingly allow the application dated 30<sup>th</sup> May 2017 in terms of prayer 3 thereof. Costs shall abide outcome of the proposed appeal.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> DAY OF APRIL, 2018.**

**W. MUSYOKA**

**JUDGE**