



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 76 OF 2016**

**(FORMERLY NAIROBI SUCCESSION CAUSE NO. 1516 OF 2008)**

**IN THE MATTER OF THE ESTATE OF KARORI KIHAGI (DECEASED)**

**MOSES KARANJA KAHOCHIO .....1<sup>ST</sup> APPLICANT**

**MUNGAI KAHOCHIO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOEL MBURU.....1<sup>ST</sup> RESPONDENT**

**ISAAC MUNGAI KARANJA .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The summons filed on 24<sup>th</sup> April, 2018 seeks two orders; prayer 2 seeks the grant of leave to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, also co-administrators of the estate of the deceased herein, to lodge an appeal to the Court of Appeal against the ruling delivered by **Ngugi J** on 8<sup>th</sup> March, 2018. Prayer 3 seeks that, pending the intended appeal, there be “stay of execution and/or stay of the issuance of the certificate of confirmation of grant pursuant to orders in that regard by **Kimaru J**, made on 27<sup>th</sup> June, 2014”. The fourth prayer essentially seeks that in addition or alternatively, this court issues an order to maintain the *status quo*, effectively suspending distribution of the estate pending the intended appeal.
2. The application is expressed to be brought under the provisions of Rules 49, 63, 67 and 73 of the Probate and Administration Rules, and is supported by the affidavit sworn by the 1<sup>st</sup> Applicant **Moses Karanja Kahochio**, in his own behalf and on behalf of the second Applicant and co-administrator, **Mungai Kahochio**.
3. Evidently, the Applicants are aggrieved with the court’s decision of 8<sup>th</sup> March, 2018 and have raised what are essentially argumentative matters in their affidavit. They also express apprehension that if stay orders are not granted, the appeal will be rendered nugatory as distribution would result in the dissipation of the estate.
4. The Respondents filed grounds in opposition as well as a Replying affidavit sworn by the 1<sup>st</sup> Respondent/Administrator **Joel Mburu Kanyuku** on his own behalf and on behalf of “other beneficiaries”. The gist of the grounds of opposition and Replying Affidavit is that the application is bad in law and lacking in merit. The Respondents view the Summons as intended to thwart distribution of the estate, while the Applicants allegedly continue to intermeddle with the estate of the deceased.
5. The application was canvassed principally on the basis of the material filed by the respective parties. Counsel for the Respondent conceded prayer (2) during the hearing. What therefore remains to be determined is the two outstanding substantive prayers, being no. 3 and 4 in the Summons.
6. The court has considered the background to the instant Summons as captured in the ruling by **Ngugi J** delivered on 8<sup>th</sup> March, 2018. No useful purpose will be served by restating the history. Suffice to state that, the application dismissed by **Ngugi J** had sought a review of the orders of **Kimaru J** made on 27<sup>th</sup> June, 2014 which confirmed the grant in respect of the deceased’s estate. The subject of the intended appeal is the decision by **Ngugi J**.
7. Rule 63 (1) of the Probate and Administration Rules does not apply the provisions of Orders 42 Rule 6 of the Civil Procedure Rules to Succession causes. However, Rule 49 which is among the provisions invoked by the Applicant is in my view wide enough to admit the present application. Rule 49 of the Probate and Administration Rules provides that:

**“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported, if necessary, by affidavit.”**

8. Moreover, the court has wide powers under Section 47 of the Law of Succession Act to entertain any application and to determine and dispute under the Law of Succession Act. During the oral canvassing of the Summons, counsel for the Respondents appeared to retreat from the jurisdictional objection raised in the grounds in opposition to the Summons. By dint of Rule 5 of the Court of Appeal Rules, a duly lodged notice of appeal suffices as a basis for an application for stay pending appeal. In this case, the notice of appeal annexed to the supporting affidavit of the applicants as annexure “MKK1” states *inter alia* that the Applicant “*being dissatisfied with the Ruling of the Honourable Justice Joel Ngugi delivered on the 8<sup>th</sup> day of March 2018 intends to appeal to the Court of Appeal a---- the whole of the said decision*”.

9. However, there is patent dissonance between the prayer for leave to appeal and the prayer for stay pending appeal. The latter is essentially directed at the orders of **Kimaru J** made on 27<sup>th</sup> June, 2014, being the executable order, pursuant to which, the certificate of confirmation of grant may issue. The applicants herein elected to apply for revocation of the relevant grant before **Musyoka J** initially and subsequently, lodged an application to review the order of **Kimaru J**, rather than lodge an appeal. Thus, in so far as **Kimaru J**'s orders are concerned, no appeal can properly be lodged or canvassed in light of the provisions of Order 45 Rule 1 of the Civil Procedure Rules.

10. Rule 1 provides:

**(1) Any person considering himself aggrieved—**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” (emphasis added)**

11. Technically therefore, the prayer for stay of the execution of **Kimaru J**'s orders has no relationship to the appeal intended. Besides, even if the court were to be generous enough to consider the merits of that prayer, the delay in bringing it is clearly inordinate. Ditto for prayer 4 which in my view is not substantially different from prayer 3 seeking stay of execution.

12. In *John Mbuu Muthoni & Another v Ruth Muthoni Kariuki (2017) eKLR*, **Ngugi J** was confronted with a situation almost similar to that obtaining herein. The matter was a succession cause where, the applicant *inter alia* sought to stay “execution/giving effect” of a ruling dismissing an application for the revocation of a grant. It is true that unlike in the present case, that Applicant's stay prayers in that case were directed at the dismissal ruling.

13. In this case the real orders targeted go back to 2014 when the grant was confirmed, and subsequent to which an application for review, the subject of the intended appeal, was dismissed. I think there are two problems posed by the instant application, the first being the fact that the order sought to be stayed is not the subject of the intended appeal. Possibly, this prayer was so crafted to avoid the objection, raised in the case of **John Mbuu Muthoni** that a dismissal order (in this case in respect of the review application) is not a positive order in favour of the successful party or otherwise capable of execution.

14. I agree with **Ngugi J**'s observations in **John Mbuu Muthoni** that:

**“ I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decisions in *Republic v Commissioner for Investigation and Enforcement exparte Wananchi Group of Kenya (2014) eKLR*. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the court has dismissed an application for Judicial Review, the court does not grant any positive order ..... capable of execution.**

**..... I am persuaded that the circumstances are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwaru Case (AG v James Hosea Gitau Mwaru (2014) eKLR) where the court urged a consideration of whether there is anything capable of being stayed in ruling sought to be appealed (before granting stay). The narrow holding in that case (Wananchi) is that a stay is not available where the court has declined to issue judicial review order since a refusal to issue the orders cannot be “executed”. A broader holding would be that whenever a court strikes out a suit or refuses to grant the substantive orders sought ....., a stay of execution is not available since any such stay would be directed at a decisions against which the intended appeal is not directed.”**

15. In this case the stay orders sought are clearly expressed *not* to be related to the appeal intended. What is more, and constituting the second difficulty, is that an order for stay in respect of the last ‘executable’ order would in any event not be available pending appeal, because the applicant, rather than appeal against the said order elected to apply for review pursuant to Order 45 Rule 1 of the Civil Procedure Rules.

16. In view of all the foregoing I have to decline the prayers (3) and (4) seeking stay pending appeal and/or for the maintenance of the status quo respectively. Having filed a notice of appeal, the applicants have for purposes of order 5 (2) b of the Court of Appeal Rules filed an appeal. For whatever it may be worth, this court grants the applicants leave to appeal the decision of **Ngugi J** delivered on 8<sup>th</sup> March, 2018.

Delivered and signed at Kiambu this **27th** day of **July, 2018**.

**C. MEOLI**

**JUDGE**

In the presence of:-

For the Applicant Ms Karuitha holding brief for Somba

1<sup>st</sup> and 2<sup>nd</sup> Respondents – Mweni – Nyokabi holding brief for Kahuthu

Court Assistant: Kevin/Nancy