REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1940 OF 1996

CONSOLIDATED WITH SUCCESSION CAUSE NO. 1860 OF 1996

IN THE MATTER OF THE ESTATE OF FREDRICK POLWARTH KUBAI – DECEASED

ANDREW KAMAU DENIS KUBAI …….APPLICANT

VERSUS

CHRISTINA GAKUHI KUBAI ……RESPONDENT

RULING

1. By application dated 12th May 2016 the applicant Andrew Kamau Denis Kubai sought against the respondent:-

a. preservatory orders against the disposal or intermeddling with the free property of the deceased Fredrick Polwarth Kubai;

b. review of the order of the court dated 13th March 2015; and

c. in the alternative, leave to appeal against the ruling dated 13th March 2015 by this court and judgment dated 19th December 2013 by Justice William Musyoka.

2. The prayer of review was made on the following grounds:-

a. the **Civil Procedure Act** is not applicable to succession matters save the **Civil Procedure Rules** as provided by **rule 63** of the **Probate and Administration Rules**;

b. there is discovery of new and important evidence which ha led to the criminal prosecution of the respondent and the public policy that a party should not benefit from illegal acts;

c. there are clear mistakes and errors on the face of the record; and

d. natural justice and **Article 159** of the Constitution of Kenya 2010 dictate that the applicant be granted a hearing and the court does not dispense with substantial justice on the altar of legal technicalities.

3. In answer to the application, the respondent filed a notice of preliminary objection seeking to have the

application struck out with costs on the grounds that:

a. the application is barred by the *res judicata* rule in that similar applications were filed by the applicant and dismissed by Justice Kimaru on 4th June 2014 and by this court on 13th March 2015;

b. the application for leave can only be made to the High Court within 14 days of the decision to be appealed against or to the Court of Appeal within 14 days within refusal of the High Court, and the applicant did not observe these timelines; and

c. there is no jurisdiction to make conservatory order where there are no pending proceedings.

4. The brief history of this cause is that the deceased died on 1st June 1996. The respondent, on the basis that she was the deceased's widow, filed Succession Cause No. 1860 of 1996 for the grant of probate of written Will made by the deceased on 19th January 1991 in which she was named as the executor. An objection was filed to challenge the petition on the grounds that the respondent was not the widow of the deceased and that the deceased did not leave a written Will. The sons of the deceased separately filed Succession Cause No. 1940 of 1996 for the grant of letters of administration intestate. The grant was issued to them. It was subsequently confirmed. When the respondent found out, she applied to have the grant revoked and/or annulled on the basis that she held a valid Will. She sought interim restraining orders which were granted. The two causes were consolidated by Justice Musyoka who received oral evidence to determine whether the deceased had left a valid Will and whether the respondent was a widow of the deceased. It was determined that the deceased had left a valid Will whose executor was the respondent who was the widow. The grant of letters of intestate and its confirmation were revoked. The respondent was issued with a grant of probate.

5. The applicant and his brothers filed an application to review and set aside the judgment on the basis that the death certificate of the deceased that the respondent had relied on and her own national identity card were forged. The application was heard by Justice Kimaru who in a ruling dated 4th June 2014 dismissed it on the basis that it was *res judicata*. The applicant filed an application dated 25th November 2014 seeking to have the grant of probate issued to the respondent revoked and/or annulled on the grounds that the death certificate presented by the respondent was forged, the deceased's Will was forged and the respondent's national identity card was forged. The applicant is the grandchild of the deceased. The respondent filed a notice of preliminary objection to say that the application was *res judicata* for the reason that it was raising the issues that had been raised before and on which a judgment had been rendered on 19th December 2013 and a ruling on 4th June 2014. This court gave a ruling on 13th March 2015 in which it found that indeed the issues being raised were *res judicata*.

6. In the present application, the applicant is still aggrieved by the decisions in the foregoing. His complaint is that the respondent was not the widow of the deceased; she produced a Will saying it was made by the deceased when in fact the same was a forgery; she presented to court a forged deceased's death certificate; and she presented her national identity card which is forged. He has since got the police to arrest and charge the respondent for the alleged forgeries. The criminal case is pending.

7. Dr. Kamau Kuria for the respondent submitted, and I agree with him, that this court has no jurisdiction to entertain these matters as they have been heard and determined by courts of competent jurisdiction. No new evidence is being raised, and there is no mistake or error on the face of the record that is being pointed out.

8. Rule 63(1) of the **Probate and Administration Rules** made under the **Law of Succession Act (Cap. 160)** provides that:-

"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to

proceedings under these Rules."

Order XLIV deals with review. It is therefore not correct for the applicant to claim that the court was wrong to invoke **Order XLIV** to find that this application was *res judicata*. (**John Mundia Njoroge and 9 Others –v- Cecilia Muthoni Njoroge and Another [2016]eKLR)).** Secondly, the applicant cannot seek to rely on **section 47** of the **Law of Succession Act, rule 73** of the **Probate and Administration Rules** or **Article 159** of the Constitution of Kenya 2010 to re-open this matter that was substantially heard and on which both oral and affidavit evidence were extensively considered. Especially, when the remedy of appeal was open to him and he did not take advantage of the same.

9. It is clear that there was no appeal preferred against the judgment of Justice Musyoka dated 19th December 2013, the ruling of Justice Kimaru dated 14th June 2014 and the ruling of this court dated 13th March 2015. Dr Kamau Kuria submitted that leave to appeal cannot be granted because it is being sought well after 14 days from the date of the judgment or ruling, and, further that, there has been no demonstration that the intended appeal involves special circumstances and serious questions of law **(Re The Estate of Ronald Austine Whittington (Deceased) [2015]e KLR; Rhoda Wairimu Karanja and Another –v- Mary Wangui Karanja and Another [2014]e KLR).** It is trite that under the **Law of Succession Act** there is no express automatic right of appeal to the Court of Appeal; that the appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court and where the application for leave is refused, with leave of the Court of Appeal. Leave will normally be granted where *prima facie* there are grounds which merit serious judicial consideration. Leave has to be sought within 14 days from the date of the decision being appealed against.

10. It follows that the application for leave is not competent as it is being brought outside 14 days from the date of the judgment or ruling complained of. Secondly, no proposed memorandum of appeal was annexed. It is from such memorandum that the court can determine whether the issues to be raised are of such nature that the Court of Appeal will be called upon to deal with serious questions of law, or serious judicial jurisdiction.

11. Without a pending appeal, and there being no leave to appeal, this court would not have jurisdiction to grant any conservatory orders.

12. The result is that, the application dated 12th May 2016 by the applicant is dismissed with costs for lack of merits. The preliminary objection dated 13th June 2016 is allowed with costs.

SIGNED and DATED at NAIROBI this 25th JANUARY 2017

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 26th JANUARY 2017

M. MUIGAI

JUDGE