



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 81 OF 2002

IN THE MATTER OF THE ESTATE OF TERESIAH WANJIRU WAGERA (DECEASED)

ELIZABETH WAIRIMU THIMBA & OTHERS.....PETITIONERS

VERSUS

WILFRED NJOGU MBUGUA.....1ST OBJECTOR

JAMES MUNENE THIMBA.....2ND OBJECTOR

RULING

1. The Notice of Motion dated 14th July, 2015 was brought under Section 47 of the Law of Succession Act, Cap. 160 Laws of Kenya and Order 51 of the Civil Procedure Rules. The Applicants seek leave of this court to appeal against the ruling dated 9th July, 2015 by which Mulwa, J declined to enlarge the time to file a notice of appeal against the ruling of Emukule, J which was delivered on 5th December, 2014. They have also asked the court to grant them a temporary stay of implementation of the ruling of Mulwa, J until they file a formal application for stay pending appeal.
2. The application is supported by the affidavit of Elizabeth Wairimu Thimba which was sworn on 14th July, 2015.
3. The background of this application is that by a judgment made on 8th February, 2013, Emukule, J declared the proper beneficiaries in this succession cause. In a ruling made on 5th December, 2014, the same court distributed the properties to the beneficiaries and further directed the administrators of the estate to ensure the entire distribution process is concluded within six months and thereafter, to file in court a complete account of the completed distribution.
4. The Applicants were aggrieved with the ruling delivered on 5th December, 2014 and filed an application in this court dated 26th February, 2015 seeking an order for enlargement of time to file a notice of appeal. In her ruling delivered on 9th July, 2015, Mulwa, J declined to allow the application. The Applicants now seek leave to appeal against the latter ruling. They argued that the court erred in failing to consider their reasons for delay in filing the notice of appeal which was occasioned by the mistake of their counsel. They further contended that if the estate is distributed in terms of the ruling delivered on 5th December, 2014, a miscarriage of justice will result as this distribution was premised on a family agreement that had been withdrawn. They believe that the appeal has a high chance of succeeding and if the prayers are not granted they will suffer irreparable loss. They undertook to abide by any directions or orders that this court may make.
5. The application is opposed by the Objectors vide the Grounds of Opposition dated 21st July, 2015.

- They argued that this court has no jurisdiction to determine an application for leave to file an appeal as this is a preserve of the Court of Appeal pursuant to Rule 39 of the Court of Appeal Rules. They argued that after their application for enlargement of time was disallowed, the Applicants should have appealed against this decision to the Court of Appeal.
6. The Objectors also contended that the prayers for stay of execution of the ruling of Mulwa, J cannot be granted as this was a negative order that simply dismissed the application. It did not require the parties to act or refrain from acting in any certain manner, which action can be stayed pending the determination of the intended appeal.
 7. Counsel for the Applicants relied entirely on the averments in the application and in the supporting affidavit and did not submit further. Counsel for the Objectors maintained that this court has no jurisdiction to grant leave to a party to file the intended appeal. This power is vested in the Court of Appeal by Rule 39 of the Court of Appeal Rules. He argued that even if this court had jurisdiction to grant leave to the Applicants it could not grant stay of execution of the orders of Mulwa, J as the orders which stand to be effected and with which the Applicants are aggrieved are those that were issued by Emukule, J on 5th December, 2014. He also urged the court to consider the age of the matter and find that it is in the interests of justice that the case is concluded.
 8. In response to the submissions of counsel for the objectors, counsel for the Applicants submitted that this court has jurisdiction to grant them leave to file the intended appeal. Counsel relied on the decision of the Court of Appeal in **Rhoda Wairimu Karanja & Another V. Mary Wangui Karanja & Another**, [2014] eKLR.

DETERMINATION

9. The application before me seeks leave to appeal the Ruling of this court (Mulwa, J) of 9th July, 2015. **Rule 39 (a)** of the **Appellate Jurisdiction Act Cap 9 Laws of Kenya** provides that:

“where an appeal lies on certification by the superior court that the case is fit for such leave may be made informally at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision.”
10. The applicant has exercised his rights as provided therein and the application having been filed on the 14th July, 2015 and the Ruling having been delivered on 9th July, 2015 the same meets the timeline of fourteen(14) days allowed under the Act.
11. The issues for determination in the matter are:
 - a) Whether this court is clothed with jurisdiction to grant the leave sought.
 - b) Whether the applicant has satisfied the grounds to warrant such leave and
 - c) Whether the applicants should be granted a stay of execution of the court's orders pending the filing of a formal application for stay.
12. On the question of jurisdiction, a clear reading of **Section 39(a)** of the **Appellate Jurisdiction Act** (supra) clearly shows that this court is clothed with the jurisdiction to adjudicate on the issues now before it. I am fortified in this finding by the holding in **Rhoda Wairimu Karanja and Another V. Mary Wangui Karanja and Another**, [2014] Eklr the Court of Appeal rendered itself thus:

“...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 will normally be granted where *prima facie* it appears that there are grounds which merit serious judicial consideration.”
13. On whether the applicant has satisfied grounds to warrant such leave, it flows from the **Rhoda Wairimu Karanja** case (supra), that to obtain such leave as sought herein, an applicant needs to

- show that *prima facie* there are grounds which merit serious judicial consideration.
14. In our instant case, Mulwa, J was seized of an application dated 26th February, 2015 where the applicant sought for enlargement of time within which to lodge a notice of appeal. This application has been denied on grounds inter alia that there was no evidence on record to show that leave to appeal the decision that aggrieved the applicant has been sought and therefore extension of time would in the circumstances serve no useful purpose. That application was found to be incompetent. Again, the applicant had not demonstrated that the intended appeal had chances of success. The court went ahead to observe that this cause has been in court since 2002. The court went further to make a finding that blaming the delay on the filing of the appeal on the Advocate was not sufficient. Quoting from the case of the **Matter of the Estate of Waringa Gitau**, (Kimaru, J), the court noted that a case is not owned by the Advocate but by the litigant and that it was the duty of the party to pursue the progress of the case.
 15. In view of the above, I am not persuaded that the applicant has raised any grounds that merit serious judicial consideration.
 16. As to whether a stay of execution should issue, the finding on 15 above resolves this question. In any event, a dismissal order cannot be a basis of which an order for a stay of execution is sought. There is nothing in the orders of Mulwa, J to stay.
 17. For the above stated reasons, I find the application before court without merit and dismiss the same. Each party to bear its costs.

Dated, Signed and Delivered at Nakuru this 16th day of February, 2016.

A. K. NDUNG'U

JUDGE