



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 621 OF 2010

IN THE MATTER OF THE ESTATE OF RONALD AUSTINE WHITTIGHAM (DECEASED)

RULING

1. The application the subject of this ruling is dated 26th November 2013. It seeks in the main two prayers – leave to appeal against the decision given on 15th November 2013 and stay of the orders made on that date pending an intended appeal.
2. The grounds upon which the said orders are sought are set out on the face of the application and in the affidavit of the applicant, Peter Henry Huth, sworn on 26th November 2013. The applicant expresses dissatisfaction with the decision of 15th November 2013 and evinces an intention to appeal against it. He states that he has filed a Notice of Appeal, and that his appeal has merit and reasonable grounds of success. He is concerned that if the said decision is not stayed the beneficiaries would suffer loss. He states that the orders sought to be appealed against would irrevocably alter the administration of the estate and adversely affect the distribution the estate.
3. Two affidavits have been filed in response to the application dated 26th November 2013. There is one sworn by Patricia Joan Heather-Hayes on 5th December 2013. Ms. Heather– Hayes was the applicant in the application which culminated in the judgment of 15th November 2013, which is the subject of the application herein dated 26th November 2013. The other affidavit was sworn on 9th December 2014 by Rustam Hira, the advocate appointed in the ruling of 15th November 2013 as administrator of the estate of the deceased.
4. Ms. Heather-Hayes challenges the Notice of Appeal allegedly filed by the applicant on the grounds that the same was not served on her advocates within fourteen (14) days of its filing. This in her view makes the application for leave to appeal incompetent. She further argues that there is no basis upon which it can be determined whether the intended appeal has reasonable chances of appeal for no memorandum of appeal is attached to the affidavit in support of the application. She asserts that there is nothing in the orders of 15th November 2013 which would alter the administration of the estate and adversely affect distribution amongst the beneficiaries. She accuses the applicant, as executor, of having failed in his duties as such. She further argues that it has not been demonstrated that the intended appeal would be rendered nugatory and the applicant would suffer any personal loss.
5. Rustam Hira basically confirms that he has agreed to become administrator of the estate of the deceased.

6. It was directed on 21st May 2014 that the application dated 26th November 2013 be disposed of by way of written submissions. There are written submissions on record filed by the respondent, but there is nothing from the record to indicate that any were filed on behalf of the applicant. The respondent's written submissions are dated 10th July 2014 and were filed in court on 11th July 2014.

7. It is submitted that an appeal from a decision of the High Court sitting as a probate court is not appealable to the Court of Appeal as a matter of right, the person wishing to appeal such decision must obtain leave from the High Court. Even then grant of leave to appeal is not automatic for certain conditions must be satisfied. The first condition being that leave must be sought informally at the time of delivery of the decision or in a formal application filed within fourteen (14) days of the said decision by virtue of Rule 39 (a) of the Court of Appeal Rules. The second condition is said to be that the applicant has to satisfy the court that the intended appeal involves special circumstances and raises serious questions of law. It is submitted that the said conditions have not been met. No material has been placed before the court to assist it access whether the intended appeal has probability of success. Therefore it has not been demonstrated that there are serious questions of law worth probing in the intended appeal. To buttress her case, the respondent has cited the decision of the High Court in *Teresia Nyangweso Keng'otore .vs. The Public Trustee* HCSC No. 1402 of 1998 (2003) eKLR and *Mary Wangui Karanja & Anor .vs. Rhoda Wairimu Karanja & Anor.* HCSC No. 1366 of 1995 (2014) eKLR.

8. On stay of execution of the judgment of 15th November 2013, the respondent submits that stay under Order 42 rule 6 of the Civil Procedure Rules (2010) is grantable upon the applicant meeting these conditions – the court being satisfied that the applicant would suffer substantial loss if the order is not granted, the application has been made without unreasonable delay and security has been furnished by the applicant. The respondent submits that these conditions have not been satisfied. The applicant is said to be a minor beneficiary, who is only entitled remuneration for his role as executor.

9. The provision in the Law of Succession Act governing appeals arising from decisions made in matters governed by the Act is Section 50. It provides that –

“50 (1). No appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's court in respect of the estate of a deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

10. The language of Section 50 of the Act is such that it does not make provision for an appeal from a decision of the High Court sitting as a probate court to the Court of Appeal. That however is not to say that such decisions cannot be appealed from. An appeal can lie with leave of the Court of Appeal. The condition attached to grant of leave is that the court should be satisfied that the intended appeal involves special circumstances and serious questions of law. The authority on this are the decisions in *Teresa Nyangweso Keng'otore –vs- The Public Trustee, Mary Wangui Karanja & Anor .vs. Rhoda Wairimu Karanja & Anor and Sango Bay Estates Ltd & Others .vs. Dresdner Bank* (1971) EA 17.

11. Has the applicant satisfied this condition? The applicant avers in his affidavit in support of the application that his intended appeal has chances of success. He pleads that the orders will irrevocably alter the administration of the estate and will adversely affect the distribution of the estate amongst the beneficiaries. He does not explain how the administration of the estate will be irrevocably altered, nor how the orders adversely affect the interests of the beneficiaries.

12. I am not convinced that the applicant has demonstrated that special circumstances exist nor that there are serious questions of law that arise from the matters alluded to in paragraph 11 above to warrant consideration by the Court of Appeal. In any event, a draft memorandum of appeal was not exhibited to the application to bring out the grounds upon which the applicant intends to challenge the impugned ruling. Such draft memorandum of appeal would have assisted me in determining whether I should grant

leave or not.

14. On grant of stay of the order made in the ruling, I take the view that the prayer for stay should fall with the disallowance of the prayer for leave to appeal. Even if I were to grant leave to appeal, I doubt whether I would be inclined to grant stay for the applicant has not demonstrated that he would suffer any substantial loss should stay not be granted, nor has he offered to furnish security for due performance.

15. In view of everything that I have stated in the forgoing paragraph of this ruling, I have come to the conclusion that the application dated 26th November 2013 is without merit and I do hereby dismiss the same. The respondents shall have the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF January 2015.

W. MUSYOKA

JUDGE