



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.998 OF 2006**

**IN THE MATTER OF THE ESTATE OF CHARLES KARUGA KOINGANGE**

**ROSEMARY B. KOINANGE**

*(suing as legal representative of the*

*Late Dr. Wilfred Koingange and also in her*

*Own personal capacity).....1<sup>ST</sup> APPLICANT*

**CKK ESTATES (1973) LTD.....2<sup>ND</sup> APPLICANT**

**SAMUEL KARUGA KOINANGE.....3<sup>RD</sup> APPLICANT**

**SUSAN NDUTA KOINANGE.....4<sup>TH</sup> APPLICANT**

**PETER WANDUGA KOINANGE.....5<sup>TH</sup> APPLICANT**

**KAKOI DEVELOPMENT COMPANY LTD.....6<sup>TH</sup> APPLICANT**

**VERSUS**

**ISABELLA WANJIKU KARANJA.....1<sup>ST</sup> RESPONDENT**

**PETER MBIYU KARUGA.....2<sup>ND</sup> RESPONDENT**

**WILLIAM KIHARA KARUGA.....3<sup>RD</sup> RESPONDENT**

**MRS. MARY NJOKI KARUGA.....4<sup>TH</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> Applicant Rosemary B. Koinange was aggrieved by the decision of this court rendered on 22<sup>nd</sup> January 2015. She filed notice of her intention to appeal against the said decision to the Court of Appeal. On 27<sup>th</sup> January 2015 she filed the present application under **Rules 49 and 73** of the **Probate and Administration Rules** and **Order 42 Rule 6** of the **Civil Procedure Rules** essentially seeking two (2) orders from the court: firstly, she seeks to have the 2<sup>nd</sup> to 6<sup>th</sup> Applicants enjoined as parties to this application for the purposes of the intended appeal. The 2<sup>nd</sup> and 6<sup>th</sup> Applicants are limited liability

companies whose shares were the subject of the Ruling that was delivered by this court. The 3<sup>rd</sup> - 5<sup>th</sup> Applicants are the children of the 1<sup>st</sup> Applicant. During the hearing of the application, the 1<sup>st</sup> Applicant indicated to the court that she acted in her capacity as the administratrix of the estate of Dr. Wilfred Koinange. In that capacity, she also acted for her children.

The second limb of the application is that the 1<sup>st</sup> Applicant seeks to have the effect of the said Ruling of this court stayed pending the hearing and determination of the intended appeal. In that regard, the 1<sup>st</sup> Applicant also prayed that further proceedings in this succession cause be stayed pending the hearing and determination of the intended appeal. The application is supported by the annexed affidavit of the 1<sup>st</sup> Applicant. She swore a further affidavit in support of the application. The application is opposed. John Miringu Karuga and Ernest Ngugi Karuga, beneficiaries to the estate of the deceased filed grounds in opposition to the application. The 1<sup>st</sup> Respondent filed a replying affidavit in opposition to the application. The 4<sup>th</sup> Respondent Mary Njoki Karuga filed grounds in opposition to the application.

Prior to the hearing of the application, counsel for the parties agreed to file written submission in support of their respect opposing positions. This court has carefully considered the submission filed and the oral submission made before this court by Dr. Kamau Kuria for the Applicants, Dr. Khaminwa for the 4<sup>th</sup> Respondent, Mr. Njenga for the beneficiaries and Mr. Murgor for the 1<sup>st</sup> - 3<sup>rd</sup> Respondents. Dr. Kamau Kuria submitted that the Applicants had opted to exercise their constitutional right of appeal. They were aggrieved by the decision of this court especially the part of the Ruling where shares in two (2) limited liability companies were declared to be part of the estate of the deceased. He submitted that if stay was not granted, then the intended appeal would be defeated. He urged the court to take into consideration that there was possibility that the Court of Appeal would reach a different decision than that reached by the court. In that regard, it was his submission that this court should grant leave for the 2<sup>nd</sup> to 6<sup>th</sup> Applicants to be enjoined as parties to this suit for the purpose of hearing and determination of the intended appeal. It was his further submission that *status quo* in respect of the estate of the deceased should be maintained pending the hearing and determination of the intended appeal. He urged the court to stay further proceedings before this court pending the hearing and determination of the intended appeal.

The application was strenuously opposed by the Respondents and the beneficiaries to the estate of the deceased. In summary, they were of the view that the application was made with the sole intention of frustrating the distribution of the estate of the deceased to the beneficiaries. They urged the court to take into consideration the fact that the dispute has taken a long time to be determined and any further delay would cause injustice to the beneficiaries. They further submitted that there was no basis for this court to grant leave for the 2<sup>nd</sup> – 6<sup>th</sup> Applicants to be enjoined as parties to these proceedings as all along the interest of the said applicants had always been taken care of by the 1<sup>st</sup> Applicant. In essence, their plea to the court was to the effect that if the application was allowed it would affect the distribution of part of the estate of the deceased which is not part of the dispute in the intended appeal. They urged the court to dismiss the application with costs.

As stated earlier in this Ruling, there are two limbs to the application. In the first limb, the 2<sup>nd</sup> – 6<sup>th</sup> Applicants seek to be enjoined as parties to these proceedings. According to Dr. Kuria, the Ruling delivered by this court affected the 2<sup>nd</sup> – 6<sup>th</sup> Applicants who were not parties to these proceedings. Mr. Njenga, Mr. Murgor and Dr. Khaminwa for the Respondents and the beneficiaries are opposed to this part of the application. They argued that the said 2<sup>nd</sup> – 6<sup>th</sup> Applicants were all along represented by the 1<sup>st</sup> Applicant. They urged the court to take into consideration the directions that this court issued prior to the hearing and determination of the Ruling that is the subject of this application. They were of the view that the intended inclusion of the 2<sup>nd</sup> – 6<sup>th</sup> Applicants was a mischievous effort to divert the court from considering the actual matters in dispute. In normal circumstances, this court would not refuse any party to be enjoined as a party in succession proceedings. However, in the circumstances of this case, it is clear that the application to enjoin the 2<sup>nd</sup> – 6<sup>th</sup> Applicants has been made belatedly. It has also not been made in good faith. Prior to the hearing of the dispute that resulted in the Ruling that the 1<sup>st</sup> Applicant seeks to impeach on appeal, this court issued directions on 27<sup>th</sup> February 2014 in regard to how the dispute

between the parties was to be heard and determined. It is important that the directions issued by this court be reproduced in full:

***“Isabella Wanjiku Karanja, William Kihara Karuga, Samuel Karuga Koinange and Peter Mbiyu Koinange are hereby appointed to be the administrators of the estate of the deceased. The court shall determine the validity of the Will of the deceased dated 16<sup>th</sup> June 1999. The parties shall also address the court in regard to another Will written by the deceased dated 8<sup>th</sup> May 1975. The parties shall also make submission in regard to whether the transfer of 14999 shares of CKK Estates Ltd to Dr. Wilfred Karuga Koinange in 1994 was valid and whether the said shares form part of the estate of the deceased. The parties shall also make submission on the properties [gifts intervivos] that were made by the deceased prior to his death and whether they should be upheld. Written submission to be filed and exchanged within thirty (30) days. Hearing on 26<sup>th</sup>/27<sup>th</sup> May 2014.”(Insertion mine).***

It was clear from the directions issued above that one of the issues that the parties had agreed would be considered for determination by the court was whether the transfer of shares by the deceased to Dr. Wilfred Karuga Koinange in 1994 in CKK Estates Ltd was valid. There was no dispute as regard to representation of the three (3) children of Dr. Wilfred Karuga Koinange in the proceedings. They were represented by the 1<sup>st</sup> Applicant Rosemary Koinange, their mother and the administratrix of the estate of Dr. Wilfred Karuga Koinange. It was represented to the court, and which position the court accepted, that Rosemary Koinange represented the interest of her children. CKK Estates Ltd and Kakoi Development Company Limited were not parties to the proceedings. The two companies have no interest in the succession proceedings. This is because the said companies are not dependants as understood under **Section 29** or creditors as recognized under **Section 66(d)** of the **Law of Succession Act**. The two companies cannot therefore have an interest which can be adjudicated in succession proceedings. The issue for determination before this court was whether the shares in the two companies were lawfully transferred by the deceased to Dr. Wilfred Karuga Koinange. That issue was determined by this court. The 1<sup>st</sup> Applicant wishes to have a second opinion from the Court of Appeal. That is her constitutional right. She can argue her appeal before the Court of Appeal without the necessity of enjoining the 2<sup>nd</sup> – 6<sup>th</sup> Applicants. To allow the 2<sup>nd</sup> – 6<sup>th</sup> Applicants to be enjoined in these proceedings at this stage will not only cause confusion and delay but will lead to the clogging of the distribution of the estate of the deceased to the beneficiaries. In the premises therefore, the application to enjoin the 2<sup>nd</sup> – 6<sup>th</sup> Applicants lack merit and is disallowed.

As regard the second limb of the application, the 1<sup>st</sup> Applicant seeks to have the effect of the Ruling delivered by this court on 22<sup>nd</sup> January 2015 stayed pending the hearing and determination of the intended appeal. The 1<sup>st</sup> Applicant has applied for *status quo* to be maintained in respect of the distribution of part of the Ruling that declared the shares in the two companies constituting certain real estate pending the hearing and determination of the intended appeal. The application has been opposed. Although part of the 1<sup>st</sup> Applicant’s application is predicated upon **Rule 49** and **73** of the **Probate and Administration Rules**, the principles guiding this court in determining whether or not to stay the execution of its order is provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The 1<sup>st</sup> Applicant is required to establish that she would suffer substantial loss if the order of stay of execution is not granted. She is also required to provide security for the due performance of the order. The application for stay must be filed without undue delay. This court is further guided by the decision in **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** at p.419 where Madan JA (as he then was) held thus:

***“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, Brett, LJ in Wilson –vs- Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case Cotton LJ said at p 458:***

***“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”***

In the present application, there was consensus that not all the properties belonged to the estate of the deceased were the subject of the intended appeal. In fact, the 1<sup>st</sup> Applicant and the Respondents have made applications for this court to issue a partial confirmation of grant in respect of that part of the estate that is not in dispute. This court cannot therefore stay proceedings in respect of the distribution of that part of the estate to the beneficiaries. The directions issued by the court in regard to the distribution of that part of the estate shall continue. As regard the shares in the properties owned by the two (2) companies, namely CKK Estates Ltd and Kakoi Development Company Limited, this court took cognizance of the fact that the said shares constitutes a substantial part of the properties that comprise the estate of the deceased. The 1<sup>st</sup> Applicant and members of her family have enjoyed income derived from transfer of the said shares. This court is of the view that to grant stay of the distribution of the said shares to the beneficiaries of the deceased would amount to this court indorsing an illegal transaction. This court is not prepared to exercise its discretion in such circumstances. The application for stay of the Ruling delivered by this court on 22<sup>nd</sup> January 2015 lacks merit and is hereby dismissed with costs.

The 1<sup>st</sup> Applicant is however given a chance to exercise her right of appeal, and so that her intended appeal is not rendered nugatory, this court will grant temporary stay of proceedings and execution of the Ruling of this court for sixty (60) days to enable the 1<sup>st</sup> Applicant make an appropriate application before the Court of Appeal. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE 2015**

**L. KIMARU**

**JUDGE**