



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 527 OF 1981
IN THE MATTER OF THE ESTATE OF MBIYU KOINANGE (DECEASED)

RULING

1. The application for determination is the Summons for Leave to Appeal to the Court of Appeal dated 28th September 2015. It seeks two principal orders-
 - a. **Leave to appeal against the judgment of this court delivered on 25th September 2015; and**
 - b. **Stay of the distribution as ordered in the said judgment and/or stay of the orders made in the said judgment.**
2. It is brought at the instance of the applicant, Eddah Wanjiru Mbiyu, and it is premised on the grounds set out on the face of the application, as well as in her affidavit sworn on 28th September 2015. Principally, she is dissatisfied with the judgment of 25th September 2015 and desires to appeal against it at the Court of Appeal. The grounds of appeal identified are-
 - a. **That the trial court purported to sit on appeal against previous decisions where Judges of concurrent jurisdiction in this and other suits had identified the applicant as widow and beneficiary of the deceased;**
 - b. **That the issue as to whether the applicant was a widow and beneficiary of the deceased was not before the court for determination;**
 - c. **That the trial court distributed assets that belonged exclusively to the deceased, which amounted to deprivation of private property and a deprivation of the applicant's right to own property; and**
 - d. **That the distribution of assets in the judgment was unfair, irregular and discriminative on grounds that are listed both on the face of the application as well as in the affidavit in support.**
3. The applicant states that her intended appeal has high chances of success. It is her view that should the orders made in the judgment of 25th September 2015 be not stayed pending appeal the estate is likely to be distributed as per the said orders, which would defeat the proposed appeal and render it nugatory.
4. Filed simultaneously with the application is a document titled "***Proposed Grounds of Appeal to the Court of Appeal,***" which sets out the grounds of appeal referred to in paragraph 2 here above in more elaborate terms.
5. When the application was placed before Ougo J. on 29th September 2015, under Certificate of Urgency, it was directed that the same be served and be placed before me on 6th October 2015 for

inter parties hearing.

6. It transpired on 6th October 2015, when the parties appeared before me that the application had only been served on the administrators, but not on the survivors of the deceased who were not administrators, nor on the interested parties. I directed that the application be served on all the parties, and fixed the same for oral argument on 21st October 2015.
7. I have scrupulously perused through the record before me and I have only come across two replies to the application. One is an affidavit sworn on 15th October 2015 by Joyce N. Njunu, while the other is the affidavit sworn on 19th October 2015 by David Waiganjo Koinange.
8. In her affidavit, Joyce Njunu does not appear to have any problem with the applicant appealing the decision of 25th September 2015, stating that it is within her right to do so. She is more concerned about stay of the judgment. She is of the view that the matter has been pending for over thirty (30) years, and blames the applicant for contributing to the delay. She states that no good grounds have been demonstrated for the stay order being sought. She further states that the applicant is not entitled to stay orders for she has over the years benefited unfairly from the estate by virtue of her previous position as administrator.
9. David Waiganjo Koinange on his part states that the applicant has not established grounds that merit judicial consideration. On the allegation that the applicant's constitutional rights had been violated, he argued that the alleged infringements were not pleaded. He further argues that the issue of *res judicata* did not arise. It is his case that all the issues addressed by the court in the judgment had been raised in the application for confirmation of grant which was the basis of the judgment. He submits that the court came to the correct finding so far as the issue of Kiambaa/Waguthu/2324 was concerned.
10. The application was argued on 21st October 2015. Mr. Mbabu urged the case for the applicant. He submitted that leave of court to appeal is required for probate matters, citing the decision of the Court of Appeal in *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* (2014) eKLR. He referred the court to the grounds listed in the application and submitted that there was a *prima facie* case that there are issues to be determined by the Court of Appeal. On stay, he submitted that if leave to appeal is granted, the court should stay the judgment or the distribution, for once the estate is distributed the entire intended appeal would be rendered nugatory. His position was supported by Mr. Gikandi for Margaret Njeri Mbiyu and Ms. Waitere for Sylvia Maryanne Mbiyu.
11. In opposition, Mr. Odhiambo for David Waiganjo Koinange submitted that in probate matters, the Court of Appeal has settled the law by stating that leave must be sought and obtained first. In determining whether to grant leave to appeal or not, he submitted, the court must be satisfied that there is an issue or question that requires serious consideration by the Court of Appeal. It was his case that the grounds stated in the application did not demonstrate *prima facie* that there was a case for the Court of Appeal to consider. In his view, the grounds of appeal were fanciful and only intended to drag out the long succession matter to the detriment of the beneficiaries. On stay, he submitted that grant of the same would expose the estate to intermeddling as preservation of the estate would thereby be made very difficult. Mr. Odhiambo's position was supported by Mr. Munge for Joyce Njunu, Mr. Wena for Lennah Catherine Koinange, Mr. Mugwuku for Susan Kihara, Mr. Kiarie for David Njunu and Mr. Kamaara for Tangulizi Ventures Ltd and Barbara Koinange.
12. The Court of Appeal has settled the law on the right to appeal against an original decision of the High Court to the Court of Appeal. It was held in *Makhanqu vs Kibwana* (1996-1998)1 EA 16; which was subsequently followed with approval by the Court of Appeal in several decisions, that although the Law of Succession Act, Cap. 160, Laws of Kenya, does not specifically provide for appeals from the original decisions of the High Court to the Court of Appeal, the appeal does lie to

the Court of Appeal.

13. The said court in *Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another* (supra) stated that as there is no express automatic right of appeal to the Court of Appeal, an appeal from original decisions of the High Court to the Court of Appeal lies with leave of the High Court or, where the application for leave is refused by the High Court, with leave of the Court of Appeal. Such leave is grantable when it is demonstrated that there are grounds, *prima facie*, which merit serious judicial consideration.
14. Based on the position stated by the Court of Appeal in the cases mentioned above, it is my conclusion that the applicant is entitled to appeal to the Court of Appeal from the decision of 25th September 2015 if she can demonstrate that she has a *prima facie* case to present at the Court of Appeal.
15. The only thing for me to consider is whether she is entitled to grant of leave. Before I can grant such leave I have to be satisfied that the applicant has raised issues that *prima facie* merit being considered by the Court of Appeal. My understanding of it is that the applicant need not demonstrate that her proposed appeal has an overwhelming chance or probability of success, rather it merely requires that she has an arguable and reasonable appeal.
16. The primary issue raised by the applicant is *res judicata*. She argues that the trial court in its judgment dealt with matters that had previously been finally determined by another court or Judge. These, therefore, were matters that were not before the court for determination. In my view that is an arguable matter. Whether the trial court ought to have considered those matters merits judicial consideration by the Court of Appeal, for the outcome of the proceedings before the trial court would perhaps have been different had those matters not been considered.
17. There is also the question of the manner in which the assets were distributed. The applicant takes it that the same was unfair, improper and discriminatory. Details of what made it so, in the opinion of the applicant, are set out in the application. To my mind that would also be arguable. It is something that would exercise the mind of the appellate court.
18. I need not say more on this, for I have no jurisdiction to sit on appeal on the decision in question. I am convinced that this is a proper case for grant of leave to appeal against the decision of 25th September 2015.
19. Having granted leave to appeal, I need to address my mind as to whether I should grant stay of the judgment in question. The applicant argues that if stay is not granted, the assets are likely to be distributed, which would make her proposed appeal academic and render it nugatory should she be successful.
20. The net effect of the judgment of 25th September 2015 was distribution of the estate of the deceased. Its implementation would mean that the assets would be vested in the names of the persons identified as beneficiaries thereof. If the exercise of distribution is carried out while the proposed appeal is pending, the same no doubt would be rendered useless, should the applicant ultimately succeed.
21. The subject matter of the judgment and the proposed appeal is valuable property. Once this is vested in the beneficiaries, there is real likelihood that the same would change hands either through sale or gift; the effect of which would be to take the property completely outside the reach of the applicant. There is therefore merit in the prayer for grant of stay pending appeal.
22. The appeal has not been filed, and will not be filed at the High Court. I note that the applicant has filed a Notice of Appeal and has applied for certified copies of the proceedings and judgment. The appeal will ultimately be filed at the Court of Appeal. That court ideally should be the proper one to grant stay pending appeal.

23. In view of everything that I have said above, I am moved to make the following orders:-

- a. That leave is hereby granted to the application to file an appeal against the judgment made herein on 25th September 2015;
- b. That there shall be a thirty (30) days stay of the judgment of 25th September 2015 to allow the applicant move the Court of Appeal for stay of execution of the said judgment pending appeal; and
- c. That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE