

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.1788 OF 2006

IN THE MATTER OF THE ESTATE OF NJIRIRI MUKOMA (DECEASED)

GEORGE MBURU NJIRIRI &

SAMUEL MBURU NJIRIRI.....APPLICANTS

VERSUS

PATRICK MUCHAI NJIRIRI &

NDUNGU NJENGA.....RESPONDENTS

RULING

The Applicants were aggrieved by the decision of this court rendered in HC Civil Appeal No.32 of 2004. In that decision, this court (Dulu J) upheld the decision of the trial magistrate in Limuru SRMC Succession Cause No.24 of 2002 in relation to the estate of the deceased in this cause. The subject of the dispute was whether the deceased had left behind a valid written Will. The Applicants challenged the validity of the Will. Both courts upheld the Will of the deceased. The Applicants were aggrieved that decision and have filed an appeal to the Court of Appeal in **Civil Appeal No.182 of 2010**. The Applicants want the court to stay proceedings herein pending the hearing and determination of the said appeal. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Applicants. The application is opposed. The Respondents filed a statement citing the grounds in opposition to the application.

Counsel for the parties herein agreed to file written submission in support of their respective opposing positions. The written submission were duly filed. The parties appeared before Njagi J and requested him to render a ruling on the basis of the written submission. Njagi J is no longer in the Family Division. This ruling is therefore delivered on the basis of the proceedings before Njagi J. This court has carefully considered the facts of this case. It has also benefited from reading the written submission filed by counsel for the parties herein. The issue for determination by this court is whether the Applicants have established a suitable case for this court to stay proceedings in this succession cause pending the hearing and determination of the appeal that is now pending before the Court of Appeal.

This court is guided by the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** which provides that no order of stay shall be granted unless the Applicants establish that they would suffer substantial loss. They are further required to provide security for the due performance of the decree. The application for stay is required to be filed without undue delay. In **Samuel O. Tima & Anor –Vs- HFCK & Anor Nairobi HCCC No.660 of 2002 (Milimani)** Njagi J held as follows in page 3 of his Ruling when he was considering an application similar to the present one:

“The jurisdiction of the High Court to grant stay as provided for in Order 42 Rule 6(1) is to be exercised whenever in a judgment of the Court there is “sufficient cause” to grant the orders sought. In that regard, I would associate myself with the words of Ringera J, as he then was, in GLOBAL TOURS TRAVELS LIMITED, WINDING UP CAUSE NO.43 OF 2000, in which the learned Judge stated as follows:

“...Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in

the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting or not granting the Order. And in considering matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

In the present application, the Applicants were required to first establish that they had a valid appeal that is pending determination before the Court of Appeal. The application is predicated on there being a valid appeal pending before the Court of Appeal. As stated earlier in this ruling, the first determination on the matters in dispute was made by the magistrate’s court at Limuru. The Applicants were aggrieved by that decision. They appealed to this court. Their appeal was dismissed. **Section 50(1)** of the **Law of Succession Act** provides thus:

“An 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.”

In the present application, it is clear that the Applicants have no appeal that can be said to be validly pending before the Court of Appeal. Their appeal to this court from the decision of the trial magistrate was final. They cannot therefore say that they would suffer substantial loss if stay of proceedings in this case is not granted. The matters in dispute have been litigated for a long time. This court is of the view that it would not serve the interest of justice for the proceedings herein to be stalled. In any event, the Applicants were required to make the application for stay in the appeal that was dismissed by Dulu J. This court has no jurisdiction to entertain the Applicants’ application.

In the premises therefore, the application dated 26th July 2010 is hereby dismissed with costs to the Respondents. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF APRIL 2014.

L. KIMARU

JUDGE