



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.16 OF 1988**

**IN THE MATTER OF THE ESTATE OF LABAN KINGORI MACHARIA (DECEASED)**

**JOHN MWANGI**

**KING'ORI.....APPLICANT**

**VERSUS**

**ZAWERIA WANGARI**

**KINGORI)**

**MACHARIA MAINA ) .....OBJECTORS**

**IRUNGU MAINA**

**)**

**KARIUKI MAINA )**

**RULING**

The Applicant, John Mwangi Kingo'ri, was aggrieved by the decision of this court rendered on 21<sup>st</sup> January 2014. He has filed notice of his intention to appeal against the said decision to the Court of Appeal. The Notice of Appeal was filed on 29<sup>th</sup> January 2014. On 21<sup>st</sup> February 2014, the Applicant moved this court pursuant to **Rules 49 and 73** of the **Probate and Administration Rules** seeking two (2) orders from this court: he sought to be granted leave to appeal against the said decision of the court. The Objectors did not oppose the Applicant's application to be so granted leave to appeal. Indeed, on perusal of the court's record, this court did infact grant leave to the Applicant to appeal against the decision that is a subject of this application. In the premises therefore, this court is of the view that it cannot grant leave to appeal twice in respect of the same decision. That prayer is therefore superfluous. In the second prayer, the Applicant sought an order of this court to stay the execution of its decision pending the hearing and determination of the intended appeal. The application is supported by the annexed affidavit of the Applicant.

The application is opposed. The Objectors filed grounds in opposition to the application. They stated that the application had no merit as the orders made were by consent. The Objectors were of the view that the Applicant had filed the application to frustrate the distribution of the estate of the deceased to the beneficiaries. This was because the Applicant was single-handedly enjoying a prime asset of the estate to

the exclusion of other beneficiaries. The Objectors urged the court to dismiss the application with costs. One of the Objectors, Zaweria Wangari King'ori filed a replying affidavit in opposition to the application. She essentially stated that the application should be dismissed because, if granted, it would prevent the beneficiaries from enjoying the fruits of the decision of this court which ultimately distributed the properties that comprised the estate of the deceased.

At the hearing of the application, this court heard oral rival submission made by Mr. Chege for the Applicant and by Mr. Njiraini and Mrs. Ngugi for the Objectors. This court has carefully considered the said submission. Before giving its decision, it is imperative that this court gives a background to the decision that is the subject of the application. The Applicant is the executor of the Will of the deceased. A dispute arose between the beneficiaries regarding how the properties that comprised the estate of the deceased were to be distributed. The beneficiaries agreed that the basis upon which the said estate was to be distributed would be the houses of the deceased. The deceased was married to three (3) wives. The beneficiaries agreed that the estate would be distributed in accordance with the three houses of the deceased. The beneficiaries were unable to agree on how the properties that comprised the estate of the deceased were to be distributed. The distribution was therefore undertaken by the court in the presence of all beneficiaries.

The estate of the deceased comprised of ten (10) properties. There is no dispute regarding how the nine (9) properties were distributed to the beneficiaries by the court. The Applicant disputes the manner in which the property registered as LR. No. 209/1413/28 Accra Road Nairobi was distributed by the court. This is a commercial property. It was common ground that after the death of the deceased, the Applicant improved the value of the property by constructing several floors above the two (2) floors that already existed at the time of the deceased's death. The parties agreed in court that the aspect of the property that was to be distributed to the beneficiaries was the land itself and not the developments thereon. The Applicant conceded that the land belonged to the deceased and was therefore part of his estate which was available for distribution. To that extent, there was no dispute between the beneficiaries.

To resolve the distribution of this particular property, the court ordered the land to be valued. It directed the contesting parties to each appoint a Valuer of their choice to undertake the valuation of the suit parcel of land, and upon the filing of such valuation report, the court would make its determination as to the value of the land. In compliance with the order of this court, Messrs Townland Valuers, duly instructed by one of the Objectors, valued the land at Kshs.90 million. The Applicant appointed Mathu & Associates. He valued the land at Kshs.60 million. The two reports were handed to the court. Mr. Chege for the Applicant made an application for the two Valuers to be summoned by the court to explain the basis upon which they reached their respective valuations. The Applicant doubted the qualification of the Valuer appointed by the Objectors. Mr. Njiraini for the Objectors objected to the application. This court rendered its Ruling finding in favour of the Objectors. The material part of the Ruling stated thus:

***“That there would be a difference in the respective valuations is no surprise to this court. In fact, the valuation reports are considered by this court to be professional opinions which this court is bound to take into account in arriving at its decision on the respective values. The ultimate decision as to the values of the subject properties is ultimately the court's, taking into consideration the nature of the dispute between the parties to this suit.”***

The court proceeded and ascribed the value of the suit parcel of land at Kshs.75 million.

The court ordered the Applicant to pay to the estate the said sum of Kshs.75 million so that the same is distributed equally between the three (3) houses. The court took into consideration the fact that the Applicant had expressed to the court his wish to retain the suit property. The court granted his wish subject to the Applicant surrendering the value of the land to the estate. For the avoidance of doubt, as a beneficiary, the Applicant would also benefit in a similar manner as other beneficiaries: meaning that the house where the Applicant belongs would get a third of the said sum of Kshs.75 million. Because there were other properties too which were valued and other beneficiaries given the first option to purchase, the respective values of those properties would be set-off as between the houses so that what will ultimately be paid in form of cash is the balance of the set-offs.

The court got the distinct impression that the Applicant has over time convinced himself that the suit property is now his property on the basis of the fact that the register at the Lands Office reflects his name as the registered owner. The Applicant should by now be aware that he was so registered as the executor of the Will of the deceased. The fact of his registration as an executor did not grant him proprietary rights over any of the properties without the court's say so. The Applicant has benefitted far too long from the status quo. It is to his interest that the status quo persists indefinitely.

It is this decision that the Applicant wants to appeal against. The Applicant has his constitutional right of appeal. This court has no jurisdiction to comment on the merit or otherwise of the intended appeal. That is the exclusive jurisdiction of the Court of Appeal. The Applicant has applied to stay the execution of the Ruling of this court pending the hearing and determination of the intended appeal. Although the 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 Applicant is required to establish that he would suffer substantial loss if the order of stay of execution is not granted. He is also required to provide security for the due performance of the order. The application for stay must be filed without undue delay.

In the present application, the Applicant argued that he would suffer substantial loss if the court does not stay the execution of its orders. The Applicant stated that, according to the Will of the deceased, it was intended that the properties comprising the estate of the deceased would be enjoyed by the beneficiaries and not be disposed of to third parties. The Applicant was apprehensive that if stay was not granted, the ultimate result would be that some of the properties that comprise the estate of the deceased will be sold to satisfy the order of this court. On their part, the Objectors were of the view that if stay is granted, the status quo currently prevailing (which favours the Applicant) will continue to persist to the detriment of the Objectors who have waited for a long time to enjoy their respective inheritances.

Upon evaluation of the facts of this application, it was clear to this court that the prayer sought by the Applicant cannot be granted. The Applicant has not established, to the satisfaction of this court, what prejudice he would suffer when he is being asked to distribute the assets of the deceased to the beneficiaries. The distribution of the estate of the deceased has been pending in the corridors of this court for more than twenty-eight (28) years. During this period, the Applicant has enjoyed the status quo to the exclusion of other beneficiaries. The Applicant can exercise his right of appeal but not to the detriment of the other beneficiaries. The Applicant's application lacks merit and hereby dismissed with costs. The estate of the deceased shall be distributed as ordered by this court. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER 2014**

**L. KIMARU**

**JUDGE**