

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 134 of 1984

IN THE MATTER OF THE EVANS KAMAU GATIBA a.k.a EVANS BORO KAMAU -
DECEASED

RULING

The application for determination is dated 19th March 2011. In it the applicant seeks in the main stay of execution of the order of the court given on the 9th August 2011. The stay orders are meant to last during the pendency of an appeal which has not yet been lodged.

The order whose execution is sought to be stayed was given on 27th July 2011 by Maraga J, as he then was, and extracted on 9th August 2011. It provided for rectification of a certificate of confirmation and the survey and subdivision of the property the subject of the motion.

The application dated 19th March 2012 is a Notice of Motion premised on **Order 42 rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. It is grounded on the affidavit of the applicant, Geoffrey Wainaina Evans. It is effectively an application for stay pending appeal.

Is the application competent based, as it is, on the premises of the Civil Procedure Act, instead of the Law of Succession Act?

This court has held in a long line of cases, among them In the Matter of the estate of Joseph Mwangi Mwaranu (deceased) Nairobi High Court **Succession Cause number 1814 of 1996**(Khamoni J), and Francis Kamau Mbugua and another -vs- James Kinyanjui Mbugua Nairobi High Court case number 111 of 2004 (Nyamu J) that the Law of Succession Act and the Probate and Administration Rules provide a complete code of procedure on probate and succession matters. The Law of Succession Act provides a special jurisdiction so far as these matters are concerned, complete with its procedural rules and forms. This special jurisdiction is saved in Section 3 of the Civil Procedure Act.

Regarding special jurisdiction and procedures, Onyancha J held in Shah -vs- Shah (number 2) (2002) 2KLR 607, that where any proceedings are governed by special legislation, the provisions of the special legislation must be strictly applied and the provisions of the Civil Procedure Act and the Rules made under it would be of no application unless expressly provided for by such special legislation and that that position would hold even if the special legislation is silent on whether or not the Civil Procedure Act and Rules apply.

The provisions of the Law of Succession Act assert the legislation as one which provides a special jurisdiction. **Section 2(1) of the Law of Succession Act** provides that except for any express provisions in the **Law of Succession Act** or some other law to the contrary, the provisions of the Law of Succession Act constitute the law of Kenya so far as succession to the estates of persons dying after the 1st of the July 1981 is concerned and to the administration of estates of such persons. **Part VII of the Act** which governs administration of estates, provides the procedures for use in probate and succession matters. **Section 97** of the Act empowers the Rules Committee to make the rules of procedure for probate and succession purposes. The Rules committee has come up with the Probate and Administration Rules.

Under the Probate and Administration Rules certain provisions of the Civil Procedure Rules have been imported. This is through Rule 63. The imported purposes are **Orders V(now Order 5), X (spent), XI (spent), XV (now Order 16) XVIII (spent), XXV(now Order 26), XLIV (now Order 45) and XLIX (now Order 50)**. These are the only provisions of the Civil Procedure Rules that are of application in

Probate and Succession Litigation.

The stay of execution application before the court is premised on **Order 42** (formerly **Order XLI**) of the Civil Procedure Rules. This Order is not one of those imported into probate and succession practice by **Rule 63** of the **Probate and Administration Rules**. Consequently, the process governed by **Order 42** of the **Civil procedure Rules** has not been imported into probate and succession practice, and is not available in probate and succession causes. Indeed, Koome J, as she then was, held so in the matter of **Joram Waweru Magondu (deceased) Nairobi High Court succession cause number 2721 of 2002**, where she held that stay of execution of an order made by a probate court could not be granted under **Order XXI** (now **Rule 22**) of the **Civil Procedure Rules** as **Rule XXI** had not been imported into probate practice.

The application is therefore not merited and I dismiss it with costs.

W. Musyoka
Judge

DATED, SIGNED and DELIVERED at NAIROBI this 6th DAY OF FEBRUARY, 2013.

Miss Githaiga for Mr. Wachira for the applicant.

Miss. Kabuthi for the respondent.