



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO.437 OF 2005**

**IN THE MATTER OF THE ESTATE OF MARY NJERI (DECEASED)**

**JACINTA NJERI KURIA..... 1<sup>ST</sup> PETITIONER/RESPONDENT**

**RUTH WANJIRU KAMAU.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**VERSUS**

**FRANCIS KARIUKI KURIA.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**PATRICK KIMANI KURIA.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**RULING**

In dismissing the applicants' objection to the making of a grant and cross-petition, Koome, J found that the deceased, Mary Njeri Kuria, an adult of sound mind, exercised her free will in distributing to her children, the two petitioners, the objector and another son disproportionate acreage of her only estate, NYANDARUA/ SABUGO/476.

That decision aggrieved the applicant who filed a notice to challenge it on appeal, while at the same time sought to stay the judgment by filing a Notice of Motion on 25<sup>th</sup> June, 2009. The application was struck out by Maraga, J for being brought under the wrong provision of the law, hence the instant application.

In the application, the applicant has averred that having been aggrieved by Koome, J's judgment, he filed a notice of his intention to appeal to the Court of Appeal; that the respondents are women of straw and are married; that if a stay is not granted, they would sell the suit property and render the appeal nugatory; that the applicant has sub-divided his 16 acre-portion and distributed the same to his children who have in turn developed them. The respondents opposed the application stating in their replying affidavit that they stand to be prejudiced if an order of stay was granted.

I have carefully considered the application, the replying affidavit, written submissions and authorities cited. The application is expressed to be brought pursuant to **section 47** of the **Law of Succession Act**, **Rules 47, 63(1)** and **73** of the **Probate and Administration Rules**, **sections 1A, 1B** and **3A** of the **Civil Procedure Act**. It has been argued for the respondents that an order of stay of execution does not issue in a probate cause as the application of **Order 41** of the **Civil Procedure Rules** is excluded by **Rule 63** of the **Probate and Administration Rules**. In support of this proposition, the case of **In the Matter of the Estate of the Late Njuguna Kibuthu (Deceased)**, Nbi. H.C. Succession Cause No.1014 of 1993 was cited. This is a persuasive decision being a decision of a court of coordinate jurisdiction.

Yes, the **Law of Succession Act** is a self-regulating legislation complete with its procedures. The only provisions of the **Civil Procedure Rules** imported in the Act are specified in **Rule 63** of the **Probate and Administration Rules**. They are **Orders 5, 10, 11, 15, 18, 25 44 and 49**. These are limitations imposed by the rules (P & A Rules). The substantive law and indeed the same P & A Rules however, donate to the court inherent jurisdiction to entertain any application and determine any dispute and to pronounce such decrees and make such orders as may be expedient or as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The instant application has not been brought under **Order 41** of the **Civil Procedure Rules** but pursuant to the inherent powers of this court to make orders that appear expedient and to meet the ends of justice. The application is, I find, properly brought.

Is there merit in the application? In other words, can the court stay the decision of Koome, J dismissing the applicants' objection and cross petition?

To answer this question, I will quote the Court of Appeal in the following the occasions:

1. **Republic Vs. Municipal Council of Mombasa & 2 others** *ex parte* **Adopt – A – Light Limited**, Civil Application No.NAI.15 of 2007 where the court dealing with **Rule 5(2)(b)** of its rules, which principle applies to this court's jurisdiction under **Order 41 rule (4)** of the **Civil Procedure Rules**, said:

**“The court has no jurisdiction under Rule 5(2)(b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs.”**

1. In **Kenline Agencies Limited Vs. Housing Finance Company (K) Limited & John Githua Njogu**, Civil Application No. NAI.83 of 2007, where the High Court had dismissed the appellant's application for restraining orders, the Court of Appeal in a ruling on application for stay of execution remarked:

**“The second prayer (*for stay of execution*) in the application is incompetent because the superior court did not grant any order capable of execution, save for the order for the payment of costs”**

Finally

1. In **Dr. Paul Makau Wambua Vs. Diana Ndele Wambua**, Civil Application No.NAI.119 of 2004, the Court of Appeal reiterated that where a matter has been dismissed, there cannot be a stay of execution except for costs

A stay of execution will therefore, only be granted where the court makes a positive order capable of execution.

For these reasons, I find no merit in the application which I hereby dismiss with costs to the respondents.

**Dated, Delivered and Signed at NAKURU this 27<sup>th</sup> day of January, 2011.**

**W. OUKO**

**JUDGE**