



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 12 OF 1998

IN THE MATTER OF THE ESTATE OF BEDAN KINARO GATIMUDECEASED

BETWEEN

ZIPPORAH WANJUGU KINARO PETITIONER/RESPONDENT

AND

GEOFFREY WACHIENI KINARO OBJECTOR/APPLICANT

R U L I N G

Before me is Summons in general form dated 26th September 2008 and expressed to be brought under rule 49 and 73 of the Probate and Administration rules. In the application, **Zipporah Wanjugu Kinaro**, hereinafter referred to as “*the applicant*” seeks against **Geoffrey Wachieni Kinaro**, hereinafter referred to as “*the respondent*” an order in terms that:-

“..... The Honourable court be pleased to order its deputy Registrar to sign all the necessary documents on behalf of Geoffrey Wachieni Kinaro to give effect to the Grant of Letters of Administration issued on 24th September 1998 and confirmed on 27th November 2007.....”

The applicant asked that the costs too of the application be provided for.

The application was supported by the affidavit of the applicant. In pertinent paragraphs she deponed that the cause related to the estate of **Bedan Kinaro Gitimu**, her late husband. That grant of letters of administration was issued to her on 24th September 1998 and although all her children mandated her to proceed with the succession proceedings only one, the respondent herein objected. Despite his objection the cause proceeded and the grant of letters of administration was confirmed to her subsequently. Following the confirmation of the grant she has requested the respondent severally to sign the necessary documents to have the transmission processed but he has declined to do so hence this application.

The application was opposed. The respondent through a replying affidavit dated 26th September 2008 deponed that he was dissatisfied with the mode of distribution confirmed by this court pursuant to which he had filed notice of appeal on 10th June 2008. That subsequent thereto he filed the appeal on 8th August, 2008. That it is on the basis of his said pending appeal that he had declined to sign the transmission documents. He went on to further depone that he would suffer irreparably if transmission is executed since a substantial portion of his school will be taken away and he may be forced to close it down for want of sufficient land. Finally that his appeal will be rendered nugatory if the execution

proceeds.

In his oral submissions in support of the application **Mr. Mugo**, learned advocate for the applicant stated that the respondent has been unwilling to sign the necessary documents. Though there is an appeal filed, the same is a nullity since no leave was sought and obtained from this court. Finally he submitted that no prejudice will be occasioned to the respondent if the application is allowed.

Orally, **Mr. Kiama**, learned advocate for the respondent submitted that the respondent had refused to sign the documents because he had lodged an appeal whose merits will be determined by the court of appeal. The respondent will suffer prejudice if the certificate of confirmation of grant is effected as the school may be closed down for lack of space. No prejudice will be occasioned to the applicant. Finally he submitted that lack of leave to file appeal is a curable defect.

I have carefully considered the application, the affidavits in support and opposition thereof together with the annexures and oral submissions. It is common ground that the applicant is seized of a confirmed grant. It is also common ground that in order to carry into effect the terms of the confirmed grant, there are certain documents that require the respondent's signature. Finally it is common ground that the respondent has refused to execute those documents. Reason; that he has filed an appeal against this court's ruling delivered on 5th June 2008 although in his application he indicates that the ruling was on 6th June 2008. This court did not deliver any ruling on 6th June 2008. Clearly therefore the respondent is appealing against a non-existent ruling.

In any event the mere filing of an appeal cannot amount to a stay of execution. There being no formal stay of execution in place, nothing stops the applicant from carrying into effect the terms of the confirmed grant. She cannot be stopped from executing the terms of the confirmed grant merely because the respondent has preferred an appeal. The respondent ought to have sought and obtained an order of stay of execution of the ruling against which he has lodged an appeal. He cannot just sit back and refuse to execute the documents merely because he has lodged an appeal. This court is aware though that by an application dated 26th September 2008, the respondent had sought an order of stay of the distribution of the estate herein pending the hearing and final determination of the appeal pending before the court of appeal. However when this court pointed out to **Mr. Kiama** that the said appeal may not have any legs to stand on in view of the fact that no leave had been sought and obtained from this court before the appeal was lodged, **Mr. Kiama** elected to withdraw the said application on that basis. Nothing has so far changed that would lead me to believe that the appeal as preferred is competent. An appeal to the court of appeal arising out of a succession cause is not automatic. The intended appellant must seek and obtain leave of this court in order to file an appeal to the court of appeal out of a succession cause. No such leave has been exhibited in the respondent's replying affidavit. **Mr. Kiama**, did submit on this issue that lack of leave to file appeal was a curable defect. My take on this is that it is indeed a fatal defect. It is not curable. The appeal to the extent that it was filed without leave of this court is a nullity. Accordingly, the applicant cannot be denied her right to carry into effect the terms of the confirmed grant merely because of an appeal which may be incompetent has been filed.

Finally, if the applicant is appealing against the mode of distribution of the estate as confirmed on 27th November 2007 then the appeal in the court of appeal is grossly out of place as time for such appeal has long elapsed and the respondent has not exhibited any leave to file notice of appeal or indeed the appeal out of time.

For all the foregoing reasons, I find the application dated 5th July 2008 merited. Accordingly I allow it in terms of prayer 1. The applicant too shall have the costs of this application.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE