

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 259 of 1994

**IN THE MATTER OF THE ESTATE OF M'KWARIA MBUKIA alias KWARIA KIUJO
MBUKIA (DECEASED)**

MWARANIA KWARIA APPLICANT

VERSUS

JULIUS KATHIA KIUJO..... RESPONDENT

RULING

By an application dated 10th May, 2006, the applicant is seeking that the court stays execution and all proceedings in this cause pending appeal. The application is based on the grounds that the applicant, being aggrieved by this court's order made on 4th April, 2006 dismissing his application dated 9th April, 2001, has preferred an appeal.

That if the stay sought is not granted, the respondent will proceed with execution and his (applicant's) appeal shall be rendered nugatory.

The respondent, in opposing the application has filed a replying affidavit in which he depones that the application is frivolous and that the notice of appeal was lodged after the 14 days allowed for filing it.

Further, that the applicant has not filed an appeal. The respondent also argues that Order 41 has no application in the Law of Succession Act and the rules made there under.

Finally it was submitted that the applicant has not furnished any security. I have considered these rival arguments and must now determine the issues raised. The application is expressed to be brought under order 41 rule 4 of the Civil Procedure Rules.

Under this rule an order of stay of execution will be granted if the applicant demonstrates that he will suffer substantial loss if the stay is not granted. He must also satisfy the court that the application has been brought without unreasonable delay and finally, the applicant must express readiness to comply with any orders as to security as the court may make.

The order complained of dismissed the applicant's two applications which sought that a grant of representation be revoked and inhibition of a parcel of land, respectively.

The applicant has not demonstrated how that dismissal will cause him substantial loss. He has only averred that his appeal shall be rendered nugatory if the orders sought are not granted. That appeal has not been prosecuted since the notice was filed on 13th April, 2006 – one year ago. Infact the appeal itself has not been filed.

I am satisfied, on the second requirement, that this application was brought without unreasonable delay. The respondent is not required to furnish security before it is ordered. All he was expected to state is his

readiness to comply with any orders as to security as may be made by the court.

The final point I want to consider is whether order 41 has any application to the Law of Succession Act (Act) or the Probate and Administration Rules, (the Rules). The Act is self-regulated in the sense that it provides for its independent procedure under the Probate and Administration Rules. That explains why the latter makes specific provisions of the Civil Procedure Rules that are applicable to it in Rule 63(1).

In the result I find that this application is incompetent and the same is struck out with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 28TH DAY OF MAY 2007.

W. OUKO

JUDGE