



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 1589 of 1994

IN THE MATTER OF THE ESTATE OF ASHFORD NJUGUNA - (DECEASED)

RULING

Before me is an application dated 25th May, 2004 by way of a Chamber Summons provided under Rules 49 and 73 of the Probate and Administration Rules (hereinafter referred to as the Rules). These Rules are, for the record, made under the Laws of Succession Act (Cap 160 Laws of Kenya).

It seeks prayers for grant of leave to appeal from the ruling delivered by Hon. Waweru J. on 14th March, 2004 and stay of its execution.

The bone of contention of the Applicants is the reasonableness of the distribution made under the ruling from which leave to appeal is sought for.

The application is supported by the grounds set forth on its face as well as on the affidavit sworn by the 1st Applicant on 25th May, 2004. She swore the affidavit on behalf of other four applicants who are her children.

In paragraph 10 of her affidavit she has also specified grounds on which he intends to file the appeal.

The ruling giving grievances to the Applicant is made after the applicant applied for reasonable provision under Section 26 of the Laws of Succession Act, (Cap 160 Laws of Kenya) (hereinafter referred to as '**the Act**'). It is not in dispute that the estate was a testate one and that is why the application was made for reasonable provisions to be Defendants. The applicant is an aged person. She was 82 years old in the year 2004.

I also note that the main grievances of the Applicant are that the decision of the court does not disclose reasonable distribution, and that the applicant is deprived of her right of life interest in the estate. With respect to the anxiety of applicants, I do not agree that she is entitled for either of those grounds under the Act when the estate is a testate one.

I also note that the application was filed under Certificate of Urgency on 26th May, 2004 which could only be heard due to efforts of the court after more than two years. No further affidavit is filed to show how the applicants survived or managed during the two years without the stay of execution. Without anything further from both sides, I would not presume either way.

I do agree with Mr. Kiago that on the first principle, our advertial system of justice should not encourage finality of the decision by single court only. I also agree with him as regards propositions in law that the leave to appeal be granted when there is an arguable case. (see **Sango Boy Estates Ltd and**

Others –v- Dresdner Bank A.G. (1971) E.A.C.A. 17.

Before I go into the issue of first principle submitted by Mr. Kiago, I should determine whether the appeal would be an arguable one.

I have read carefully the ruling under question and do note that the Hon. Judge has rightly considered that under Section 26 of the Act he is not expected to rewrite the Will. What he is expected, is to give reasonable provisions to the dependants, the applicants having been found to be such dependants under Section 29 of the Act.

With those grounds and reasons shown by the applicant, I do not think that what is sought to be canvassed before the Court of Appeal by the Applicant is an arguable case and cannot grant the application for leave to appeal as prayed for.

Finally, although it is not necessary for the determination of this application to make my findings on the issue whether right of appeal exists under the Act from the Judgments, rulings and order of the court. However, the issue was canvassed and I shall humbly try to address the same.

It is apparent that under Rule 63 of the Rules neither Section 66 of the Civil Procedure Act nor Order XLII of the Civil Procedure Rules are applicable to the Act. If the Parliament intended to have the right of appeal as per the provisions of the Civil Procedure Act or the Civil Procedure Rules, nothing would have been simpler but to include those provisions in Rule 63 of the Rules wherein other provisions are specifically adopted for purposes of this Act.

Section 50 of the Act provides that appeals from the decree and order made by the Resident Magistrate courts shall lie to the High Court whose decision thereon shall be final. No provision for appeal as relates to the decree and order made by the High court is made under the Act.

With these specific provisions, one fact arises conclusively that there is no automatic right of appeal from the decree and order made by the High Court either with or without the leave of the court. On the other hand, there is absence of a positive provision in the Act which stipulates that the judgment, decree and order made by the High Court are final. It is contended and I do agree that if the intention of the parliament was to make the judgment, decree or order of the High Court as final, a clear provision has to be made to that effect.

In this scenario, the issue before me is whether an appeal lies from the judgment, the decree and order by the High Court.

I would hesitate to accept the proposition that the decree and order made by the High Court should be final, simply because our judicial system which advocates an advertial system, cannot bar a further or fresh consideration of the first decision made by any court.

I would add that, considering the nature of disputes under the Act, which involves mostly the family members, the Parliament, by providing the inherent powers to the High Court under Rule 73 of the Rules has empowered the High Court to look into each individual case before it and then to allow the right of appeal only to those causes which are found to be judiciously fit to go for appeal. By doing so, in my humble opinion, the Parliament intended to bar an automatic right of appeal which is manifest in Civil Litigations.

In this respect in my humble view, the High Court under the Rules has been given an indirect power in the matter of leave to appeal, which power has to be exercised judiciously.

My findings get fortified by the provisions of Rule 63 of the Rules which provides inter alia that the court or the Registrar can, for reasons to be recorded, make any order in any particular case which may be outside the provisions of the Civil Procedure Act and Rules which are specifically mentioned in the said Rule, i.e. Rule 63 of the Rules.

The upshot of all the above is that the application before me is dismissed.

Under the circumstances of the case, I do not make any order on costs.

Dated and signed at Nairobi, this 22nd day of June, 2006.

K.H. RAWAL

JUDGE

22.6.06.