



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION NO. 441 OF 1984

IN THE MATTER OF THE ESTATE OF WAKAPA PERE (DECEASED)

JONH WAKAPA PERE APPLICANT

V E R S U S

RICHARD NJENGA WAKAPA..... RESPONDENT

R U L I N G

In this cause I delivered a Judgment on 5th December, 2000. Leave to appeal against the same was granted on the same day. I also granted on an oral application, stay of execution of order for seven days pending filing of formal application.

That is how the application dated 19th February, 2001 is filed and specific prayer is made therein for stay of execution of Court orders issued on 5th December, 2000 till hearing and determination of the appeal.

In meantime an application to review my orders was made on 16th March, 2001 on the grounds of error apparent and the redistribution of the plot of land belonging to the estate was sought. I did review my orders and varied the orders of distribution of the estate property.

The orders made in my previous ruling of 5th December, 2000 are thus clearly varied and replaced and they are effectively the orders of this court as per my ruling of 19th October, 2001.

Can I now grant stay of execution of the orders made on 5th December, 2001? Mr. Macharia and Ms Mbaka learned counsel for the respondent submit that this court cannot give such stay and Mr. Mutiso the learned counsel for the applicant submits I can as nothing is effectively challenged. He made a very bold and interesting contention that what the applicant is challenging is the reasons of my judgment and not the end part thereof, that is the effective order. He however could not clearly respond to my specific question to wit ***“From which ruling the decree or order shall be extracted”***. He responded it should be from the later ruling but he proceeded to emphasize and reiterate that the applicant is not really interested in the specific shares of distribution, he is challenging the order of distribution itself.

With greatest respect to Mr. Mutiso I cannot agree with him for the following simple reasons.

The appeal is against the decree or order which is the most important document in appeal proceedings. The stay prayed for is also against the execution of decree or order made on 5th of December, 2000. The notice of appeal was and is in this case against the Judgment and order given on 5th December, 2000. That order is varied on 19th October, 2001 which is not appealed against and is not sought to be stayed.

I agree that if I grant the application for stay as prayed for, I shall be staying the order which is not on record and cannot form a part of decree or order of this cause which is a formal expression of the decision of this court.

I shall not however agree that the application as such is not competent because it is filed after seven days, the period for which I granted the stay pending the formal application.

As per my order for stay it is the stay which lapsed after seven days and not the right of the applicant to file a formal application. However for reasons earlier stated, I dismiss the application being incompetent and bad in law.

The Respondent having sought the consent of the applicant to hear and determine the review application prior to this application, I shall not make orders on costs.

Dated and delivered at Nairobi this 26th day of February, 2002.

K. H. RAWAL

J U D G E