REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO 31 OF 2017

(CORAM: F.M. GIKONYO J.)

IN THE MATTER OF ESTATE OF THE LATE WANGA OLE OIYIE

SAMUEL SHUKURU OLE OYIE.....1ST PETITIONER/RESPONDENT

MICHAEL NTIATI OLE OYIE.....2ND PETITIONER/RESPONDENT

VERSUS

SAMANTE OLE OYIE.....3RD PETITIONER/ 1ST APPLICANT

JOHN KIRTELA OYIE.....3RD PETITIONER/ 2ND APPLICANT

RULING

[1] The significant orders sought in the Summons dated 18th March 2021 are four, namely: -

i) **Stay of execution of the** Judgement/Decree dated 20.1.2021 pending appeal; **or;**

ii) **An order of status quo, barring and inhibiting the registration Certificate Confirmation of Grant herein.**

iii) Lea**ve to file appeal against the judgement/Decree of this Court dated 20.1.2021.**

iv) **Costs of the application to abide the Appeal."**

[2] The application is expressed to be brought under Rules 49, 59, and 73 of the Probate and Administration Rules, and is supported by the affidavit sworn by the 1st Applicant **Samante Ole Oyie**, on his own behalf and that of the 2nd Applicant, **John Kirtela Oyie**.

Applicants' gravamen

[3] The applicants have expressed apprehension that if stay orders are not granted, the appeal will be rendered nugatory as distribution would result in displacement from their homes in which they have lived since the year 2001. This, according to them is a major disruption to their lives.

Respondent: distribution was fair and just

[4] The Respondents filed a Replying affidavit sworn by the 1st petitioner/respondent **Samuel Shukuru Ole Oyie** on his own behalf and on behalf of the 2nd petitioner/respondent.

[5] According to the respondents, the court was guided by the evidence, observation on the ground position and respective occupation as well as the law when it ordered distribution of the estate of the deceased.

[6] They further argued that the occupation of the estate by each of the parties was on a temporary basis in the absence of any will and or formal survey or sub division on the ground by Wanga Oyie (deceased). The respondents formed an overall impression of the case; that the mode of distribution herein is fair and non-discriminatory since each of the 3 homesteads have an equal right to access to the more valuable land along Narok- Nakuru highway as well as access to water on the lower end of the land.

Submissions

[7] Pursuant to directions by the court, parties filed written submissions in support of their respective positions in the matter.

Necessity of leave to appeal

[8] Counsel for the applicants submitted that leave is necessary before appealing against a decision of the high court in succession matters in exercise of its original jurisdiction as in the instant matter. Counsel cited the court of appeal in the case of ***Rhoda Wairimu Karanja & another V Mary Wangui Karanja & Another [2014] eKLR.***

[9] Counsel for the respondents has in his submissions entirely supported that this court grants stay of execution. But, it would seem from the submission some confusion of sort and muddle-up of facts. Nonetheless, the less I venture into this, the better.

Stay of execution

[10] The Applicants submitted that their grounds of appeal raise weighty and triable issues worthy of consideration by the court of appeal. They relied heavily on the argument that, should distribution of the estate be done, and the Court of Appeal reverses the High court judgment, any resettlement of the families would be extremely chaotic. Hence, the need to preserve the estate in the current form; this is more practical and beneficial for the amity and comity of the estate as well. The applicants cited the cases of ***Samvir Trustee Limited Vs Giardian Bank Limited Nairobi (Milimani) Hccc 795 of 1997***.

[11] In conclusion the applicants' counsel submitted that the applicants have reasonably demonstrated factors which show that denial of stay pending appeal will create a state of affairs that will irreparably affect or negate the very essential core of a successful appeal. Consequently, the applicants urged this court to invoke the inherent powers of this court under Rule 73 of the Probate & Administration Rules and grant stay of execution in the interest of substantive justice.

ANALYSIS AND DETERMINATION

[12] I have considered the application, the grounds thereof, the replying affidavit, the rival submissions and the law. arising therefrom are the following issues for determination: -

> **i) Whether leave to appeal is necessary and or merited?**
>
> **ii) Whether execution of the judgment herein should be stayed pending appeal.**

Necessity of leave to appeal in succession cases

[13] The debate on whether leave is necessary before filing appeal from the High Court exercising its original jurisdiction in succession cases is not quite closed. A dichotomy still lingers amongst eminent commentators, scholars and lawyers. One school of thought posits that there is necessity of leave to appeal in succession matters; and the reasons advanced by the proponents of this school of thought are two-fold.

[14] The first one was well captured in the case of ***Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR*** by the Court of Appeal in these words: -

> **We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.''**

[15] The second, which has its origins in the Anarita Karimi case, was enunciated in the case of ***Mary Wangui Karanja & Another -vs- Rhoda Wairimu Karanja & Another [2014] eKLR,*** by Musyoka J. to be that:-

> **"…A right of appeal is statutory and since the Law of Succession Act has not provided for such a right the same does not exist. ''**

[16] Another school of thought takes the view that the Constitution of Kenya, 2010 provides for unfettered right of appeal. And such provisions in the Law of Succession Act requiring leave to appeal being existing law should be dealt with in accordance with section 7(1) of the Transitional Provisions in the Sixth Schedule of the Constitution: -

> **7. Existing laws**
>
> **(1) All law in force immediately before the effective date continues in force** ***and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*** **[Emphasis mine]**

[17] The Court of Appeal recognized this dichotomy of opinion in the case of ***Peter Wahome Kimotho v Josphine Mwiyeria Mwanu [2014] eKLR*** the when ***VISRAM, KOOME & MARAGA, JJ.A*** (as they then were) stated thus: -

> **There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court**

as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the Civil Procedure Act is not automatically imported into the Law of Succession Act. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the Constitution of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the Constitution, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.'

[18] Be that as it may, the Court of Appeal in the case of ***John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR*** held: -

"9 ……We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR and Josephine Wambui Wanyoike – v- Margaret Wanjari Kamau & another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu – v- Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981).

In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant."

[19] Even as the debate rages on, I should think that the focus should be on the considerations a court should take into account in granting or refusing leave. This necessity emerged in the case of ***Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR*** **when** the Court of Appeal held that;

''In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.

We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. *Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration*. [Emphasis supplied]

[20] According to this precedent, leave to appeal should normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. I should add that, exercise of the discretion in granting leave to appeal in succession causes, should be underpinned by the right of appeal provided in the Constitution.

Applying the test

[21] The applicants have expressed grievance on the decision of this court **(Bwonwongá J)** and wish to litigate in the Court of Appeal. As the court considered the situation on the ground after visiting the land, and took into account the dwelling houses, I do not see anything substantial which may require further and serious discriminating interrogation by a higher court. Nevertheless, in light of the right of appeal enshrined in the Constitution, I grant the applicants leave to experience the appeal tour. Accordingly, I grant the applicants eave to file appeal within the prescribed time for appealing commencing today.

Whether stay of execution is merited

[22] I note that the applicants premised their application on Rules 49, 59, and 73 of the Probate and Administration Rules. Their main prayer is stay of execution of the judgment herein. Whereas Rule 63 (1) of the Probate and Administration Rules has not cited Order 42 Rule 6 of the Civil Procedure Rules as one of the orders of the Civil Procedure Rules which apply to Succession causes, Rule 49 which is among the provisions invoked by the Applicant, is in my view wide enough to cover the present application and entertain a remedy of stay of execution of a judgment or decree in succession proceedings. Rule 49 of the Probate and Administration Rules provides that:

"A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported, if necessary, by affidavit."

[23] In addition, the court may draw upon the wide powers in Section 47 of the Law of Succession Act to entertain any application and to determine any dispute under the Law of Succession Act.

[24] I need not state that, the court may, in appropriate instances, draw upon its inherent jurisdiction to grant appropriate orders under Rule

73 of the Probate and Administration Rules in order to meet the ends of justice and to prevent abuse of process of the court. These elegant provisions of ‘’*existing law*’’, are in perfect conformity with the Constitution especially the strict command in Article 159 of the Constitution that courts of law should strive to administer substantive justice. As such the application is properly before the court.

[25] Apt borrowing from the Civil Procedure Rules. The applicants herein have filed a memorandum of appeal and notice of appeal and thus clothed with the *locus standi* to apply for stay pending appeal.

Substantial loss occurring

[26] Stay of execution pending appeal is a discretionary power but, which must not be exercised on whims, but judiciously; on defined principles and the facts of the case.

[27] The objective of stay of execution is to prevent substantial loss from befalling the applicant; ordinarily, it is to prevent the appeal from being rendered nugatory. Such is lawful and reasonable reason to limit the respondent’s right to immediate realization of the fruits of judgment. See ***James Wangalwa & Another vs. Agnes Naliaka Cheseto*** **[2012] eKLR**: -

> **“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.**

[28] The applicants state that they will suffer substantial loss if the stay is not granted, for they will be displaced from their homes resulting in rude and irreparable disruption to their lives. The respondents on the other hand averred that the mode of distribution of the estate is fair and non-discriminatory.

[29] I do note that the court visited the land and determined the mode of distribution after considering all factors including placement of the beneficiaries on the land, dwelling houses and other essentials like access to water and road. I do not see how implementation of the grant or changes of boundaries will cause rude displacement of the applicants from their homes. I note that the applicants are merely obsessed with getting particular portions or parts of the estate property. It would be a dangerous proposition that occupation of a particular part or portion of land of the intestate estate should be the sole factor in the distribution of the estate of the deceased. I have lamented before; it would be most insidious and preposterous a practice to encourage beneficiaries to embark on occupying and developing particular portions or parts of the intestate estate’s real property after the death of the deceased in the hope that the occupation and developments will confer or vest preferential interest during distribution of the estate. Such would be the ablest architect of ruin.

Conclusions and orders

[30] It bears repeating that, the claims in this application were made in the trial and the court had to visit the *locus in quo* before determining the distribution of this estate. The applicants plead difficulties that may be experienced in resettlement if they are successful. I am not persuaded that implementation of the grant herein will cause a displacement which may occasion substantial loss to the applicants as the homes on the estate property was one of the considerations the court took into account. I do not think changes in boundaries would make resettlement so difficult as it has been claimed, if it becomes necessary. In light of the foregoing, I decline to stay implementation of the grant herein.

[31] In the upshot the application herein succeeds in part. Accordingly:

> **(1) I grant the applicants leave to file appeal in accordance with the applicable regulations;**
>
> **(2) I reject the request for stay of execution or implementation of the judgment and grant herein, respectively.**
>
> **(3) Each party to bear own costs as this is a dispute among members of the same family.**

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS DAY 10TH OF FEBRUARY, 2022.

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F. GIKONYO M.

JUDGE

In the presence of:

1. Okinyi for the Petitioner

2. Kilele for Respondent

3. Mr. Kasaso - CA