



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO 12 OF 2019

(CORAM: F.M. GIKONYO J.)

IN THE MATTER OF ESTATE OF THE SAITOTI KIDIIS (DECEASED)

RESIAN KIDIIS.....PETITIONER/RESPONDENT

VERSUS

GEORGE SANKALE KIDIIS.....OBJECTOR/ APPLICANT

RULING

[1] Before me is a Notice of Motion dated 16th November 2020 which seeks *inter alia* orders: -

“(1) THAT there be a stay of execution of the judgement delivered on 26th October 2020 pending the hearing and determination of the intended appeal.

(4) THAT costs of this application be costs in the cause.”

[2] The application is expressed to be brought under Order 51 Rule 1, Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act revised edition 2010, and is supported by the affidavit sworn by the Applicant **George Sankale Kidiis**.

[3] The applicant has expressed apprehension that if stay orders are not granted, the respondent might execute the judgement before the appeal is heard and determined.

[4] The Respondent filed a Replying affidavit sworn by the petitioner/respondent **Resian Kidiis**. The gist of his argument is that the orders sought in the application will substantially affect proprietary rights of other persons who are not parties to these proceedings. That the application is incompetent, misconceived and should be struck out. That further the objector has not demonstrated what irreparable harm will be occasioned to him if the orders are not granted.

Submissions

[5] Parties filed submissions pursuant to directions by the court.

[6] The applicant submitted that the properties have been awarded to the beneficiaries and there is a real risk of the properties being sold and /or alienated by the beneficiaries and therefore the appeal would be rendered nugatory.

[7] Counsel for the respondent has submitted that the merits of the objector/applicant’s case were determined by this court on its judgment on 26th October 2020 and in the said judgment the court dismissed the applicant’s objection. The dismissal of the objection took the parties to the position they were before the objection was filed on 27th February 2017.

[8] Counsel submitted that parcel no. CISMARA/KISIRIRI/336 ceased to exist after the respondent was granted letters of administration and as a result of the sub division parcels CISMARA/KISIRIRI/336 new titles no. CISMARA/KISIRIRI/410 and CISMARA/KISIRIRI/411 were issued to the beneficiaries who have not been enjoined into this suit.

[9] Counsel submitted that since the judgment was delivered, there is no pending suit, it therefore follows that a party challenging a judgment cannot file an application and the same be heard by the trial court as the same amounts to the same court sitting on its own appeal. He argued

that procedurally the applicant should approach the Court of Appeal under the provisions of Rule 5(2) (b) of the Court of Appeal Rules but as it stands this court is *functus officio*.

[10] Counsel submitted that the court merely dismissed the objector's summons and there is no positive order granted capable of being executed and in any case the estate has already been distributed. Counsel cited the case of *George Ole Sangui V Kedong Ranch Limited Civil Application No. Nai 55 Of 2015, Daniel Lomagul Kandeil & 2 Others V Kamanga Holdings Limited & 40 Others [2017] eKLR, and Western College Of Arts And Applied Sciences Vs Ep Orange & 3 Others (1976) eKLR*

[11] Counsel submitted that the applicant has not fulfilled any of the three conditions for grant of the orders of stay of execution provided under Order 42 Rules 6(2) of the Civil Procedure Rules sought and therefore undeserving of this court's discretion. Counsel cited the cases of *Kenya Shell Ltd Vs Kabiru & Another [1986] KLR 410, Machira & Machira & Co. Advocates Vs East Africa Standard (No.2) [2002]2klr 63, Daniel Chebutul Rotich & 2 Others Vs Emirates Airlines, Civil Suit No.368 Of 2001, National Bank Of Kenya Ltd Vs Alfred Owino Bala [2015] eKLR, Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 Of 1997, Tropical Commodity Suppliers Limited, Bungoma HC Misc. Application No. 42 Of 2011, James Wangalwa & Another Vs Agnes Maliaka Cheseto, Kenya Commercial Bank Ltd Vs Suncity Properties Ltd & 5 Other [2012] eKLR, Arun C Sharma V Ashana Raikundalia T/A Rairundalia & Co. Advocates And William Wambugu Wahome Vs The Registrar Of Trade Unions Ca No Nai 308 Of 2008.*

[12] In conclusion counsel submitted that the application is misconceived, an abuse of the court process and that it is in the interest of justice that the application should be dismissed in its entirety.

ANALYSIS AND DETERMINATION

[13] Arising from the application, the rival submissions of the parties, the record and the law: -

a. Is this court is functus officio. Under this issue, the court should determine whether leave of court was sought to file appeal; and

b. Is stay of execution merited?

Leave of the court to appeal

[14] Although there seems to be a dichotomy of opinion and two schools of thought on the necessity of leave to appeal in succession matters, insistence has been that appeal from the decision of the High court in exercise of its original jurisdiction is only with the leave of the court.

[15] See the Court of Appeal in the case of *Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another [2014 eKLR]* :-

"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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

[16] The reasons for the position taken is explained by the Court of Appeal in the above case thus...: -

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

[17] And of course the origins of this thinking was in the *Anarita Karimi* case and was captured in the case of *Mary Wangui Karanja & Another -vs- Rhoda Wairimu Karanja & Another [2014] eKLR*, by Musyoka J. 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. "

[18] I should, however, be glad to read an exposition on and a reconciliation of the above position in the Law of Succession Act with the Constitution on the right of appeal on the basis of section 7 of the Sixth Schedule of the Constitution on existing law.

[19] Be that as it may, no leave was applied for or obtained to appeal from the High Court to the Court of Appeal in this case- which is Probate cause. This is a major consideration in this application.

[20] In any case, the court is not in any position or in possession of any material in this case which may make it to appreciate whether there are weighty issues requiring further serious judicial consideration and interrogations. See *Rhoda Wairimu Karanja* (Supra).

Merits of stay execution.

[21] Borrowing from the Civil Procedure Rules, the objective of stay of execution is to prevent substantial loss or irreparable damage from occurring. The applicant stated that the estate property is likely to be distributed, hence, this will cause substantial loss to him. The

respondents have stated that the estate property, to wit, L.R. No. CISMARA/KISIRIRI/336 ceased to exist upon sub division into parcels no. CISMARA/KISIRIRI/410 and CISMARA/KISIRIRI/411 and new titles were issued to the beneficiaries.

[22] As the estate property has been subdivided and distributed, the request for stay of execution of the judgment herein has been overtaken by events. Be that as it may, I do not find any sufficient reason upon which the court could fashion or grant any other form of relief.

[23] Lest it is forgotten, I noted two incidents which would also cripple this application. No leave to appeal was applied for. And, there is no material to show that the applicant will suffer substantial loss unless stay is granted. The Applicant merely stated that he would be disinherited and that the intended appeal would be rendered nugatory. Nothing in his pleadings or submissions demonstrates that he has an arguable appeal or that if the orders of stay sought are not granted, he would suffer substantial loss. Thus, the application is without a foot on which to stand.

[24] The upshot of the foregoing analysis is that the application dated 16th November 2020 lacks merit and is dismissed with costs to the Respondents. It is so ordered.

Dated, signed and delivered at Narok through Teams Application, this 8th day of February, 2022.

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F. GIKONYO M.

JUDGE

In the presence of:

1. Mr. Kamwaro for the Petitioner
2. The Objector
3. Mr. Kasaso - CA