



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 76 OF 2016

IN THE MATTER OF THE ESTATE OF KARORI KIHAGI (DECEASED)

MOSES KARANJA KAHOCHIO.....1ST ADMINISTRATOR/APPLICANT

MUNGAI KAHOCHIO.....2ND ADMINISTRATOR /APPLICANT

VERSUS

JOEL MBURU KANYUKU.....1ST ADMINISTRATOR/RESPONDENT

ISAAC MUIGAI KARANJA.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. The application dated 2nd March, 2020 by **Moses Karanja Kahochio** and **Mungai Kahochio** (the Applicants) is one in a series of applications by the Applicants in this matter. It comes in the wake of the most recent ruling of this court delivered on 27th July, 2018. The ruling related to their application filed on 24th April, 2018 seeking leave to appeal from the ruling of **Ngugi J** of 8th March, 2018 dismissing an earlier application to review the order made by **Kimaru J** on 27th June, 2014, to confirm the grant in respect of the estate of **Karori Kihagi**, the deceased herein.

2. Earlier on, the Applicants had unsuccessfully sought to apply for revocation of the grant, which application was dismissed by **Musyoka J** on 26th October, 2016. By this court's latest ruling of 27th July, 2018, the court granted the prayer for leave to file an appeal but declined the prayer for stay of the orders of **Kimaru J** of 27th June, 2014. In its ruling, the court stated inter alia that:

9. However, there is patent dissonance between the prayer for leave to appeal and the prayer for stay pending appeal. The latter is essentially directed at the orders of Kimaru J made on 27th June, 2014, being the executable order, pursuant to which, the certificate of confirmation of grant may issue. The Applicants herein elected to apply for revocation of the relevant grant before Musyoka J initially and subsequently, lodged an application to review the order of Kimaru J, rather than lodge an appeal. Thus, in so far as Kimaru J's orders are concerned, no appeal can properly be lodged or canvassed in light of the provisions of Order 45 Rule 1 of the Civil Procedure Rules.

10. Rule 1 provides:

(1) Any person considering himself aggrieved—

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” (emphasis added)

11. Technically therefore, the prayer for stay of the execution of Kimaru J's orders has no relationship to the appeal intended. Besides, even if the court were to be generous enough to consider the merits of that prayer, the delay in bringing it is clearly inordinate. Ditto for prayer 4 which in my view is not substantially different from prayer 3 seeking stay of

execution.(emphasis added)

3. It appears that subsequent to the above ruling, the Applicants approached the Court of Appeal seeking an extension of time to appeal the order of **Kimaru J** of 27th June, 2014, and whose review had been denied by **Ngugi J** by his ruling of 8th March, 2018. The court of appeal (Kiage JA) allowed the application to extend time for filing of the notice of appeal by his ruling of 21st February, 2020. Whereupon the Applicants withdrew their notice of appeal dated 19th March, 2018 in respect of the decision of **Ngugi J** of 8th March, 2018 and filed a fresh notice of appeal in respect of the decision of **Kimaru J** of 27th June, 2014.

4. The notice, filed on 24th February, 2020 forms the basis of the Applicants' fresh motion dated and filed on 2nd March, 2020. The application expressed to be brought under Rules 49, 63 and 73 of the Probate and Administration Rules, inter alia, primarily seeks that pending the hearing and determination of the intended appeal, there be an order to stay the execution of the grant confirmed by **Kimaru J**, or alternatively, an order to maintain the **"status quo of assets comprised in the deceased's estate as it is. So that the titles, assets and properties as appearing in the deceased Karori Kihagi's name do remain as such..."** (sic)

5. The application is based on grounds that the Applicants have filed a notice of appeal in respect of the confirmation of grant on 27th June, 2014; that the appeal raises weighty issues deserving consideration and could be overtaken by events leading to substantial loss to the Applicants if stay is denied; and that the Applicants could not have filed the application earlier because the Applicants **"had all along sought recourse in the matter through inappropriate avenues that have since been regularized by the Court of Appeal in its ruling of 21st February, 2020....."** The application is supported by the affidavit of Moses Karanja Kahochio the 1st Applicant/administrator. The affidavit is taken up with a rendition of the history of the cause and in addition expands upon the grounds on face of the motion.

6. It does not seem that the Respondent /co-administrators namely **Joel Mburu Kanyuku** and **Isaac Muigai Karanja** (deceased) filed a replying affidavit. Nonetheless, on 20th July 2020, the parties' advocates agreed to canvass the summons by way of written submissions. The parties have now filed their respective submissions. The court has perused the submissions. The Applicants' submissions state in part that:

"Your Ladyship, it is important to note that the administrator/Applicants had initially filed a similar application dated 24/04/2018 which was dismissed by yourself on 27th July, 2018 out of the fact that they sought a stay of execution order pending appeal on account of a notice of appeal dated 19/03/2018 that did not relate to the contested order of 27/06/2014 which confirmed the grant herein...

The notice of appeal was in respect of the ruling delivered by Justice Joel Ngugi on 8th March, 2018 in which the administrators/Applicants sought to review the orders of Justice Luka Kimaru but the same was dismissed...

Having been convinced after a relook at the matter, that this honorable court's reasoning in the said ruling of 27th July, 2018 was more than merited, we withdrew the said notice of appeal..." (sic).

7. As can be seen from the portions of the stated ruling of this court replicated at paragraph 2 herein, the Court went further than point out the dissonance between the subject matter of the stay orders sought and the then subsisting notice of appeal. This court is bound by the decision of the Court of Appeal allowing the Applicants to appeal out of time in respect of the decision of **Kimaru J** of 27th June, 2014. However, in view of the contents of paragraphs 9, 10 and 11 of its ruling of 27th July, 2018 quoted earlier in this ruling, the court may be embarrassed and indeed it may not appear prudent if it were to engage with the merits of the instant application dated 2nd March, 2020.

8. For good order, it is more prudent that the said application be filed in the Court of Appeal, now that a notice of appeal has been filed there. This court therefore declines to make a determination on the application dated 2nd March, 2020. In the interest of justice however, pending the filing of an appropriate application in the Court of Appeal, the court directs that there be a temporary order, to last for a period of 21 days, to maintain the status quo obtaining as of the date of this ruling, concerning the estate of the deceased. Parties will bear own costs in view of the nature of the dispute.

Delivered and signed electronically on this 13TH Day of May 2021.

C. MEOLI

JUDGE

IN THE PRESENCE OF:

Mr. Sumba for the Administrator/Applicants.

Administrator/ Respondents: N/A

Kevin Ndege- Court assistant