



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 152 OF 1993**

**IN THE MATTER OF THE ESTATE OF THE LATE GEDION**

**RIMBERE ALIAS GEDION M'RIMBERE - ( DECEASED)**

**CHARLES KIRIINYA RIMBERE.....PETITIONER**

**VERSUS**

**CATHERINE MWARI MUREITHI.....APPLICANT**

**VERSUS**

**LAWRENCE KIMATHI KIRIINYA.....INTERESTED PARTY**

**RULING**

1. There are two applications pending determination by the court and directions were given that both be canvassed by way of written submissions.
2. The 1<sup>st</sup> application is that dated 9/01/202 by the petitioner and seeking an order of stay pending appeal against the judgment of the court dated 25/9/2019 so that the status quo is maintained and the said decision is not implemented.
3. The grounds set out to premise the application and disclosed on its face and in the affidavit in support are that being dissatisfied with the decision, a notice of appeal was filed on the 7/10/2019 thus instituting an appeal which appeal would be rendered nugatory and applicant exposed to prejudice. The applicant pleads that the court adopt the principle of proportionality by balancing the interests of the litigants.
4. The application was opposed by the co-administrator who took the position that the applicant/petitioner to stands to suffer no prejudice if the application is declined and it is the rest of the beneficiaries who stand to suffer great prejudice if the orders are granted. In any event it is contended that no particulars of prejudice had been set out by the applicant it being noted that an individual interest should not be made to overshadow that of the large family comprising nine others. The assertion that the appeal is meritorious was termed incapable of being ascertained as no memorandum was exhibited hence the court is left to speculate otherwise. It was in addition contended that there was no appeal pending as none had been filed because a notice of appeal is just but a mere intention. The respondent then contended that the application is a nonstarter as no leave to appeal had been sought nor obtained hence the jurisdiction of the court had been invoked in an irregular and untenable manner. The applicant was accused of collecting rent due to the estate and not accounting for the same.
5. The second application was that dated 27/01/2020 and filed by one Lawrence Kimathi Kiriinya, an acknowledgement a grandson to the deceased asserting to be directly entitled to share in the estate. He asserts that during the deceased's life, he, the deceased, had given him plot No. 6A, THEGE MARKET a fact well known to the other beneficiaries of the family because the same was contained in the deceased personal diary. He asserted that the fact was disclosed to court by the petitioner resulting in the certificate of confirmation of grant only for him, the petitioner, to change heart once the grant was revoked. He faults the court for having accorded him the right to be heard once the grant was revoked. He faults the court for having heard the matter on affidavit evidence and denied him a chance to be heard yet he had all along occupied the plot and collected rent therefrom. On those facts, he seeks in the application that he be allowed to join the matter and the judgment be set or reviewed to the limited extent regarding his title to the plot No. 6 THEGE MARKET.
6. The second application is opposed by the CATHERINE MWARI MURIITHI, the co-administrators on the basis that the judgment by the court established who the children of the deceased were and that plot No. 6 THEGE MARKET was fully disclosed in paragraph 1(e) of the summons for revocation of grant the applicant ought to have pursued his can then and that being a grandchild he could not benefit directly from the deceased while his father the petitioner remained alive and that there is no place in which he was ever identified as a beneficiary. On the diary displayed the co-administrator took the position that it amounts not to oral or written will even though the authenticity cannot be

vouched for. She concluded that the application does not meet the threshold for grant of orders of review and is merely calculated to delay and derail the distribution of the estate pursuant to the judgment of 19/09/2019. That application was declared to be unopposed and rather supported by the petitioner 1<sup>st</sup> administrator.

7. I propose to deal with the two applications separately starting with first in time. Being an application for stay pending appeal the principles are not new but well entrenched and crystalized. They are to the effect that there must be a pending appeal which must not be frivolous but arguable and whose subtraction or object of the appeal that the very case amount to a substantial loss to the appellant.

8. Here while I do appreciate that an appeal to the court of appeal is instituted and initiated by a notice of appeal which has been demonstrated to have been filed and served the contention by the respondent, co administrator that no appeal has been filed cannot be tenable an argument. I find that once notice of appeal is filed, the appeal is instituted for purposes of stay pending appeal. That is what order 42 rule 6 (4) provides by the words-;

***“ for the purposes of this rule and appeal to the court of appeal shall be deemed to have been filed when under the rule of that court notice of appeal has been given”***

9. The other ground put forth in opposition to the application is the allegation that there has not been leave sought and obtained to appeal for the judgment of 19/9/2019. I find no merit in that contention on the fact that reading of 66 of Civil Procedure Act gives a right of appeal against any decision of this court. If that was to be doubted then article 164 (3) of the constitution is more specific and forceful when it mandates that the court of appeal has jurisdiction to hear appeal from the decision of the High court without regard to what the nature thereof is. That provisions has been interpreted innumerable times to grant to the court of appeal to hear every and any decision of the High court and that no statutory enactment surfaces to restrict or limit the power. In **Jared Odoyo Okello & another IEBC & 6 others ( 2014) IKLR** the court of appeal expressed itself thus -;

***“We need not belabour the first principle that subsidiary legislation cannot, in our jurisdiction, be inconsistent with the principal legislation under which it is made, let alone the Constitution (See section 31(b) of the Interpretations and General provisions Act, cap 2 Laws of Kenya). It cannot possibly be that jurisdiction which is not expressly limited by the Constitution in Art***

***164(3) is left to be limited by subsidiary legislation. We do not buy the argument at all..***

***We have come to the conclusion that nothing in the Elections Act or the Election Petition Rules limits the jurisdiction of this Court under Art 164(3) to hear and determine interlocutory appeals.”***

10. In this matter the decision sought to be challenged was not interlocutory but formal as far as the administration of the estate by the petitioner alone was concerned. Being a final decision, it results in a decree and cannot be viewed to attract no appeal unless with leave of the court. I do find no merit in the above and I find ultimately that the argument that leave was necessary to institute an appeal challenging this court's decision is untenable.

11. Now on the merits of prayer for stay pending appeal, the central consideration is that an applicant must demonstrate that it stands to suffer substantial loss unless the order is granted. The duty is to demonstrate the substantial loss to the satisfaction of the court. It is not enough to allege substantial loss and stop at that. It is important the nature and extent of the loss be made out and demonstrated to the satisfaction of the court see **Machira t/a Machira &Co advocates Vs East Africa standard (2) (2015) Elkr-**;

***“to demonstrate that he will likely suffer substantial loss, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words, and that it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory.”***

12. Here the affidavit of the application indeed alleges substantial loss but make no further efforts. In my view, all the applicant has done is to throw the allegations at the court and leave it to court to find out what the loss would look like. I find that no demonstration has been made of any conceivable loss. Without such proof the essential requirement of grant of stay pending appeal dissipates and there is no ground upon which the court can grant stay.

13. To the contrary the court takes the position that litigation even on delicate family matter needs to be dealt with expeditiously for justice delayed remain denied. Here the decision the applicant seeks to be stayed merely distributed the estate to the admitted beneficiaries to the estate. It is of note that the deceased died in the year 1989 some 31 years ago and the estate is yet to be distributed and transmitted to the persons entitled. While that state of affairs persists different individuals have acquired for themselves the right to benefit from the estate by sale and collection of rent to the exclusion of the others. That has played out clearly and brazenly in that by an order of the 4/2/2020 the court directed that rent from the estate property be collected and deposited in a joint account. More than 18 months later only a paltry sum of 27,500 had been deposited yet the estate is said to have a potential of collecting atleast Kshs. 41,000 per month. I find that to grant stay and keep the beneficiaries from accessing their shares is a worse loss than any loss the applicant may suffer individually by letting people get their dues and if the appeal succeeds the same can be reversed. I find no merit in the implication from stay and order that it be dismissed.

14. How about joinder of the one LAWRENCE KIMATHI as an interested party on the basis that he is a grandson who had been bequeathed a property of the estate called plot No. 6 THEGE MARKET and the request revision of the judgment so as to open the said property to litigation afresh? As said before, the foundation of the interested parties claim is that he was bequeath the property by the deceased during his life time and the evidence of such is a document called the *extract of the deceased diary*.

15. When a court would join a party to the proceedings is dependent upon the nature of claim the applicant demonstrates to desire to litigate. The law is that the joinder should be purposed to ensure that every party necessary to enable the court to effectively and completely

adjudicate the dispute before it, be made party.

16. What is not disputed is the fact that the proposed interested party and the petitioner who initiated the cause is a son and a father. It is equally not in dispute that in seeking to have the grant confirmed, the petition in the affidavit sworn on the 17/01/1996 included the proposed interested party and another person said to be purchaser as beneficiaries when indeed the said persons were in reality not beneficiaries nor creditors to the estate. It is that act by the petitioner which the proposed interested party asserts recognized his right to the property he now claims. That act by the petitioner cannot change the law on who is a dependant. In the entire affidavit there is no allusion that the proposed interested party was being maintained by the deceased immediately prior to his death<sup>[1]</sup>. The assertion by the applicant are not sufficient to enable him be joined in these proceedings. A grandson cannot inherit from the deceased directly, unless through the present

17. Even the allegation that the subject property was earmarked for the benefit of the proposed interested party can only surface if the extract of the diary was to qualify as a will. I find that the same does not qualify as a will and that even on the basis of the affidavit filed the claim by the proposed interested party is not entitled to that property. The net effect is that there is no useful purpose to be served by joinder of the applicant to these proceedings. I find that to join him at this juncture of the proceedings will add no value but rather prejudice and procrastinate the desired conclusion of the matter at the earliest available opportunity.

18. Having said that the applicant is not a necessary party to the proceedings, I am left with the prayer for review so that the matter opens for determination of his right to plot No. 6 THEGE MARKET.

19. Every time a court is faced with an application for review, it must remind itself that not every reason that entitles a court to review its orders. The window is limited to the discovery of new and important matter of evidence that could not be availed by the applicant at the time the decision was made and error of fact, not law apparent on the face of the record or any of the sufficient reason.

20. Here no demonstration has been made on what basis the review is sought but a reading of the application reveals that the applicant takes view that his entitlement to the land was not brought to the attention of the court. I have looked at the record of papers filed and considered by the court in coming up with the decision of 19/9/2019 and I note that the same extract of diary was indeed exhibited in the petitioners affidavit in reply sworn on the 29/01/2019. It is thus not a new matter that has come up and could not be availed to the court at the time the decision was made. It was indeed there and if the court failed to take regard of it or misconstrued it as a piece of evidence, then remedy is in appeal rather than review. The court of appeal in **National Bank of Kenya Ltd Vs Ndungu Njau (1997) Eklr** did say-;

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

21. In effect I find no basis has been demonstrated to merit review and accordingly the application lacks merits and it is hereby dismissed.

22. Lastly, there has been the concern of the court that the orders of 20/2/2020 be complied with. When parties attended court on the 6/7/2021 Mr. Muchiri informed the court that his client collects an average of Kshs. 38,000 per month while Mr. Gichunge said that his collect Kshs. 3,000 per month. Such admitted sums ought to have been deposited in the joint account as ordered by the court. The deposits made so far fall far too short of the sum due and those two individual owe it to court that the sum be deposited. I therefore direct that Mr. Muchiri's client deposits a sum equivalent to a monthly rent of Kshs. 38,000 per month with effect from March 2020 todate.

23. Mr. Gichunge's client will also deposit into the account a sum equivalent to monthly rent of Kshs. 3,000 from March 2020 todate. Both must deposit the sum into the account before the 20/8/2021.

24. On costs, I still appreciate the parties to remain kindred even with the dispute in court. I make no orders as to costs.

25. This matter will be mentioned on 02/12/2021 for the administrator to report on the progress made at transfer of shares to the beneficiaries and for a report with the aid of bank statements that estate rent shall have been deposited.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF JULY 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

Mr. Wambua for Petitioner

Mr. Kimaita for the co-administrator

Miss Kaunyangi for interested party

**PATRICK J.O OTIENO**

**JUDGE**

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[\[1\]](#) Section 29 of the law of Succession Act