



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1075 OF 1997

IN THE MATTER OF THE ESTATE OF PETER KAMAU NJUGUNA ALIAS PETER KAMAU

DANIEL NJUGUNA ALIAS PETER KAMAU D. NJUGUNA ALIAS PETER KAMAU – (DECEASED)

ELIZABETH NYAMBURA KAMAU.....APPLICANT

VERSUS

BEATRICE NJERI KAMAU.....1ST RESPONDENT

BEDAN KAMAU NJOROGE.....2ND RESPONDENT

ANTHONY NJUGUNA KAMAU.....3RD RESPONDENT

RULING

1.The deceased Peter Kamau Njuguna alias Peter Kamau Daniel Njuguna alias Peter Kamau D. Njuguna alias Peter Kamau died intestate on 20th December 1996. He was survived by a widow, two sons and two daughters. The respondents Beatrice Njeri Kamau, Bedan Njoroje Kamau and Anthony Njuguna Kamau are three of the children of the deceased. A grant of letters of administration was issued to them on 3rd September 1997, and confirmed on 27th November 1998.

2.On 1st April 2009 the applicant Elizabeth Nyambura Kamau (one of the daughters of the deceased) applied to have the grant revoked and to preserve the estate of the deceased. The applications were heard and dismissed on 9th April 2019.

3.The applicant was aggrieved by the ruling dismissing the applications. She filed a notice of appeal on 12th April 2019. On 18th April 2019 she filed leave to appeal the stay of distribution of the estate of the deceased and that stay of the orders issued on 9th April 2019 pending the hearing and determination of the intended appeal.

4.The application was opposed by the respondents, through the replying affidavits sworn by the 2nd and 3rd respondents. Their case was that the estate had long been distributed, some of it sold to third parties, and therefore there was nothing to stay. Secondly, the ruling of 9th April 2019 was dismissal one and not a positive one and, consequently, there was nothing to stay and therefore the application was misconceived; that, since the ruling, the parties had met and provided for the applicant, and her claim compromised. This was why, according to them, she had not sworn a supporting affidavit; that the supporting affidavit had instead been sworn by her advocate (Gasanzule Noreen).

5. M/s Gasanzule Noreen was for the applicant and Mr Kimondo was for the respondents. The applicant's advocates filed written submissions which I have read and considered.

6.The applicant seeks to challenge the ruling delivered by this court on 9th April 2019. Given Articles 48 and 164(3) of the Constitution, and the decision of the Court of Appeal in Rhoda Wairimu Karanja & Another –v- Mary Wangui Karanja & Another [2014]eKLR, this court cannot withhold leave to appeal. I grant leave. The notice of appeal filed on 19th April 2019 will be deemed to be properly filed.

7. As for the stay of the orders of distribution, it is noted that the grant was confirmed on 27th November 1998. This is about 22 years ago. It was deponed by the respondents that the estate has since been distributed and some property sold to third parties. I appreciate that the application was made under section 47 of the Law of Succession Act (Cap 160) and rule 73 of the Probate and Administration Rules which command this court to entertain any application and to determine any dispute under the Act and to pronounce such decree and to make such orders therein as may be expedient. However, the court cannot stay and/or suspend orders of the distribution that has already taken place. The applicant did not appeal against the confirmation of the grant to be able to stay the distribution. The stay of distribution cannot be allowed under the circumstances.

8.Regarding the stay of the orders of 9th April 2019, it is clear that the orders were dismissal orders. They were negative orders not capable of stay. They were not positive orders. The dismissal orders were incapable of execution. Stay cannot therefore be granted (Executive Estates Ltd –v- Kenya Posts & Another [2005]I EA 53). Where the court has not ordered any of the parties to do anything or to refrain from doing anything, there is nothing arising out of the court order to be stayed, except for the order regarding costs (The Hon. Peter Anyang' Nyong'o & 2 Others –v- The Minister for Finance & Another Civil Application No. Nai 273 of 2007). The application for stay is, to that extent, misconceived.

9. In conclusion, I grant leave to appeal but dismiss the application for stay.

10. Costs shall be borne by the applicant.

**DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8TH day of APRIL 2020.**

**A.O. MUCHELULE**

**JUDGE**