



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**SUCCESSION CAUSE NO.224 OF 2015**

**IN THE MATTR OF THE ESTATE OF M'THIRIKA MBURIRE (DECEASED)**

**JOHN MUTEGI MBURIRE.....PROTESTOR/APPLICANT**

**VERSUS**

**JOYCE MBINYU MBAKA.....PETITIONER/RESPONDENT**

**R U L I N G**

1. Before this court is an application dated 29<sup>th</sup> January 2019 brought by way of summons under **Rule 49** and **73 P&A Rules**. The applicant (John Mutegi Mburire) is seeking for the following orders namely;

*i) That he be granted leave by this Court to Appeal to the court of appeal at Nyeri.*

*ii) That there be a stay of execution/implementation of certificate of confirmation of grant made to the Petitioner on 23<sup>rd</sup> January 2019.*

*iii) Costs*

2. The grounds upon which this application has been brought are;

*a) That the applicant was aggrieved by the judgment of this court.*

*b) That the applicant is desirous to appeal to the Court of Appeal against the whole judgment of this court.*

*c) That the applicant intend to pose the following questions at the Court of Appeal.*

*(i) Whether this court was correct by holding that the deceased died on 24<sup>th</sup> December 1995 as per the Death Certificate or whether he was buried on 23<sup>rd</sup> December 1995 with a family meeting taking place on 24<sup>th</sup> December 1995.*

*(ii) Whether the deceased left a varied oral will and whether the said oral will as an item in the agenda of the meeting on 24<sup>th</sup> December 1995.*

*(iii) Whether the distribution of the estate ordered by this court was in tandem with the wishes of the deceased.*

*(iv) Whether the deceased left a will.*

*(v) Whether this court exercised its discretion judiciously.*

*(vi) That the Applicant has a constitutional right to appeal and should not be hindered.*

*(vii) That the Applicant feels he has high chances of success in the appeal.*

*(viii) That a stay of execution is desirous to preserve the estate.*

*(ix) That unless stay is granted the applicant's house will be demolished in Magumoni/Mwonge/536.*

*(x) That the Respondent stands to suffer no prejudice if stay of execution is granted.*

3. The Applicant has supported the above grounds with an affidavit sworn on 29<sup>th</sup> January 2019 where he has basically reiterated the same.
4. In his written submissions done through Ms Waklaw Advocates, learned counsel for the Appellant, the Appellant has submitted that he has come to this court for leave because of the legal requirement for leave to appeal to Court of Appeal. He contends that he is desirous of a second legal opinion of the Court of Appeal on the grounds he has listed which he terms pertinent. He submits that his right of appeal is hinged on right to access justice under **Article 48** of the **Constitution of Kenya**.
5. On the other hand, Joyce Mbinyu Mbaka, the Respondent herein has opposed this application through a Replying Affidavit sworn on 2<sup>nd</sup> August 2019. She contends that the applicant filed a notice of appeal without the leave of this court and that he has not demonstrated that he had any serious ground of appeal.
6. The Respondent contends that the Applicant's only interest is to cause delay to the implementation of the decision of this court because he is the only one currently utilizing the estate. She further avers that the Applicant has not demonstrated what prejudice he would suffer if the grant is implemented.
7. This court has considered this application and the response made. It is trite that an aggrieved does not have an automatic right to appeal to the Court of Appeal from a decision of this court in probate matters in appeal in probate matters only lies with leave of this court.
8. This court therefore has a discretion to determine based on the material placed before it whether or not to grant leave to appeal. In the case of *Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another [2014] eKLR* the Court of Appeal *inter alia* noted as follows:-
- " leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration."***
9. The Applicant in this matter maintains that the deceased made an oral will and if so if the decision of this court is in tandem with that will.
10. In my considered view that issue is not a frivolous one and merits re-consideration by the Court of Appeal. I therefore find that the Applicant has satisfied the criteria for this court to exercise its discretion to grant him leave to appeal which I hereby do.
11. However on the question of stay I am not satisfied that the applicant has demonstrated sufficiently that he would suffer prejudice if the other beneficiaries who have been locked out can also enjoy the fruits of their litigation. This court found that they have every right to a share in the estate and in my considered view their enjoyment of that right will not bar or prejudice the Applicant's right to pursue an appeal against the decision of this court.

In short, this court partly finds merit in the application dated 29<sup>th</sup> January 2019. The Applicant is granted leave only in terms of prayer I which is the order that the Applicant is hereby granted leave by this court to appeal to the Court of Appeal and has 21 days to do so. In default the leave granted shall abate.

The prayer of stay of execution of the certificate of confirmation is disallowed for the aforesaid reasons. Costs of this application shall abide by the decision of the Court of Appeal.

**Dated, signed and delivered this 6<sup>th</sup> day of May 2020.**

**R.K. LIMO**

**JUDGE**

**6/5/2020**

Ruling signed, dated and delivered in the open court in presence of Kirimi for Applicant and in absence of Respondent.

**R.K. LIMO**

**JUDGE**

**6/5/2020.**