

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 89 OF 2019

BERNARD KABEU KIRIU.....APPLICANT

VERSUS

FRANCIS WAITHAKA KIRIU.....RESPONDENT

R U L I N G

1. By a ruling delivered on 19th September 2019 this court dismissed the motion filed by the Applicant **Bernard Kabeu Kiriu** on 27 /7/18 and which had sought leave to appeal against the judgment delivered on 14/12/17 and execution orders made on 12/3/19 in **Thika CM's Succession Cause No. 160 of 2006** In the matter of the Estate of Wairimu Kiriu alias Lydia Wairimu Kiriu. The said motion for leave to appeal out of time had been filed in **Kiambu HC. Misc. App No.151 of 2018**. It appears that prior to the ruling delivered on 19th September 2019, the Applicant had approached the lower court by an application dated 20/3/19 seeking stay of execution of the judgment delivered by the lower court on 14/12/17, pending the outcome of his miscellaneous application to this court, to appeal out of time. His said application was dismissed by the lower court on 14th May 2019.
2. Further, despite the pendency of the ruling in the miscellaneous cause before this court, the Applicant proceeded to file a memorandum of appeal in respect of the ruling of 14th May 2019 in the lower court. The appeal, HCCA No. 89 of 2019 (the instant cause) was filed on 10th June 2019 contemporaneously with an application seeking among other orders, leave to appeal against the said ruling and stay of execution or setting aside of the said ruling pending determination of the intended appeal.
3. The application was supported by the affidavit of the Applicant which made no direct reference to the pending miscellaneous application. The application was opposed by **Francis Waithaka Kiriu**, who termed the application as an abuse of the Court process pointing out that the pending miscellaneous cause was not an appeal in respect of the judgment of the lower court or subsequent orders.
4. The application was canvassed by way of written submissions. The court has considered the affidavits and submissions filed in respect of the motion which is the subject of this ruling. The orders for leave to appeal out of time and stay sought by the Applicant relate to the ruling of the lower court delivered on 14th May 2019. The said ruling was in respect of an application seeking stay of execution of the judgment delivered on 14th December 2017 and subsequent orders of 12/3/19, pending the hearing and determination of **Misc. Application No. 151 of 2018** now already determined.
5. Upon the dismissal of the miscellaneous application by this court on 19th September 2019 the substratum of the Applicant's present application has disappeared. The Applicant failed to disclose, at the time of making the present application, that a related miscellaneous cause seeking leave to appeal against the lower court judgment was pending before this court. In my view, given these facts, no more needs to be said. The application filed on 10th June 2019 cannot proceed *in vacuo*, must fail and is hereby dismissed with costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 16TH DAY OF JULY 2020.

C. MEOLI

JUDGE