



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**SUCCESSION CAUSE NO. 167 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE HARON LITABA AKHABELE - (DECEASED)**

**MARGARET OYAMBO ANGUKO & ANOTHER.....APPLICANTS**

**VERSES**

**JAPHET OSILU LITABA & ANOTHER.....RESPONDENTS**

**RULING**

1. The Petitioner's application dated 14<sup>th</sup> May, 2020 prays that there be stay of execution of the judgement of this court dated 5<sup>th</sup> day of May 2020 pending the hearing of this application and the intended appeal to the Court of Appeal. The application is supported by the affidavit of Margaret Ayomba Anguko sworn on the even date.
2. The substance of her application is that if the said judgment is executed, they stand to suffer loss and damage that cannot be compensated. That the intended appeal shall be rendered nugatory. In other words, land parcel number Kakamega /Mabusi/18 shall be divided among the beneficiaries of the deceased which shall cause the estate to suffer substantial loss.
3. The Respondent in response has filed a preliminary objection dated 27<sup>th</sup> May, 2020 in which he has argued that the application herein is incompetent as it offends the provisions of Section 50 of the Law of Succession Act and that the same offends the provisions of Rules 59 and 63 of the Probate and Administration Rules.
4. When the matter came up for directions the court ordered that the same be disposed by way of written submissions and that the preliminary objection be argued together with the main application.
5. The parties have complied and have filed their submissions which the court has gladly perused. It would be worthwhile to consider the preliminary objection first as is the practice and if it has any merit the same shall determine the application without going into the other issues.
6. The Respondent has submitted that the application failed to seek the leave of this court to file her appeal to the Court of Appeal. According to him the requirement of such leave is necessary and is mandatory. He went ahead and cited the provisions of Section 50 of the Law of Succession Act.
7. The Respondent also relied on several authorities in particular the case of Rhoda Wairimu Kioi & another verses Mary Wangui Karanja & another where the Court of Appeal held that such a leave would be paramount and mandatory.
8. In response the Applicant argued that the preliminary objection was incompetent and sought to rely on the provisions of Article 159 of the Constitution where parliament decided that **"justice shall be administered without undue regard to procedural technicalities"**.
9. The Respondent other grounds of objection depending on the outcome of this ground alone may or may not be considered. The provision of Section 50 of the Succession Act provides as hereunder;

**"(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.**

**(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."**

10. This position was clarified by the Court of Appeal in the case of **Rhoda Wairimu Karanja & another versus Mary Wangui Karanja & another (2014) eKLR**. The court after a lengthy analysis of the reasons why they thought there is need for a party in the situation of the applicant herein to seek the leave of the court stated as hereunder;

**“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”**

11. Looking at the application at hand, this court is inclined to agree with the respondent. Although the applicant has filed a notice of appeal dated 7<sup>th</sup> May 2020, the same was filed without the leave of this court. The Law of Succession Act is *sui generis*. In other words, its complete on its own and the provisions of the Civil Procedure Act are only applicable where it is expressly provided in the said Act.

12. Consequently, in the absence of a prayer for leave to the Court of Appeal the application is surely incompetent. This court as the Applicant prays cannot import the provisions of Article 159 of the Constitution when the Act has expressed itself.

13. The application for the above reasons is hereby struck out. There is therefore no need to consider the other grounds raised by the Respondent.

14. The Respondent shall have the costs of this application.

**Dated, signed and delivered in open court at Kitale this 7<sup>th</sup> day of July 2020.**

---

**H. K. CHEMITEI**

**JUDGE**

**7/7/2020**

**In the presence of:-**

**Mr. Ngeiywa holding brief for Mr. Okile**

**Temba holding brief for Telo**

**Court Assistant – Silvia**

**Ruling read in open court.**