



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 252 OF 2013**

**IN THE MATTER OF PETER NDERITU GATUMBO (DECEASED)**

**BEATRICE NYAGUTHII NDERITU.....APPLICANT**

**VERSUS**

**EDWARD WACHIRA NDERITU.....ADMINISTRATOR/RESPONDENT**

**RULING**

1. This is a ruling on preliminary objection dated 28<sup>th</sup> February 2020 raised in respect to a Notice of Motion dated 5<sup>th</sup> February 2020. The Notice of Motion seeks dismissal and discharge of the interim orders of stay of execution given on 6<sup>th</sup> February, 2020 on the following grounds: -

*i. The application is bad in law, fatally incompetent and does not lie, and is an abuse of court process;*

*ii. There is no competent” intended Appeal” or Notice of Appeal herein;*

*iii. No requisite leave to appeal has been sought or obtained;*

*iv. An appeal does not lie as a right from the judgment herein;*

*v. The Notice of Appeal filed is incompetent and does not relate to the judgment herein.*

vi. Parties were given directions on 3<sup>rd</sup> March 2020 for preliminary objection determined to be heard first and to proceed by way of written submissions.

**APPLICANT’S SUBMISSIONS**

3. The Applicant submitted that the date indicated as 10<sup>th</sup> October, 2019 is a typographical error which is excusable and curable under **Article 159 of the Constitution**; that there is only one judgment delivered in this succession cause which they intend to appeal against thus the Respondent cannot be prejudiced. The applicant submitted that the Respondent is yet to file a replying affidavit and the applicant reserves the right to amend the Notice of Appeal and the application to reflect the correct date.

4. In respect failure to seek leave of Court to file appeal, the applicant submitted that leave can be sought at any stage prior to the filing of a record of appeal and relied on **Rule 74(4) of the Court of Appeal Rules 2010** which provide as follows: -

**“when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the Notice of Appeal.”**

5. The applicant submitted that the Notice of Appeal was filed within the stipulated time frame of 14 days and the judgment was delivered on 10<sup>th</sup> December, 2019 and not 4<sup>th</sup> December, 2019 as dated and the Notice of Appeal was filed on 19<sup>th</sup> December, 2019.

**RESPONDENT’S SUBMISSIONS**

6. The Respondent submitted that as per the Notice of Appeal filed, the applicant intends to appeal on a judgment delivered on 10<sup>th</sup>

November, 2019 and clearly the said Notice of Appeal does not relate to the judgment herein as it was not delivered on the said date; that the error cannot be cured by amendment as the same is not provided under the law, the only remedy being withdrawal of the Notice of Appeal; that there is no Notice of Appeal or intended appeal against the judgment herein therefore no need for stay of execution pending appeal. And in any event if the said Notice of Appeal was intended for the said judgment as per **Rule 75(2) of the Court of Appeal Rules 2010**, a Notice of Appeal must be lodged within 14 days of the date of the impugned judgement. Respondent submitted that in the instant case, the said notice was filed out of time without leave of the Court and therefore bad in law and incompetent.

7. The respondent further submitted that an appeal from the succession cause does not lie as of right; that leave of Court has to be sought either in the High Court or Court of Appeal; that the application is incompetent, bad in law, unsustainable and fatally defective since the applicant invoked **Order 42 of the Civil Procedure Rules** which order is not applicable in succession causes as stipulated under **Rule 63 of the Probate and Administration Rules**.

#### **ANALYSIS AND DETERMINATION**

8. The basis of the preliminary objection raised is that a succession appeal from the High Court does not lie as a right in the Court of Appeal. The Respondent further argues that the Notice of Appeal referred herein does not relate to this matter and if it was intended for this matter, it was filed out of the stipulated time.

9. I first wish to consider the respondent's argument to the effect that appeal refer to judgment delivered 10<sup>th</sup> December, 2019 but against 10<sup>th</sup> November, 2019. The Applicant submitted that it was a typographical error which can be amended; the Applicant argues that the Court has only delivered one judgment in this matter, and was therefore was referring to one and only judgement.

10. On perusal of the record, I note that judgment was dated 4<sup>th</sup> December 2019 by Justice Ndungu who had been transferred to another station but delivered by me on 10<sup>th</sup> December 2019.; record show that no other judgment has been delivered in this matter; there is therefore no doubt that the Applicant is referring to the one judgment delivered herein. The date was an error which should not prevent a party from being given an opportunity to raise real issues which may occasion injustice if the opportunity is denied. The Respondent has not demonstrated any prejudices he is likely to suffer in view of the error in the date which the Applicant has indicated it could be amended. This argument cannot therefore stand.

11. On leave to file appeal in the Court of Appeal in respect to succession matters, there is no dispute that leave is a requirement as stated by the Court of Appeal in the case of **Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another [2014 eKLR]** where the Court made the following observations: -

**" 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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."**

12. The Applicants have argued that they can seek leave after filing Notice of Appeal. I however noted that it's one year down the line and no application for leave to appeal filed. The application for leave to appeal would give the Court an opportunity to determine whether there are grounds which may require consideration by the Court of Appeal. The applicant has not demonstrated that attempts have been made to seek leave.

13. I believe the legislature had valid reason for ensuring that condition for appeal to Court of Appeal is included in the legislation. As observed above by the Court of Appeal, litigation should come to an end and I believe that was the intention of the legislature in denying parties automatic right to appeal so as to allow deserving cases to proceed to Court of Appeal. The application herein seeks stay pending intended appeal. The applicants have to demonstrate there is arguable appeal before leave is granted. That was not done and has not been done to date. In my view as at now, there is no valid appeal filed and pending to warrant entertaining an application for stay. The preliminary objection is merited.

#### **14. FINAL ORDERS**

1. Preliminary objection is upheld.
2. Application dated 5<sup>th</sup> February 2020 is hereby dismissed
3. Costs to the Respondent.

**Ruling dated, signed and delivered via zoom at Nakuru This 10th day of December, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Ms. Wanjiru holding brief for Waichungu counsel for Applicant

Ms. Gatu Magana counsel for Respondent