



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 58 OF 2016

IN THE MATTER OF THE ESTATE OF SARASTINO M'CHABARI

M'UKABI alias CHABARI MUKABI (DECEASED)

AND

MARGARET KARIMI CELESTINO.....PETITIONER

VERSUS

JOHN NJERU MBARE.....1ST PROTESTOR

DAVID MUGENDI MBARE.....2ND PROTESTOR

GEORGE MUNENE MBARE.....3RD PROTESTOR

R U L I N G

1. Before this court is a Notice of Motion dated 23rd January 2019 brought by John Njeru Mbare, David Mugendi Mbare and George Munene Mbare (the applicants herein) asking for the following prayers namely:-

(i) That this application be certified urgent and be heard exparte in the 1st instance (which prayer is spent)

(ii) That this honourable court be pleased to grant an order for stay of execution of the Judgment given on 13th December, 2018 together with the consequential order directing the executor/administratrix to expeditiously move to bring this matter to an end pending the hearing and determination of the applicants' intended appeal.

(iii) That an order of stay of proceedings be hereby issued to stay any further proceeding of the cause herein until the hearing and determination of the intended appeal or until further order of the court.

(iv) That this honourable court be pleased to issue orders of inhibition on L.R. KARINGANI/NDAGANI/895 and /or its subsequent subdivisions namely; Karingani/Mugirirwa/10987, and 10988, Karingani/Mugirirwa/583, Karingani/Ndagani/655 and Account No. 148459855 KCB Chuka Branch until the intended appeal is heard and determined.

(v) That costs of this application be borne by the respondent.

2. The grounds upon which this application has been brought are as follows:-

a) That this court has validated the will made by the deceased and gave free rein to the executor/administratrix.

b) That the applicants are aggrieved by the judgment of this court and has since lodged a Notice of Appeal which was done on 31st December, 2018.

c) That the applicants have sought certified copy of the proceedings and judgment for appeal purposes.

d) That the appeal has high chances of success owing to erroneous findings by this court on matters of fact and matters of law.

e) That unless stay is granted the objects of this application and the intended appeal will be defeated and rendered nugatory as the applicants will be evicted from parcels they have lived for long and constructed permanent houses and planted tea and coffee.

f) That the applicants have met the conditions laid down under Order 42 Rule 6 (2) of the Civil Procedure Rule.

3. The applicants have supported this application with a Supporting Affidavit by John Njeru Mbare sworn on 23rd January, 2019. In that affidavit; the applicants aver that the estate is highly developed with petrol stations and rental houses within Chuka Town and fear losing the incomes from the properties since the will excludes them. They have exhibited photographs showing the extent of the said developments.

5. The respondent, Margaret Karimi Celestino has opposed this application vide a Replying Affidavit sworn on 30th January, 2019. The respondent has contended that there is no basis to grant orders sought because the prayers sought are incompetent because appeal to the Court of Appeal from this court only lies with leave from this court in succession matters.

6. The respondent has also denied that she intends to sell off any part of the estate and has denied collecting rent from any of the properties comprising the estate.

7. The respondent has faulted the applicants for merely try to delay this matter in order to forestall distribution of the estate. She has contended that the matter is due for Summons for Confirmation of Grant on 13th February, 2019 and the applicants have no basis to seek the prayers they are currently seeking.

8. This court has considered this application and the grounds upon which it has been made. I have considered the response made. In my considered view this application raises two issues for determination namely:

(i) Whether there are merits to stay execution and/or proceedings in this cause.

(ii) Whether the Notice of Appeal filed without leave of this court is competent.

9. This court considers appropriate to begin with the 2nd issue as the same forms the basis of this application.

The respondent has raised an important point of law by stating that the applicants cannot appeal against the decision of this court before seeking leave pursuant to the provisions of **Section 50** of the **Law of Succession Act**. The provisions of **Section 50** provides as follows:-

(i) " 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.

(ii) An Appeal shall lie to 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"

The question of whether an appeal lie as a matter of right in succession matters against decisions of the High Court exercising its original jurisdiction has been moot with two different schools of thoughts emerging. This is because the cited law above appears silent on the question of an appeal from the High Court to the Court of Appeal particularly in regard to decisions made in exercise of its original jurisdiction. The law is clear that where the High Court makes a decision in exercise of its appellate jurisdiction, the decision is final. In the case of **JULIUS KAMAU KITHAKA -VS- WARUGURU KITHAKA NYAGA & 2 OTHERS [2013] eKLR** the Court of Appeal stated as follows regarding appeals from the High Court to Court of Appeal in Succession matters:

"It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the Law of Succession Act, the provisions of such an Act must be strictly construed and applied..... therefore what is in the Law of Succession Act is what was intended to be therein in the manner and extend it is there. What is not therein expressly is what was intended not to be there by the legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court."

The above decision appear to resonate with the contention by the applicant who submitted through learned counsel Mr. Kirimi that under **Section 47** of **Law of Succession Act**, this court has power to make such orders as may be just and expedient and in his view right to appeal to the court of appeal is not only expedient but protected under the Constitution particularly under **Article 48** thereof where access to justice is guaranteed.

11. The 2nd school of thought has it that the right to appeal from the High Court to Court of Appeal only lie with leave from this court. In the case of **Mary Wangui Karanja & Another -vs- Rhoda Wairimu Karanja & Another [2014] eKLR**, Hon. Justice Musyoka held as follows:-

"I am persuaded, and it is my reading of Section 50 of Law of Succession Act that no right of appeal arises from original decisions of the High Court as a probate court to the Court of Appeal. A right of appeal is statutory and since the Law of Succession Act has not provided for such a right the same does not exist. I find not at all upon which I can grant leave in the manner sought by the respondent."

12. The above decisional direction finds traction in the Court of Appeal decision in the case of **RHODA WAIRIMU KARANJA & ANOTHER -VS- MARY WANGUI KARANJA & ANOTHER [2014 eKLR]** the Court of Appeal after a long and winding judgment finally 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."

This court is persuaded, that following the above ratio decidendi in the latter school of thought, there is need and indeed a legal requirement that appeal from the High Court to the Court of Appeal in Probate matters only lies with leave of this court. That legal requirement in my view is desirable for purposes expeditious disposal of probate matters in order to bring the disputes to an end and enable families move on. That is not to say that parties right to access justice vide appeal to Higher Courts should be curtailed or impeded. Where circumstances require like when weighty issues arise requiring further serious judicial consideration and interrogations, this court can be prompted to grant leave and as held in **RHODA WAIRIMU KARANJA** (Supra) where leave is declined, a party is at liberty to seek for the same in the appellate court.

13. For now I am persuaded by the respondent's contention that the applicants' application for stay on the basis of a Notice of Appeal devoid of leave is not well grounded. The applicants must seek leave before approaching the Court of Appeal. This court finds that the Notice of Appeal filed herein is incompetent and bad in law for want of leave.

14. I have also noted that the applicants have invoked the provisions of **Order 40 Rules 1(a), (b), 4(1) Order 42 Rule 6 Civil Procedure Rules** and **Sections 3A and 63(c) and Civil Procedure Act**. Those cited provisions in my view do not apply in succession matters. The **Law of Succession Act** is *sui generis* with its own unique and special procedures which regulates proceedings in probate courts. The **Law of Succession Act** provides exceptional instances where the **Civil Procedure Rules** apply (**Rule 63** Probate and Administration Rules) otherwise in other instances the rules provided under the **Law of Succession Act** apply. A purposive interpretation and a look at **Rule 63** of the **Probate and Administration Rules** shows that the rules cited in this application do not apply. So when the applicants cite the conditions set under **Order 42 Rule 6** Civil Procedure Code and state that they have complied and should on that account be granted the reliefs sought, the same is not relevant in succession matters. In the case of **Josephine Wambui Wanyoike -vs- Margaret Wanjiru Kamau & Another [2013] eKLR** the Court of Appeal stated as follows:

"We hasten to add that the Law of Succession Act is a self- sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63(1),"

The applicants were required to move this court by way of summons as provided under **Rule 59 Probate and Administration Rules** but chose to move this court by way of Notice of Motion under the wrong provisions of law. While the omission *per se* may not be fatal owing to the provisions of **Article 159(d)** of the **Constitution**, parties coming to court should really adhere to the rules of procedure as provided by law in order to avoid unnecessary side shows.

15. Whether the prayers sought herein are merited.

The main gist of this application is the finding of this court regarding the validity of the will left behind by the deceased. As it was well conceded by the applicants' counsel during the hearing of this application, the cause has not been determined fully as the grant has not been confirmed. The applicants' apprehension is perhaps informed by the contents of the will. I am not however persuaded that their fears are well founded because there is no basis for them to claim that they will be evicted. They have indicated that the estate has been developed with some having running business like petrol stations. This indicates that the only real fears the applicants can have is that they will no longer be collecting the rents due. The big question is why should the applicants feel that they have more entitlements to rents due than the other beneficiaries who are also children of the deceased? The applicants in my view have failed to demonstrate that their intended appeal if any will be rendered nugatory because the rents will not be going to them in the interim period. How can an intended appeal be defeated just because you one is in occupation or in control of some assets in the estate? This court finds no merit in that contention. The applicants have not laid basis for the inhibitory orders sought and so the orders sought cannot issue.

In the premises and for the reasons aforestated this court find no merit in the application dated 23rd January, 2019. the same is dismissed with costs.

Dated, signed and delivered at Chuka this 8th day of February 2019.

R.K. LIMO

JUDGE

8/2/2019

Ruling date, signed and delivered in open court in presence of Mutuma for 1st accused, Magara for 2nd and Maari for State and Mis Nyaga holding brief for Kariuki for deceased family.

R.K. LIMO

JUDGE

8/2/2019