



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2989 OF 2004

IN THE MATTER OF THE ESTATE OF ESTHER GATHONI (DECEASED)

GRACE WAIRIMU MACHUA.....1<sup>ST</sup> APPLICANT

ROSEMARY WAMAITHA KAMAU.....2<sup>ND</sup> APPLICANT

-vs-

JACINTA NDUTA.....RESPONDENT

**RULING**

1. **Grace Wairimu Machua** hereinafter as the 1<sup>st</sup> Applicant and **Rosemary Wamaitha Kamau** hereinafter as the 2<sup>nd</sup> Applicant by a Summons dated the 22<sup>nd</sup> of November 2017 brought under Rules 63, 67 & 73 of the Probate & Administration Rules seek the following orders;

- i. Spent
- ii. That the Court be pleased to grant leave to appeal against the judgment of the Court of 9<sup>th</sup> November 2017
- iii. That the Court be pleased to stay execution of the Judgment until the intended appeal is heard and determined
- iv. That costs be in the cause

2. The application has three grounds stated on the face of the application. The application is supported by the 1<sup>st</sup> and 2<sup>nd</sup> applicants affidavits dated 22<sup>nd</sup> of November 2017. They depose that they sought annulment of the grant issued to Samuel Saru ( Deceased) and Elizabeth Wambui being a beneficiary of the estate of the deceased's estate having bought a share of it from one of the beneficiaries Kanja Kamau who is now deceased. They also bought 3 plots from the deceased and the same had not been transferred into their names before her demise although she had sought and obtained the Land Control Board consent to transfer to their husbands' names on behalf of the respective families. That they seek leave to appeal against the judgment delivered on the 9<sup>th</sup> November 2017 since they have a meritorious appeal. That they stand to suffer irreparable loss and damage and risk being evicted from the properties they have been in possession for more than 30 years.

3. The respondent filed a notice of preliminary objection on the following grounds that;

- i. The court has no jurisdiction whatsoever to sit on appeal of its own judgment delivered on 9<sup>th</sup> November 2017
- ii. That the court has no jurisdiction whatsoever on land matters or to review its own judgment delivered on 9<sup>th</sup> November 2017 as it already held that has no jurisdiction to adjudicate matters of adverse possession and or purchaser's interest over any land. Thus the court cannot grant any of the orders sought herein.
- iii. That the applicants' application is made *per incuriam* and it is an absolute abuse of the court process since the applicant do not require leave from the court for them to appeal the judgment delivered on 9<sup>th</sup> November 2017.
- iv. That the court did not give any order capable of being executed by the respondent and thus there is no order for which stay of execution can be granted by the court. Further the court cannot reinstate interim orders since it already dismissed the summons for

revocation or annulment of grant dated 3<sup>rd</sup> October 2007 on whose basis discretionary interim orders were given on 1<sup>st</sup> April 2008. In any event the said interim orders had not been specifically prayed for the applicants in the said summons.

v. That the applicants is fatally defective as it does not disclose the security to be furnished by the Applicants in return for a stay of execution prayed for and thus should be struck out forthwith.

4. Parties canvassed the application by way of oral submission. The applicant submitted as follow; that the court must get to the bottom of the matter. That the respondent has not opposed the issues raised in their affidavit. That in their application dated the 3/10/2007 they did a search on **L.R. Dagoretti /Mutuini/92** which was the only parcel belonging to the deceased. That the land does not belong to the deceased as shown in the search. That the deceased Esther was registered as a trustee for herself and her sons for half of the property and the other half belonged to people whose names are listed. That they brought the application expeditiously. On substantial loss it was submitted that there will be absolute loss unless the estate is preserved and the appeal will be rendered nugatory. That what Esther owned was half the land and the other half belonged to the larger family. That if they go ahead and distribute the estate the respondent will include land which does not belong to the estate. On security it was submitted that there were no proceedings in the ELC as the parties were deceased. That their counsel advised them to come to this court in order to avoid having two parallel suits. That the respondents have no claim to the parcel occupied by the applicants. That the deceased sold to them the said properties and therefore there is no need for security. That the status quo should be maintained to avoid tension. That Section 45 of the Law of Succession Cap 160 requires the court to maintain the status quo until all properties are disposed off. That on the 3/10/2007 a similar order was made.

5. The respondent's submissions were as follows, that; the applicants claim interest on adverse possession and they also claim to be purchasers. That the court has no jurisdiction. That they want to have the orders of Justice Rawal reinstated. That the orders were given as a restriction pending the hearing of the application, the matter has been argued and that the applicants want this court to sit on appeal on its own orders. That it appears that the applicants' are seeking a review of the court orders yet they have not demonstrated any reasons for a review. That under Section 66 of the CPA the applicants don't need court's leave to appeal. That 60 days have lapsed since the judgment and any appeal is time barred and there should be no stay of execution or leave to appeal. That no appeal will give this court jurisdiction in the matter. That the court did not give any orders capable of being executed. That there is no security offered as required under Order 42 Rule 6 (2) or the loss they will suffer. That there is no decree from the ELC giving them entitlement to the land. That the ones to suffer substantial loss are the beneficiaries who have shares in the said parcel of land. That due to the court orders of Justice Rawal 6 beneficiaries have not been able to get their share of the land. That the applicants will suffer no prejudice. The respondent sought to have the application dismissed.

6. The applicants in reply argued that the Civil Procedure Act and Civil Procedure Rules does not apply to Family Court. That the substantive law is the Succession Act Cap 160. That under Cap 160 does not provide for appeal. That they have no claim for adverse possession. That the issue is whether the court can allocate land to persons who are deceased persons. That they sought a separation of the estate from the other deceased's persons. That they seek a stay of the confirmation of the grant, leave to appeal and a status quo order. That the deceased persons ought to have been substituted and that it is the mischief they are trying to stop. That the applicants will lose if the matter goes to a 3<sup>rd</sup> party. That on the ground everyone is on the land.

#### **DETERMINATION**

7. I have considered the submissions and the law governing the application. The applicants submits that the provisions of the Civil Procedure Act and Civil Procedure Rules do not apply in family matters. In my view counsel is misguided. There are provisions of the Civil Procedure Act and Rules which are applicable to succession causes. The said provisions which are applicable in the Succession Causes are spelt out under Rule 63(1) of the Probate and Administration Rules. The Rule provides as follows :-

*“63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely*

*Orders V, X, X I, XV, XVIII, X XV, XLIV and X LIX, together with the High Court (Practice and P procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”*

8. The applicants are seeking leave to appeal against the judgment of the court dated 9<sup>th</sup> November 2017. In the case of **Peter Wahome Kimotho vs. Josephine Mwinyeria Mwanu** Civil Appeal No. 52 of 2011 Nyeri (unreported) the court of appeal whilst considering the issue on whether or not an appeal lies with leave from the High Court made the following conclusion in a pertinent part of the judgment:-

**“There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Sections 66 or 75 of the Civil Procedure Act are not automatically imported into the Law of Succession Act. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the Constitution of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the Constitution, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.”** The Court of Appeal in the cited decision stated that all matters from the High Court are appealable. Since the Law of Succession Act does not expressly provide for leave to apply, it's only in order that the applicant seeks leave to appeal. Being dissatisfied with the judgment the applicants like any litigant have a right to appeal. The judgment was read on the 9<sup>th</sup> of November 2017 and they filed this application on the 22<sup>nd</sup> November 2017. There was no delay. **I therefore grant them leave to appeal against the judgment dated the 9<sup>th</sup> of November 2017. The appeal shall be filed within 30 days from the date of this ruling.**

9. The next issue is whether the applicant is entitled to stay of execution of the judgment until the intended appeal is heard and determined. In the judgment delivered on the 17<sup>th</sup> of November 2017, this court made a finding that it had no jurisdiction to determine the issue of possession or agreement as claimed by the applicants and stated that the court to determine the said issues is the Environment and Land Court (ELC). The court stated that the objectors can pursue their claim in the ELC court. These are not orders I can stay the objectors can appeal against the said orders. Their objection was not granted. Their plea for stay of execution has no merit and it is declined.

**10. Final orders**

**i. The applicants are granted leave to appeal against the judgment dated the 9<sup>th</sup> of November 2017. The appeal shall be filed within 30 days from the date of this ruling.**

**ii. The applicants' prayer for stay of execution has no merit and is declined.**

**iii. Costs in the cause. It is so ordered.**

**Dated signed and delivered this 13<sup>th</sup> Day of July 2018.**

**R. E. OUGO**

**JUDGE**

In the presence of;

**Mr. Njeru            For the Applicants**

**Mr. Mwangi h/b for Mr. Nganga For the Respondent**

**Ms Charity        Court/ clerk**