



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC SUCC.APPLICATION NO. 26 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO. 67 OF 2004)

IN THE MATTER OF THE ESTATE OF KANAMPIU KABIRU (DECEASED)

**ALICE KATHURE JUSTUS.....PETITIONER/
APPLICANT**

VERSUS

**AMOS MBAE KANAMPIU.....INTERESTED PARTY/1ST
RESPONDENT**

**MERCY KAWIRA BUNDI.....INTERESTED PARTY2ND
RESPONDENT**

**JOHNSON NJERU KIRIMO.....INTERESTED PARTY3RD
RESPONDENT**

**NDIGA JUSTUS.....INTERESTED PARTY4TH
RESPONDENT**

**LUCY GATAKAA GITONGA.....INTERESTED PARTY 5TH
RESPONDENT**

RULING

1. **AMOS MBAE, JOHNSON NJERU KIRIMO and LUCY GATAKAA GITONGA**, the Interested Party/Applicants herein have moved this court vide a Notice of Motion under **Order 22 Rule 25** of the **Civil Procedure Rules** and **Sections 3& 3A** of the **Civil Procedure Act Cap 21** Laws of Kenya for the following reliefs namely:-

(i) That this honourable court be pleased to certify this application urgent and be heard ex parte in the first instance.

(ii) That this honourable court be pleased to issue an order for stay of implementation of the orders issued on 17/5/2017 pending the hearing and determination of this application.

(iii) That this honourable court be pleased to issue an order of stay of implementation of the orders issued on 17/5/2017 pending the hearing and determination of the intended appeal to the Court of Appeal Nyeri.

(iv) That costs be provided for.

2. The application before court is grounded on the following grounds namely:

(i) That the Applicants were greatly dissatisfied with the ruling of this court delivered on 17/5/2017 and have preferred an appeal at the Court of Appeal Nyeri.

(ii) That the Respondent is pushing for the implementation of the order.

(iii) That the implementation of the order will make the Applicants suffer and render the intended appeal nugatory.

3. **LUCY GATAKAA** has sworn a Supporting Affidavit to this application vide her Affidavit sworn on 31st May, 2017 where she has inter alia deponed that she has the authority to swear on behalf of the other 2 applicants. She has further deponed that the Respondent may move to implement the orders issued by this court thus prejudicing her and developments she has allegedly carried out over the last ten years. She has further deponed that she is an innocent purchaser for value and stands to lose her investment unless orders of status quo as at 17th May, 2017 are maintained until the intended appeal is heard and determined.

4. At the oral hearing of this application, Lucy Gatakaa, added that contrary to the sentiments expressed by the respondent, she believed that she had an arguable appeal and was in the process of filing one at the Court of Appeal. She further added that she had suffered a lot since the Judgment was delivered by this court because she had planted crops on the disputed parcels. It was her contention that she bought her parcels of land procedurally from Amos Mbae who in her view had good title over the parcels. She added that she had no clue of what transpired in the Succession Cause herein.

5. The Respondent herein (Alice Kathure Justus) has opposed this Application vide a replying Affidavit sworn on 8th June, 2017. She has deponed that the transmission of the estate herein was in her view done through fraud and illegalities perpetuated by the 1st applicant in collusion with 2nd and 3rd Applicants herein. The Respondent has further faulted the application for incompetence stating that Mary Kawira Bundi and Ndiga Justus have been named wrongly as parties in this Application.

6. The Respondent has also opined that the Applicant has failed to demonstrate that she has an arguable appeal as no Memorandum of Appeal has been annexed to the instant application. The Respondent has also deponed that the applicant has come to court with unclean hands and that she should pursue Amos Mbae Kanampiu if any money changed hands.

7. At the hearing of this application, the Respondent through her learned Counsel Mr. Mutani faulted the intended appeal as frivolous and vexatious contending that in the absence of grounds of appeal this court is unable to tell whether the intended appeal is an arguable one with chances of success. She further contended that the Applicants are beneficiaries of fraud and perpetrators of the same and that granting the orders sought would be rewarding the vice. Mr. Mutani argued that the applicants are undeserving of any discretion from this court and relied on the decision in the case of ***Michael Kimutai Ronoh & 2 Others - Vs- Consolidated Bank of Kenya Ltd [2014] eKLR*** to support the Respondent's contention.

8. The court has considered this application and the response made. The applicants and in particular Lucy Gatakaa Gitonga no doubt has expressed her dissatisfaction of the Judgment of this court dated 17th May 2017 and her intention to appeal against the same. The application before court has been through a Notice of Motion under the provisions of Civil Procedure Rules and the provisions of Civil Procedure Act. Probate matters falling under Law of Succession Act such as this matter are governed by Law of Succession (Act Cap 160) which provides specific procedures to litigants who would want to approach the court for one reason or the other. **Rule 59(1) & (5) of Probate and Administration Rules** prescribes the form of proceedings relating to probate matters should take. The rules of procedure as provided under Civil Procedure Rules and Civil Procedure Act generally do not apply in probate matters save as

provided under **Rule 63 (1)** of the Probate and Administration Rules. The cited rule that **Order 22 Rule 25** is not among those rules of Civil Procedure Rules that apply in Probate and Administration Rules. To this end, the application before me is incompetent for want of form and even if I was minded to disregard the form and go for the substance in the latter and spirit of **Article 159 (d)** of the **Constitution of Kenya 2010**, the application before me still faces a legal hurdle that cannot be ignored.

9. It is important to note in probate matters an automatic right of appeal only lie to the High Court in respect of any Judgment or ruling emanating from the lower court. The provisions of **Section 50(1)** of the **Law of Succession Act** clearly states this which means that original decisions emanating from the High Court to the Court of Appeal only lies with leave of this court and leave is grantable only when it demonstrated that there are grounds which prima facie merits judicial consideration by the Court of Appeal. This position is now well settled by various decisions. In **RHODA WAIRIMU KARANJA & ANOR- VS- MARY WANGUI KARANJA & ANOR [2014] eKLR** the Court of Appeal observed that in probate matters a party had no express automatic right of appeal to the Court of Appeal from the High Court in exercising its original jurisdiction. Where the High Court makes a decision in exercise of its appellate jurisdiction, then the decision becomes final in accordance with the provisions of **Section 50(1)** of the **Law of Succession Act** (Cap 160 Laws of Kenya). This position was held in the case of **Makhangu -Vs- Kibwana 1996- (1998)1 EA 16** which was quoted with approval in the case of **Re-Estate of Mbiu Koinange (deceased) [2015] eKLR**.

10. The legal position above does not mean that an aggrieved party does not have a right to pursue an appeal which can be interpreted to mean access to justice. Far from it. The intended purpose as stated in **RHODA WAIRIMU KARANJA'S** case (**SUPRA**) is "**to promote finality and expedition in the determination of Probate and Administration disputes**" The requirements for leave is to grant this court discretion to determine matters that merits leave and hence further judicial consideration by higher court. It is important to note that the refusal of such leave if at all is also appealable to the Court of Appeal. But it must be sought first.

11. The Applicant in this instance has not sought the requisite leave to move to the Court of Appeal and moving to the Court of Appeal without leave is of course an exercise in futility. The legal hurdle renders the application before me not only incompetent but also unsustainable in law because the basis of the application itself is predicated upon an intended appeal. That intended appeal at this stage is a non starter in the absence of leave to appeal.

The upshot of this is that the Notice of Motion dated 31st May, 2017 is incompetent and lacks in merit for the aforesaid reasons. The same is struck out with costs to the Respondents.

Dated and delivered at Chuka this 11th day of July, 2017.

R. K. LIMO

JUDGE

11/7/2017

Court:

Ruling signed, dated and delivered in the open court in the presence of Mutani for Respondent and Lucy Gatakaa the applicant in person and 2nd Respondent, 3rd Respondent and 1st Respondent.

R.K. LIMO

JUDGE

11/7/2017