REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1060 OF 1987

IN THE MATTER OF THE ESTATE OF LOONTASATI OLE LOLOWUAYA (DECEASED)

MOSES MOOKE LOONTASATI…….……. APPLICANT

VERSUS

TWAARARI OLE LOONTASATI OLOLOWUAYA.....RESPONDENT

RULING

1. On 6th April 2016 this court delivered its judgment in which it allowed the application for confirmation dated 23rd October 2015 and filed on 2nd November 2015. The distribution that the court ordered was that each of the five houses that the deceased Loontasati Ole Lolowuaya left when he died intestate on 20th February 1980 be given 240.0Ha (and other minor assets) to share to its members. The application for confirmation had been filed by Twaarari Ole Loontasati Ololowuaya (the respondent). On 7th April 2016 the applicant Moses Mooke Loontasati (who was one of the administrators for the estate of the deceased) filed application dated 6th April 2016 seeking the stay of execution of the distribution in the judgment pending the hearing and determination of the appeal which he had preferred to the Court of Appeal. He annexed a Notice of Appeal dated 6th April 2017. His case was that if the stay is not allowed the estate will be distributed to the respective beneficiaries, and that will change the character of the estate with the prospect that some of the beneficiaries may dispose their benefits. Further that, the distribution will affect the present settlements and developments of the beneficiaries. It is for these, and other reasons, that the applicant stated that he stood to suffer substantially if the application was not granted; that the distribution will render the appeal nugatory.

2. The respondent filed a response to oppose the application. Then Richard T. Loontasati a co-administrator of the estate of the deceased filed notice of preliminary objection on 11th May 2016 to challenge the application. It was based on the following grounds:-

(a) the applicant had not sought leave of court to file the appeal to the Court of Appeal and therefore the present application was wrongly before this court;

(b) the applicant never sought leave to change his advocates; and

(c) the application was an abuse of the process of the court.

3. The respective counsel filed written submissions on both the application and the preliminary objection. I considered them.

4. Prior to the judgment in which the grant was confirmed the applicant was represented by Mungu Kimetto & Co. Advocates and the respondent by Wambo Muyala & Co. Advocates. In the present application the applicant was represented by H. Kago & Co. Advocates. The objection by Richard T. Loontasati was that no leave was sought or granted by the applicant to change counsel after the judgment. It is notable that this point was also taken up by the respondent in the replying affidavit. Reference was made to **Order 9 rule 9** of the **Civil Procedure Rules** of the **Civil Procedure Act** (**Cap. 21**) that provides that where there is change of advocate after judgment has been passed, such change shall not be effected without the order of court upon an application with notice to all the parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate. There is no dispute that there was no application made to change the advocate, and no consent was filed between the outgoing advocate and the proposed incoming advocate. Counsel for the respondent and co-administrator referred to the decisions in **In the Matter of the Estate of Edward Mwanganga Mwangombe (Deceased) [2015]eKLR** and **Monica Moraa –v- Kenindia Assurance Co. Ltd [2012]eKLR** in which the respective court held that any change of advocate after judgment without an order of the court is outlawed.

5. However, I agree with counsel for the applicant that the provisions of the **Civil Procedure Act** and **Rules** do not automatically apply to proceedings under the **Law of Succession Act (Cap 160) (Re the Estate of James Waithaka Kinyanjui [2007]eKLR).** Under **rule 63** of the **Probate and Administration Rules** only **Orders V, X, IX, XI, XVIII, XXV, XLIV** and **XLIX** were applicable to proceedings under the **Probate and Administration Rules** under the **Law of Succession Act.** The **Civil Procedure Act** and **Rules** have since been amended. Before the amendments, the relevant provision that dealt with change of advocate and the need for an order of the court was **Order 3 Rule 9A.** This is what is now **Order 9 rule 9.** It is clear that **rule 63** of the **Probate and Administration Rules** did not import **Order 3,** and therefore the provision that the respondent and co-administrator sought to rely on was not applicable. It follows that no leave was required by the applicant to change his advocate.

6. The other preliminary issue raised was that under the **Law of Succession Act, Section 50**, there was right of appeal to the High Court against any order or decree made by a resident magistrate or Kadhi's court, but that no such right existed for appeal to the Court of Appeal against any order or decree made by the High Court; that under the circumstances, leave had to be sought for such an appeal. In the instant case, no leave was sought, and therefore the application for stay was incompetent as there was no competent appeal.

7. Now that the appeal has been filed in the Court of Appeal, that court will deal with the competence or otherwise of the appeal. I am, however, aware that there are divergent views by both the High Court and the Court of Appeal on whether in succession matters leave to appeal to the Court of Appeal against any order or decree made by the High Court is required. Under **Article 164(3)(a)** of the Constitution of Kenya 2010, the Court of Appeal has jurisdiction to hear appeals from the High Court but the right of appeal can be limited by statute **(Rhoda Wairimu Karanja & Another –v- Mary Wangui Karanja & Another [2014]eKLR).**

8. On the merits of the application, there is no dispute that the estate of the deceased was about 1204.5 Hectares of land. This was a substantial estate by any standards. The deceased left five houses and 33 children. Each house was ordered to get 240.9 Ha. to be distributed to its members. The applicant was aggrieved by this distribution and sought to challenge it in the Court of Appeal. It is trite that no appeal shall operate as a stay of execution (**Order 42 rule 6** of the **Civil Procedure Rules**). The applicant had to show that if the application is not granted he would suffer substantial loss. It was not in dispute that once the certificate of confirmation was executed, and the distribution done, any beneficiary would be at liberty to dispose of all or any part of his entitlement. The applicant said, among other things, that the beneficiaries across the houses had put up permanent dwelling premises, and that the effect of the distribution would be to evict some of them from their present residences.

9. I am aware that the respondent and the co-administrator have a judgment which they are entitled to execute. On the other hand, the applicant is seeking to exercise his right of appeal. In **M/s Port Reitz Maternity –v- James Karanga Kabia Civil Appeal No. 63 of 1997**, the Court observed that:-

> **"That right of appeal must be balanced against an equally weighty right; that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."**

10. Given the facts, and so that the applicant does not go to slumber, I allow stay of execution for a period of 6 months to allow him to prosecute his appeal. He has been indulged and therefore will pay costs of the application. The preliminary objection is dismissed, but I make no order as to costs.

DATED AND DELIVERED at NAIROBI this 12TH JULY, 2017.

A.O. MUCHELULE

JUDGE