



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 134 OF 1984

**IN THE MATTER OF THE ESTATE OF THE LATE EVANS KAMAU GATIBA ALSO KNOWN
AS EVANS BORO KAMAU (DECEASED)**

RULING

1. The application for my determination is dated 14th July 2014. It is premised on section 47 of an undisclosed statute, Rules 49, 63 and 73 of the Probate and Administration Rules, and Articles 23, 40, 48, 50 and 159 of the Constitution of Kenya, 2010.
2. It seeks three (3) principal orders: -
 - a. *Interim stay of the order made by the court on 27th July 2011;*
 - b. *Grant of leave to appeal to the Court of Appeal; and*
 - c. *Stay of proceedings and orders given in the instant cause pending the hearing and determination of the instant application.*
3. The grounds upon which the application is predicated are set out on the face of the application, as well as in the affidavit sworn on 14th July 2014, by the applicant, Godfrey Wainaina Evans.
4. It is averred in the grounds set out on the face of the application that the applicant is aggrieved by a decision that was made herein on 27th July 2011. The application is said to have become necessary as the Law of Succession Act, Cap 160, Laws of Kenya, which governs the proceedings does not provide for appeals as a matter of right. The intended appeal is said to raise substantial issues for adjudication by the Court of Appeal. He cites the Constitution to argue that there are also weight constitutional questions touching on the right to access courts on infringement of rights, right to own property and right to a fair hearing.
5. The order sought to be appealed against was made on 27th July 2011 on an application for rectification of the certificate of confirmation of grant issued in the matter as well as that of the land registry records relating to Kiambaa/Ruaka/153. The applicant alleges that he made several applications thereafter, for stay of execution of the said ruling and of the order emanating therefrom, all of which were dismissed.
6. When the matter was placed before Muchelule J. on 15th July 2014, the same was certified urgent and interim stay granted pending the *inter partes* hearing of the application. It was directed that the application be served.
7. I have combed through the record and I have not encountered evidence of service of the application on the respondent, for no affidavit of service is on record with respect to such service. I have too not come across any reply to the application, whether by way of grounds of opposition

or by affidavit.

8. When the matter came up for *inter partes* hearing on 4th March 2015, both parties were represented, and they agreed to have the application disposed of by way of written submissions to be filed within a specified period of time. Directions to that effect were given, to which both sides complied by filing their respective submissions. I have noted the arguments made in the respective submissions, as well as the authorities cited.
9. It is common ground that as the Law of Succession Act does not provide for a right of appeal to the Court of Appeal from decisions of the High Court in exercise of its original jurisdiction, an appeal from the High Court to the Court of Appeal can only lie with the leave of either court. The Court of Appeal pronounced itself on that point in its recent decision in *Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another* (2014) eKLR.
10. Appeals from the High Court to the Court of Appeal are governed by the Court of Appeals Rules, which is the subsidiary legislation made under the Appellate Jurisdiction Act, Cap 9, Laws of Kenya.
11. The provisions of the Court of Appeals Rules, that are relevant to the matter before me, are those in Rules 39, 40 and 74. The said provisions state as follows:-

'39. In civil matters –

- a. *Where an appeal lies with the leave of the superior court, application for such leave may be made informally, at the time when the decision against which it is desired to appeal; is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;*
- b. *Where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal*

74(1). Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2). Every such notice shall, subject to rules 82 and 94, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.'

12. The applicant herein has evinced a desire to appeal against the decision of 27th July 2011. By dint of Rule 74 of the Court of Appeal Rules, he ought to have lodged a notice of appeal in this court's registry within fourteen days.
13. I have perused through the record before me. There is a notice of appeal on record dated 14th August 2011. It was filed on 17th August 2011, and signed and sealed by the deputy registrar on 6th September 2011. The date of the lodge of the notice with the registrar is indicated as 6th September 2011. Quite clearly, there was no compliance with Rule 74. The notice of appeal was not lodged with the registrar within fourteen days. That would be so even if one were to treat the date the notice was filed in court as the effective date of the lodge of the notice. The said notice is therefore incompetent.
14. Regarding the application for leave to appeal, Rule 39 is in mandatory terms. The application for leave to appeal should be lodged in court within fourteen days of the decision sought to be appealed against. The application for leave to appeal which I am being asked to determine is dated 14th July 2014, and was filed herein on even date. It was obviously not filed within fourteen days of the date of the ruling. In fact, it was filed three years after the said order was made. Again, there

is no compliance with the provisions of Rule 39. The application before me therefore cannot be competent.

15. The applicant is no doubt aware of the non-compliance, hence his citation of the provisions of the Constitution. In principle the Constitution does not overthrow procedural rules. They are still applicable and parties must strive to comply with them. I see nothing in the Constitution that would come to the aid of a party who has the statutory provisions which are in his favour, but who fails to take advantage of those provisions.

16. I need not say more, the application dated 14th July 2014 obviously lacks merit. It is in abuse of court process. It exists only for the purpose of being dismissed, and I do hereby dismiss the same with costs. Its dismissal takes with it the interim orders that had been made on 15th July 2014 and extended severally thereafter.

17. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W. MUSYOKA

JUDGE