



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO.562 OF 2004**

**JOSEPH SHISUNDI LIKHANGA .....APPLICANT**

**VERSUS**

**FERDINAND LISUTSA SHIBUKA .....1<sup>ST</sup> RESPONDENT**

**MARY GORETI INGASO .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

**Introduction**

1. This Court delivered a ruling in this matter on 24/09/2015. The same was in relation to the objection raised by the respondents herein by way of a caution on L.P Number Isukha/Mukhonje/2. After hearing the parties by way of viva voce evidence, I revoked the grant issued to the applicant herein and made fresh distribution of the deceased's estate. The respondents were ordered to remove the cautions placed on the suit property on 16/05/2011 in order to allow for completion of the distribution.

**The Application**

2. Consequently the applicant filed the Notice of Motion dated 05/11/2015 through the firm of Onsando Getanda & Co. Advocates seeking leave to appeal and extension of time so that he can file the appeal out of time. He also asked for stay of execution of the judgment and an order restraining the respondents from interfering in any manner with the suitland known as Isukha/Mukhonje/2. The application is premised on the grounds set out on the face and also in the supporting affidavit sworn on 05/11/2015 together with the annexures thereto.
3. The application is opposed vide the respective replying affidavits sworn by the respondents on 19/11/2015. In the main, the respondents contend that the applicant has been indolent and has not acted diligently with regard to the filing of the instant application. The respondents also contend that though the applicant has indicated in his application that he has a good appeal, he has not annexed the draft Memorandum of appeal for the Court's eyes. They urge the Court to dismiss the application.

**The Submissions**

4. The parties appeared before me on 11/11/2016 when the respondents were granted 14 days within which to file their replying papers. On that same date, the application was fixed for hearing on 25/11/2015. On the 25/11/2016, the respondents did not appear but because they were present when the hearing date was taken in Court, the applicant was allowed to proceed exparte. Mr.

Getanda made his submissions and urged the Court to allow the application for the reasons set out on the face of the application and in the supporting affidavit.

### **Analysis and Determination**

5. I have now carefully considered the application and the affidavits in support. The applicant filed a supplementary affidavit with leave of the Court granted on 11/11/2015. He stated therein that since he was acting in person, he did not appreciate the legal procedures involved in filing an appeal. He also annexed to the supplementary affidavit a Draft Memorandum of Appeal.
6. I note from the outset that the applicant's application which is expressed to be brought under Rule 73 of the Probate and Administration Rules is asking for a total of four orders; namely leave to appeal out of time, extension of time, stay of execution and restraining orders against the respondents. The two last orders are contained in one prayer, namely prayer 4 of the application.
7. Although Rule 73 of the P & A Rules empowers this Court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court," I find that the application as drawn is too amorphous for this Court to consider it favourably especially when the applicant is represented by Counsel. In any event, ignorance is not a defence in law. In the circumstances, I dismiss prayer 4 of the application.
8. Regarding prayer 2 of the application, it is a Constitutional right for any party who is aggrieved by a decision of any Court or tribunal to appeal such decision. That right shall not be denied and the same is accordingly allowed.

### **Conclusion**

9. In conclusion, I allow only prayer 2 of the Notice of Motion dated 05/11/2015. The intended appeal shall be filed within the next 14 days, failing which the leave granted herein shall lapse. It is my considered view that prayer 3 is subsumed in the order made under prayer 2 of the application. Prayer 4 of the application is dismissed. There shall be no order as to costs.
10. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 7<sup>th</sup> day of April 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Getanda (present) For Applicant

N/A For 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Lagat – Court clerk