REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

MISC. PROBATE APPLICATION NO. 1 OF 2015

IN THE MATTER OF THE ESTATE OF **ZAKAYO NDEMWA IKUVA** (DECEASED)

TITO NDEMWA .....1ST APPLICANT

MWALIMU NDEMWA .....2ND APPLICANT

VERSUS

KILUTE NDEMWA .....RESPONDENT

R U L I N G

1. The application dated **29th** day of **September, 2015** is for stay of execution of a ruling delivered on **16th September, 2015** in **Kitui Succession Cause No. 241 of 2015** together with proceedings in the said suit pending hearing and determination of **Probate Appeal No. 1 of 2015.**
2. The application is premised on grounds that the Applicant has an arguable appeal with very good chances of succeeding and that substantial loss will be occasioned to the Applicant unless execution of the ruling in the suit is stayed.
3. The 2nd Applicant swore an affidavit having been authorized by the 1st Applicant where he deposed that their objection to confirmation of grant dated **13th January, 2014** was dismissed by the Lower Court, an appeal has been preferred against the ruling; they stand to suffer loss if execution is not stayed and it will be in the interest of equity and justice for the order sought to be granted.
4. In response thereto the Respondent filed grounds of opposition and a replying affidavit. It is stated that the application is incompetent and the jurisdiction of the court has not been properly invoked as the **Civil Procedure Rules** cited do not apply to **Probate and Administration** matters under the **Law of Succession Act** and in any case there is no ruling dated **16th September, 2015;** Even if the jurisdiction of the court was properly invoked, the Applicants had not made up a case for stay under **Order 42 Rule 6** of the **Civil Procedure Rules;** the Learned Chief Magistrate was guided by an earlier decision; judgment and decree of competent jurisdiction involving the Applicants which was not appealed therefore binding on the Applicants; the application has no prospects of success and is intended to delay justice to the Respondents.
5. The respondent deponed an affidavit where he stated that the ruling dated **15th September, 2015** was confirmed in terms of his proposal filed in court; the Estate of the deceased comprised of Parcels of land – **Mutonguni/Muthini/1478; 1495, 1390 and Mutonguni/Kauwi/212.** The Applicants only contested distribution in respect of Land Parcel No. **Mutonguni/Muthini/1478.** The order in respect of Land Parcel No. **Mutonguni/Muthini/1478** was made by a tribunal, adopted as judgment of the court, a decision that was not appealed therefore binding on the

parties;

6. Portions of the disputed land were sold by the deceased to named creditors during lifetime a fact known to the 2nd Applicant. The appeal therefore lacks prospects of success.
7. The application was canvassed by way of written submissions that I have considered.
8. The application herein has been brought pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules, Section 3** and **3A** of the **Civil Procedure Act Chapter 21** of the **Law of Kenya** and all enabling provisions of law. As correctly stated, in the case of **Shah vs. Shah (2002) 2KLR 607, Onyancha J** stated that where any proceedings are governed by special legislation, the provisions of the special legislation must be strictly applied and the provisions of the **Civil Procedure Act** and the **Rules** made thereunder, it would be of no application unless expressly provided for by such special legislation and that the position would hold even if the special legislation is silent on whether or not the **Civil Procedure Act** and **Rules** apply. **(Also see in the matter of Evans Kamau Gatiba a.k.a. Evans Boro Kamau (Deceased) (2013) eKLR).**
9. The **Law of Succession Act** as a statute stipulates which sections of the **Civil Procedure Act** and **Rules** are applicable in Probate matters. The provision of the law alluded to would therefore not be applicable. This would make the application incompetent. However, would the application be salvaged by **Rule 73** of the **Probate and Administration Rules** which provide thus:

> ***"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

The stated Rule gives the court the authority to do what is just. This is a matter where an appeal has been lodged against the ruling of the Lower Court. Will it be just for the court to intervene to ensure that justice is done? The answer should be in the affirmative.

10. Looking at the record, the Applicant made no effort of availing the alleged order for perusal by this court. The Respondent on the other hand adduced in evidence by way of affidavit, a grant of letters of administration intestate in respect of the Estate of **Zakayo Ndemwa Ikuva,** the affidavit sworn by the administrator indicating a proposed mode of distribution of the Estate, an affidavit of protest filed by the 2nd Applicant and the decree in the land matter.
11. To form the opinion whether the Applicants have an arguable case I have to consider the order/ruling from which the appeal emanates. The alleged decision of the court having not been availed for perusal, I cannot tell if indeed the Applicants have an arguable case. Whether or not the appeal will be rendered nugatory depends on whether it has a chance of succeeding which has not been established.
12. In the premises, the Applicants have failed to demonstrate existence of the arguable case with a chance of succeeding. Consequently, the application which is devoid of merit is dismissed with costs to the Respondent.
13. It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of December, 2015.

L. N. MUTENDE

JUDGE