IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCEESSION CAUSE NO.431 OF 2006

IN THE MATTERS OF THE LATE CHEGE NJUGUNA (DECEASED)

JAMES KARANJA CHEGE…….....…..1ST APPLICANT/OBJECTOR
PAUL NJUGUNA CHEGE….....….....…..……2ND APPLICANT/OBJECTOR
DAVID NGUNGU CHEGE…….....…..….3RD APPLICANT/OBJECTOR
TIMOTHY KUBAI CHEGE….....…….....……4TH APPLICANT/OBJECTOR
VERSUS
EUNICE WANJIKU CHEGE….....……..PETITIONER/RESPONDENT

RULING

This ruling relates to two applications, provoked by the following events.

On 10th March, 2009 this court (Mugo, J) delivered a ruling in this cause distributing the estate of the deceased, Rufus Chege Njuguna to his widow and eleven children, daughters and sons. The sons were aggrieved and filed a notice of appeal to the Court of Appeal on 13th March, 2009. They subsequently one year later brought summons under the inherent jurisdiction of this court under **Section 47** of the **Law of Succession Act** and **Rules 49 and 73** of the **Probate and Administration Rules**, seeking that there be a stay of Mugo, J's decree and judgment pending the hearing and determination of the appeal.

A few months later, the sons moved to the Court of Appeal with a similar application which they withdrew on 28th September, 2010. They have now reverted to their application of 20th May, 2010 (for stay). The application is based on the following grounds, among others:

i) that the dispute as to the distribution of the estate was determined by affidavit evidence;
ii) that the learned judge ordered the main property to be divided into 12 portions;
iii) that the judge failed to consider that all the daughters ofd the deceased were married.;
iv) that being aggrieved they instructed their advocates to appeal;
v) that some beneficiaries have asked the court to order the sub-division;
vi) that if the surveyor moves in to sub-divide the property the appeal will be rendered nugatory;
In reply Tabitha Wairimu Chege, on behalf of the daughters swore an affidavit in opposition to that application arguing that:
i) the application has been brought after undue delay;
ii) that the application is aimed at disinheriting the daughters of the deceased;
iii) that the issues raised in this application having been raised before Mugo, J can only be raised on appeal to the Court of Appeal;
iv) the applicants do not stand to suffer as the property does not belong to them.

I have considered these arguments

An order of stay under **Order 41** of the revoked **Civil Procedure Rules** is not one of the provisions imported into the **Law of Succession Act** by **Rule 63** of the **Probate and Administration.** That is why the application is premised on the court's discretionary jurisdiction. In any civil proceedings, the court has inherent power *ex debito justitiae* to order a stay of execution pending appeal. It is a power that can be invoked under **section 3A** and more recently **Sections 1A** and **1B** of the **Civil Procedure Act.** In succession matters, despite **Rule 63** aforesaid, it is available under **Section 47** of the **Law of Succession Act** and **Rules 49** and **73** of the **Probate and Administration Rules.** When a court is called upon to exercise a discretion in any dispute, it must do so judicially to ensure the ends of justice are met and justice is done to both parties.

The applicants have not acted fairly to the rest of the family since the death of their father. They were reluctant to take out letters of administration prompting their mother to file a citation. When the mother filed a petition for a grant of representation, they raised an objection, filed an answer to the petition and cross application. Even after consents from the female members of the family were obtained, the applicants withheld their consent and objected to the making of the grant.

They have maintained that daughters of the deceased are not entitled to a share of his estate. In the meantime, the applicants are accused to be in exclusive use and possession of the main property. It is clear that they have lately recruited their mother to their side against her own daughters. The result of the applicants' conduct is that nearly five years since the grant was issued and almost seven years since the death of the deceased, the estate has not been distributed.

More significantly, the judgment by Mugo, J was delivered on 10th March, 2009. Three years later no appeal has been filed. Even their application for stay of execution was withdrawn. If they were seriously aggrieved, their appeal would have been filed and probably determined. Secondly, this application has been brought after undue delay. It is perhaps only intended to delay the distribution further. The applicants, by their own conduct are undeserving of the exercise of a judicial discretion and the ends of justice will not be served. The application for stay of execution is rejected and the same is dismissed with costs to the respondents.

The second application has been brought by the widow of the deceased – the administratrix. As observed by the counsel for the respondents, it is a strange application as it seeks to revoke a grant issued to the applicant herself. It is grounded on the premise that the judgment of 20th March, 2009 was a nullity because the advocates purporting to represent the administratrix had no instructions from her; that the beneficiaries have taken it upon themselves to distribute the estate.

The administratrix has all along participating in this cause. The only discernible reason for her change of heart is her recruitment by some of her sons. None of the grounds for revocation of the grant under the Law of Succession Act is present in this application. The proceedings to obtain the grant were regular. No fraud has been proved. This application for the foregoing reasons is similarly disallowed and is hereby dismissed with costs.

Dated, Delivered and Signed at Nakuru this 3rd day of March, 2011

W. OUKO
JUDGE