KENYA LAW
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Mukiri & 2 others v Karimi (Civil Application E002 of 2023) [2023] KECA 1644 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 1644 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E002 OF 2023

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

MAY 26, 2023

BETWEEN

CHRISTINE MUKIRI .... 1ST APPLICANT

JOANINA KAIMURI MBWIRIA .... 2ND APPLICANT

JULIA MUGURE MBWIRIA .... 3RD APPLICANT

AND

LYDIA KARIMI .... RESPONDENT

((An application for stay of execution and leave to file an appeal from the ruling of the High Court of Kenya at Meru (Wamae T.W. Cherere, J.) dated 21st December 2022 in Succession Cause No. 409 of 2007))

RULING

1. The background of this dispute is that the deceased, Sebastian Mbwiri Kieni, died intestate on 16th April 2011. He left seven (7) parcels of land. There was no dispute that he left two widows: Joanina Kaimuri Mbwiria (2nd applicant) and Julia Mugure Mbwiria (3rd applicant). Each had children. Christine Mukiri (1st applicant) was one of the children in the house of the 2nd applicant. The respondent, Lydia Karimi, claimed to be the deceased's third widow, and stated that she had had children with the deceased. Her marriage to the deceased was said to be under Kimeru customary law. The applicants challenged the said marriage. They also challenged the respondent's claim that her children had been fathered by the deceased. A decision was rendered on 27th June 2019, that the respondent was the third widow of the deceased and that her three daughters were children of the deceased. The court considered, among other things, the birth certificates that the respondent had produced in respect of the children that showed the deceased to be the father.

2. Based on that finding, on 20th December 2020 A. Ong'injo J. distributed the deceased's estate to the three families.

3. By an application dated 27th September 2022 the applicants sought the review of the court's ruling and orders delivered on 27th June 2019. The applicants claimed that the birth certificates were not authentic and sought for an order that they be subjected to forensic examination and that the children be subjected to DNA testing. Wamae T.W. Cherere J. heard the application. She found that the birth certificates had been on record since 2012 and therefore did not constitute new and important evidence that was not within the knowledge of the applicants at the time of the hearing of the matter; the ruling subject of the review had been delivered on 27th June 2019, which was a long time ago; and that the applicants had had the opportunity at the hearing of the dispute to challenge the birth certificates and paternity of the children, but had not. The application for review was found not merited and was dismissed with costs.

4. The applicants were aggrieved by the ruling and orders to dismiss the review application and filed a notice of appeal to challenge the same. In the draft Memorandum of Appeal the following were the grounds:-

> " (1) That the learned Judge erred in law and in fact in failing to find that the reliance of the respondent's children's birth certificate which are not authentic was new and important evidence which was not within the knowledge of the appellants at the time of hearing of the matter.
>
> 2. That the learned Judge erred in law and in fact in failing to find that the delay to bring in the said application could not defeat the substantive injustice that would be visited upon the estate of the deceased herein.
>
> 3. the learned Judge erred in law and in fact in failing to find the discovery of the fake certificates produced and relied upon by the court to make a finding that the respondent and her children are beneficiaries of the estate of the deceased herein amounts to a fraud and hence a miscarriage of justice.
>
> 4. That the learned Judge erred in law and in fact in failing to analyse the weight of the material on record hence arriving at an erroneous decision based on technicalities other than the substantive facts on record."

5. The present application seeks leave to file an appeal to challenge the above ruling, and also seeks stay of execution of the orders in the impugned ruling. The applicants stated that, in dismissing their application for review, the learned Judge had directed the administrators to distribute the estate of the respective beneficiaries within 60 days. The fear was that if stay was not granted the estate would be distributed and therefore the proposed appeal would be rendered nugatory. Their case was that, given the draft grounds, they had an arguable appeal. The respondent filed a replying affidavit to oppose the application. She deponed that, the application for review having been dismissed, there was nothing to stay. She wondered why the applicants had not appealed against the decision of 27th June 2019 if they had been aggrieved by it. And neither had the decision dated 30th December 2020 to distribute the estate been appealed against.

6. The parties were represented, and each counsel filed written submissions which we have considered. It was submitted by the applicants' counsel that the order of stay of execution was necessary to preserve the estate; that if the estate is distributed to the respective parties, to undo that would be quite

expensive. As for leave, the submission was that in a succession matter the *Law of Succession Act* (Cap. 160) does not provide for an automatic right to appeal.

7. The respondent's counsel pointed out that the applicants were dissatisfied with the ruling that distributed the estate. They sought to appeal, and asked for leave from the superior court. Leave was granted on 6th May 2021. A Notice of Appeal was lodged on 17th February 2021. Instead of pursuing the appeal, they filed the application dated 27th September 2022 seeking review. The same was dismissed, which led to the present application. On whether the threshold under Rule 5(2)(b) of the *Court of Appeal Rules* had been met, counsel's submission was that the ruling having dismissed the application this Court was dealing with a negative order. On the basis of this Court's decided cases, including *Jeniffer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2011]eKLR, the application could not be allowed. Lastly, it was argued that, given the history and conduct of the applicants, the application ought to be dismissed on the basis that it was an abuse of the process of the court.

8. There are various decisions of this Court on the point that, under the *Law of Succession Act*, there is no express automatic right of appeal to this Court from the decision of the High Court exercising original jurisdiction. The decisions in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014]eKLR and *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another* [2019]eKLR are two examples of this jurisprudence. The application for leave was filed within 14 days, as required by Rule 39(b) of the *Court of Appeal Rules*, counting from the date of the impugned ruling. The applicants are constitutionally entitled to appeal whatever decision by the High Court that has aggrieved them. We consequently grant them leave to appeal. The notice of appeal lodged by them shall be considered to have been lodged with leave.

9. Regarding the issue of stay, we reiterate that the ruling sought to be appealed against dismissed the application for review. It was a negative order. Any execution can only be in respect of costs, and there can be no stay against such an order (*Western College of Arts and Applied Sciences v E.P. Oranga & 3 others* [1976]eKLR). We decline to grant the prayer for stay.

10. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF MAY 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

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