



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), W. KARANJA & OKWENGU, JJA.)

CIVIL APPLICATION NO. 143 OF 2018

BETWEEN

JOSEPH GACHII KIRAGU.....APPLICANT

AND

FRANCIS MUREGI KIRAGU.....RESPONDENT

(Being an application for conservatory orders against the judgment of the High Court at Nyeri (J. Ngaah, J.) dated 18th August, 2017

in

Nyeri HC Succ. Cause No. 1187 of 2010)

RULING OF THE COURT

This is a succession dispute regarding the administration of the estate of Kiragu Gachii who died on 20th June 1980. His six (6) children being two (2) daughters and four (4) sons survived him. The deceased's estate comprised land title No. Iriaini/Kairia/504, measuring 3.92 Hectares, which was to be distributed equally amongst his 4 sons each receiving 0.98 hectares. On 15th September 2011, the respondent petitioned for grant of letters of administration intestate. The applicant was one of the protestors who was demanding a larger share of the estate.

On 18th August 2018, in determination of the dispute, the High Court confirmed the grant to the respondent and distributed the estate equally amongst the 4 sons each receiving a portion measuring 0.98 hectares.

Aggrieved by this judgment, the applicant intends to challenge that outcome on appeal to this Court, but in the meantime prays that this Court do grant conservatory orders to preserve the suit property pending the hearing and determination of his intended appeal.

It was the applicant's position that he has an arguable case since the High Court failed to consider his evidence and therefore the suggested mode of distribution disadvantaged him; that if the conservatory orders are not granted the appeal will be rendered nugatory and; that there will be no prejudice to the respondent should the conservatory orders be granted.

The respondent did not file any affidavit or submissions in opposition of this motion.

The principles for consideration in the exercise of the Court's unfettered discretion under **Rule 5(2)(b)** of the Court's Rules are now well settled. First, an applicant has to satisfy that the appeal or intended appeal is arguable. An arguable appeal, is not necessarily one that must succeed, but one that is not frivolous. The second principle is that the applicant must demonstrate that unless an order of stay or injunction is granted, the appeal or intended appeal would be rendered nugatory. See Stanley Kangethe Kinyanjui vs. Tony Ketter & Others (2103) eKLR.

Has the applicant met those parameters? To begin with the prayers sought by the applicant are rather vague as he seeks: **"That this honorable court be pleased to issue conservatory orders on all that property known as L.R. IRIAINI/KAIRIA/504 pending the hearing and final determination of the intended appeal herein."**

The applicant has not stated the nature of conservatory orders that he wishes this Court to grant. We take it that, having cited Rule 5(2)(b) of

our rules, the applicant wishes to be granted either an injunction or stay of execution.

The High Court (*Ngaah, J.*) distributed the suit property equally among the 4 sons. The applicant’s contention that the judge failed to consider his evidence and that the suggested mode of distribution was unfair to him is not sufficient demonstration that the appeal is arguable. Without being definitive, the distribution appears to us to have been done fairly.

The second point is this: Being a succession cause, the right of appeal under the Law of Succession Act is not automatic. A party who wishes to appeal must do so with leave of the court. See: **Rhoda Wairimu Karanja & another vs. Mary Wangui Karanja & another** [2014] eKLR where this Court stated:

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.” (Our Emphasis)

The applicant has not demonstrated that leave to appeal has been granted either by the High Court or by this Court.

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or stopped by an injunction, if allowed to happen is reversible. If not reversible, whether damages will reasonably compensate the party aggrieved. The applicant has not demonstrated how the appeal, if successful will be rendered nugatory.

From the circumstances of this application, the applicant has failed to demonstrate the existence of both limbs as required by **Rule 5(2)(b)** of this Court’s Rules. Accordingly, we find no merit in this application. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 19th day of May, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR