



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, J. MOHAMMED & KANTAL, J.J.A

CIVIL APPLICATION NO. E059 OF 2020

BETWEEN

ESTHER KABON ROKOCHO.....1ST APPLICANT

WILSON KIPRONO ROKOCHO.....2ND APPLICANT

AND

KOBILO CHEPKIYEN..... 1ST RESPONDENT

ESTHER KIPSAT..... 2ND RESPONDENT

(Being an application for stay of further proceedings pending the hearing and determination of the intended appeal from the ruling of (H.A. Omondi, J) dated 10th July 2019)

in

ELD. HC. SUCCESSION CAUSE NO. 304 OF 2019

RULING OF THE COURT

The Notice of Motion dated 17th December, 2020 by the applicants came-up for hearing and determination virtually on the 22nd June, 2021.

The same is premised on Rule 5 of the Court of Appeal Rules, Article 159(2) (d) of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 (i) of the Civil Procedure Rules. The application basically seeks stay of proceedings in the High Court Succession Cause No. 304 of 2007 with regard to the Estate of Terik Rokocho pending the hearing and determination of the current motion and the appeal against the ruling of the Honourable Judge delivered on 10th July, 2019.

A brief background to the application is that the 1st applicant is the mother to the 2nd applicant who was a co-wife of the deceased both having been married to **Rokocho Bartore** deceased too. The 2nd applicant alleges that since he was three years old, he was handed over to the deceased and raised as the deceased's son. He has been living on Parcel No. Soy/Soy Block 4(Kongasis)6 from 1973 to date and had established his home on the said farm until the deceased died. That the said arrangement of staying with the deceased was in line with Keiyo Customary Law. That the Respondents after the death of their mother, and a co- wife to the 1st applicant proceeded to apply for letters of administration without involving him as they were aware that he was a legitimate beneficiary of the deceased's estate. Upon discovering the succession cause, he filed an affidavit of protest and later filed an application dated 18th July, 2018 in which he sought to strike out the succession proceedings on grounds that the deceased held the property in his trust. It is this application which was dismissed on the 10th July, 2018 that the applicant has lodged an appeal against and the premise of the current application.

That the applicant claims to have an arguable appeal as can be gathered from the draft memorandum of appeal attached to the application in which he states among others that the Learned Judge erred in Law and fact by misdirecting herself and not addressing all the issues for determination as set out in the body of the ruling; that the Learned Judge erred in law and fact by suggesting that the rights of the 2nd applicant can be equated to those of a stranger despite being raised by the deceased from childhood as her own child under Keiyo Customary Law; that the Learned Judge erred in law and fact in disregarding the submissions by the applicants.

That the intended appeal will be rendered nugatory as the Respondents shall proceed to have the matter in the High Court listed for hearing and distribute the suit property notwithstanding the fact that the deceased was merely a trustee and therefore the property did not belong to her and thus not part of her estate and by extension therefore not available for distribution.

The applicant filed a supplementary affidavit dated 18th June, 2020 in which he further depones that by a mistake, the land registrar registered the suit property in the deceased's name as the absolute owner but the same was corrected in 1996 when the error was brought to the attention of the Registrar by the 2nd applicant and thus it was very clear that the deceased's name's appearance on the title was merely as a trustee which terminated upon her death.

The Respondents did not file any document, in opposition to the application nor written submissions. The applicant filed written submissions in which he reiterates and expounds on the contents in the supporting affidavit and relies on the case of **Nairobi Succession cause no. 2099 of 2012, in the matter of the Estate of Salome Mukami Kariuki (Deceased) [2016] eKLR**, with regard to what the court considers in applications of this nature.

We have fully considered the motion, the supporting affidavit, supplementary affidavit and submissions by Counsel for the applicant. Without delving into the merits of the application we have noted that this is a matter arising from a succession cause. It is now settled that grievances arising from such proceedings are subject to Section 47 of the Law of Succession Act. It is trite law that there is no automatic right of appeal to this Court from a decision made by the High Court in a succession cause in its original jurisdiction. For one to come to this court by way of an appeal, leave of the trial court or this Court is absolutely imperative. It was so held in the case of **Rhoda Wairimu Karanja & Another Vs. Mary Wangui Karanja & Another 2014 eKLR**, thus

“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 in to the Court of appeal from the decision of the High court, exercising Original jurisdiction with leave of the High Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial considerations. 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”.

We do appreciate that the respondents did not raise this issue as they never responded to the application. However, on the crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in **Hafswa Omar Abdalla Taib & 2 Others vs. Swaleh Abdalla Taib [2015] eKLR**;

“Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”

In light of the above exposition by the Court, there is no way the applicant can exercise his intended appellate right without first of all seeking leave of the trial court or this Court. This is indeed a fundamental jurisdictional issue and which relates to the procedure to be invoked by an intended appellant before this Court can assume jurisdiction to hear succession cause.

There is no evidence on record that leave of the High Court or this Court was sought and obtained to institute an appeal which leave would grant jurisdiction to this Court to determine the said appeal or even this application.

That being our view of the matter the application is incompetent and is accordingly struck out with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR