IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPLICATION NO. 72 OF 2018 (UR. 47/2018)

BETWEEN

JOHNSTONE OMBIMA OKWARO.....1ST APPLICANT

MARY ASIKO OKISA.....2ND APPLICANT

AND

DORCAS OKWARO..... 1ST RESPONDENT

JULIA SHIHORE OKWARO..... 2ND RESPONDENT

ANNA ONGONGA MAGANGA OKWARO.....3RD RESPONDENT

*(An application for stay of execution of the Ruling of the High Court of Kenya at Kisumu (**D. S. Majanja, J.**) dated 20th December, 2017*

in

Succession Cause No. 109 of 1987)

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RULING OF THE COURT

Being dissatisfied with the ruling by the High Court (Majanja, J.) on the mode of distribution of the estate of the deceased on 12th December, 2017, the applicants lodged a notice of appeal dated 22nd December, 2017 signifying their intention to appeal against the decision. Thereafter they filed the application dated 31st July, 2018 predicated upon rules 1 (2), 5(2)(b) and 42 of the Court of Appeal Rules in which they sought *inter alia* stay of execution of the ruling aforesaid pending the hearing and determination of the intended appeal.

The grounds in support of the application were that the High Court distributed the estate of the deceased to strangers and left a vast part of the same undistributed; that their appeal had high chances of success; that they would suffer irreparable loss and damage if execution is carried out; that no prejudice would be occasioned to the respondents which could not be remedied by costs; and that the application was made in good faith. The application was also supported by an affidavit sworn by the 1st applicant deposed to on

31st July, 2018. The said affidavit merely reiterates and expounds on the grounds stated above.

In response to the application, the respondents filed a replying affidavit sworn by the 1st respondent on 25th May, 2019. She deposed that the application was a misnomer, a nonstarter and fatally defective; that no leave was sought and none was granted by the High Court or this Court permitting the filing of the appeal, it being a succession cause; the application was premised on a non-existent appeal hence defective; the application had not fulfilled the prerequisite conditions necessary for grant of stay; that the application had been brought after an inordinate delay of eight (8) months after the ruling and no explanation had been given for the delay; the decision of the High Court was sound and within the law; that the applicants were not being candid and that they were out to delay and scuttle the just conclusion of the cause; that there was no arguable appeal and no irreparable loss had been demonstrated; and finally, that the applicants had not demonstrated how the appeal if any, will be rendered nugatory should stay not be granted. The 2nd and 3rd respondents did not file a response to the application.

At the hearing of the application, **Mr. Ojuro,** learned counsel appeared for the applicants, **Mr. Odeny,** learned counsel appeared for the 1st respondent whereas **Mr. Mwamu,** learned counsel appeared for the 2nd and 3rd respondents.

Mr. Ojuro orally submitted that the matter leading to this application arose from a succession cause in the High Court in which the learned Judge distributed the estate of the deceased based on a consent letter filed in court. Counsel contended that the 2nd applicant was not a party to the consent despite being a daughter to the deceased. It was his further contention that the 2nd applicant never received anything from the estate and that the 1st applicant only received a small portion of the house in the village. He submitted further that the applicants' request for DNA test was turned down by the High Court for no apparent reason. Lastly, counsel referred us to the annexed draft memorandum of appeal dated 31st July, 2018 and submitted that the grounds raised therein made the appeal arguable and that the delay in filing the application was occasioned by the numerous applications that were filed in the High Court.

In opposing the application, Mr. Odeny relied on the 1st respondent's replying affidavit and written submissions. On the arguability of the intended appeal, counsel pointed out that the application was defective as no appeal had been filed yet. He argued that the orders the application seeks to stay are those of 14th April, 2018. No such orders were made. He submitted that the application was filed on 31st July, 2018 to stay the order made on 20th December, 2017 but the applicants had not explained the delay. Neither had they demonstrated that they have an arguable appeal. According to counsel, the draft memorandum of appeal did not disclose any arguable point of law. The notice of appeal lodged was in contravention of rule 74(6) of this Court's rules as no leave was sought from the High Court to lodge the intended appeal. In the absence of the said leave, counsel submitted that there was no competent notice of appeal before this Court. Counsel submitted further that no material had been placed before us to demonstrate that the intended appeal would be rendered nugatory if the order of stay is not granted. Counsel also faulted the applicants for laxity as they had not applied for proceedings to be typed to enable them to compile a record of appeal.

Mr. Mwamu did not oppose the application. Indeed he supported the application.

We have carefully perused the record, submissions by counsel and the law. The issues for determination is whether the applicants have satisfied the laid down principles for the grant of stay of execution pending appeal or intended appeal.

The 1st respondent raised the issue that the applicants cannot appeal to this Court against the decision of the High Court before seeking leave of the said court. Sections 72 and 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules specify the appeals that lie automatically to this Court and those that lie with leave of court. However, while this Court may have jurisdiction to hear appeals from the High Court, a party who wishes to lodge an appeal may not necessarily have an automatic right of appeal. Section 50 of the Law of Succession Act provides for appeals to the High Court from the subordinate

courts but appears silent on appeals from the High Court to the Court of Appeal particularly with regard to decisions made by the High Court in exercise of its original jurisdiction. The section provides that:

> **(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.**
>
> **(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.**

The question of whether an appeal lies to this Court as a matter of right in succession causes against the decisions of the High Court exercising its original jurisdiction has been moot in this Court. On the one hand, this Court in the case of **Francis Gachoki Murage v Juliana Waindi Kinyua & another Civil Appeal No. 139 of 2009** held thus:

> ***"We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal, an aggrieved party wishing to appeal is enjoined to seek leave. Granting of leave is within the discretion of a judge. In this case, the appellant is appealing against an order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus following the dicta in the Makhangu v Kibwana (1996-1998) 1 E.A 168 case, the appellant can be said to have an automatic right of appeal."***

The second school of thought is that leave to appeal to this Court on matters of succession is required.

In the case of **Rhoda Wairimu Kioi & Ano. v Mary Wangui Karanja & Ano. (2014) eKLR,** 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 its original jurisdiction with the leave of the High Court or where the application for leave is refused, leave with 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….that leave of the High Court in succession matters is necessary in the former's exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this Court."***

Earlier on in the case of **Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others (2013) eKLR,** this Court observed:

> ***"… It is trite law that where any proceedings are governed by a special act of parliament like in this case, the Law of Succession Act, the provisions of such an Act must be strictly construed and applied…therefore what is in the Law of Succession Act is what was intended to be therein in the manner it is there. What is not therein expressly is what was intended not to be there by the legislature."***

In the instant application, we are persuaded to go along with the latter school of thought. In any event the two authorities are later in time, than the other authority. Indeed, there is need and indeed legal requirement that appeals from the High Court to the Court of Appeal in succession causes lie with the leave of the High Court. Such leave, as was held in the **Rhoda Kioi case (supra)** was desirable for purposes of expeditious disposal of succession causes in order to bring disputes to an end and allow families to settle.

Leave having not been obtained either in the High Court or this Court, we doubt whether the applicants'

intended appeal will be arguable. Having so found, we need not address ourselves on the question of the nugatory aspect of the intended appeal should the order of stay not be granted.

From the foregoing, we are not persuaded to exercise our discretion in favour of the applicants. The application having failed to meet the expectations and principles laid down under rule 5(2) (b) of this Court's rules, it is dismissed with no order as to costs.

Dated and delivered at Kisumu this 21st day of November, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.