



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. OLE KANTAL, JJA

CIVIL APPLICATION NO. 81 OF 2016

BETWEEN

CHRISTOPHER NDARU KAGINA.....APPLICANT

AND

ESTHER MBANDI KAGINA.....1ST RESPONDENT

TABITHA IKAMBA KAGINA.....2ND RESPONDENT

CHARITY NJOKI KAGINA.....3RD RESPONDENT

(Being an application for stay of execution of the Ruling of the High Court of Kenya at Nyeri pending the hearing and determination of an intended appeal from the said Ruling (Mativo, J.) dated 20th September, 2016 in **Succession Cause No. 300 of 2013**)

RULING OF THE COURT

1. **Christopher Ndaru Kagina** (the applicant), lodged in this Court by way of Notice of Motion dated 14th November 2016 seeking under Rule 5(2)(b) of the Rules of this Court an order for stay of the Ruling of the High Court (sitting in Nyeri) delivered in **High Court Succession Cause No. 300 of 2013** by **J. M. Mativo J.** That ruling was made in an application by the applicant herein dated 8th April 2013 seeking a multiplicity of orders totaling six which included an order that **Esther Mbandi Kagina** and **Tabitha Ikamba Kagina**, the 1st and 2nd respondents be stopped from inter-meddling with the estate of the deceased, and that there be stay of further proceedings in the said Succession Cause pending hearing and final determination of the applicant's appeal to this Court against the impugned ruling.

2. The learned Judge dismissed the applicant's said application with costs as lacking merit after finding that while there was no basis for granting prayers 3, 5, and 6, prayer 4 could not be granted at that stage as it would be tantamount to determining the main suit without affording the parties the opportunity to adduce evidence. As regards prayer two of the application, the learned Judge found it rather unclear and ambiguous while prayer 4 was refused on the ground that granting it would amount to granting final orders at an interlocutory stage.

3. In the motion before us, the applicant avers that he lodged a Notice of Appeal on 26th September 2016 against the whole of the High Court ruling and that the learned Judge erred in his decision in the ruling.

4. When the application under Rule 5(2)(b) came up for hearing, Christopher Ndaru Kagina, the applicant, appeared in person while learned counsel Mrs. E. K. Isika appeared for the respondents.

5. The applicant told the Court that the estate of the deceased in Succession Cause No. 300 of 2013 was in danger and needs to be protected. He alleged that there was impunity and that he gets nothing from the estate of his father. He told the court that he is supposed to get Kshs 10,000/= monthly. He relied on his written submissions filed in Court on 18th May 2017 and urged the Court to grant the order sought.

6. Learned counsel Mrs. Isika relied on her written submissions filed in Court on 6th June 2017 which she did not want to highlight as it would amount to repetition.

7. The written submissions by the applicant have addressed the merits in the distribution of the estate of the deceased who was the father of the parties. They also seek to show why the learned Judge was wrong in the impugned ruling. The submissions do not show in what way the

decision of the learned Judge was wrong in law and on what legal basis the applicant seeks to challenge it on appeal but the applicant does allege that he is being short charged by the respondents who are the applicant's co-administrators of the estate.

8. On her part, Mrs. Isika contends in her written submissions that the applicant's application in the High Court was rightly dismissed and the applicant's notice of motion in this Court is an abuse of the process of court. Counsel submitted that the issue of beneficiaries and properties constituting the estate ought to be determined in the Succession Cause in the High Court on the basis of evidence and not at an interlocutory stage as urged by the applicant. Learned counsel pointed out that as the Grant of Letters of Administration is held and is in the names of the applicant and the two respondents, and as there is no confirmed Grant, no administration or dealings in the estate can be undertaken without the concurrence of the three administrators, and hence there is no threat of disposal or transfer of any of the properties of the estate.

9. It was also the submission of the respondents' counsel that the applicant needs leave to appeal and that as he had not obtained it, the appeal is a nullity. We were referred to Section 50 of the Law of Succession Act, Chapter 160 of the Laws of Kenya by the respondents' counsel who contended that decisions of the Magistrate court are appealable to the High Court and that decisions of the High Court are final unless the High Court grants leave to appeal to this Court in which case decisions of this Court ought be final. Our attention was drawn to the decision of this Court in **Civil Application No. Nai. 69 (UR 56 of 2014) [Rhoda Wairimu Karanja & another versus Mary Wangui Karanja and another]**. Counsel urged us to dismiss the application.

10. We have perused the application and the submissions made by the parties and have given due consideration to the matter.

11. The application being under Rule 5(2)(b) of this Court's Rules, the applicant is enjoined to show that he has an arguable appeal and that unless the orders sought are granted, the appeal shall be rendered nugatory if it succeeds.

12. The applicant has not shown that his intended appeal is arguable. He has not shown what point of law he seeks to pursue in the intended appeal. But more importantly, the applicant has not shown that he sought or obtained leave to appeal against the decision of the High Court. As rightly pointed out by counsel for the respondents, in the decision of this Court contained in the case of **Rhoda Wairimu Karanja & another versus Mary Wangui Karanja & Another [Nbi Civil Application NO. 69 (UR 56) of 2014]**, this Court held that under the Law of Succession Act, *“there is no automatic right of appeal to this Court; that an appeal will lie to this Court 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.”*

13. As the applicant did not seek or obtain leave to appeal, his intended appeal is misplaced. Moreover, he has not shown that he has an arguable appeal.

14. For these reasons, we have no hesitation in dismissing the application, which we hereby do. We order that the applicant shall bear the costs of the application.

Dated and delivered at Nairobi, this 20th day of December, 2017

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR