



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of the Late Edward Akelo Nyang'or (Deceased) (Succession Cause 84 of 1998) [2024] KEHC 1935 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 84 OF 1998
MS SHARIFF, J
FEBRUARY 29, 2024
IN THE MATTER OF THE ESTATE OF THE LATE EDWARD
AKELO NYANG'OR (DECEASED)
AND
IN THE MATTER OF AN APPLICATION BY AMOS ATIENO
AKELO**

RULING

1. The notice of motion application dated 24th may, 2023 seeks;
 - a. Leave to appeal against this court's ruling of 20th March, 2023.
 - b. Temporary stay of execution of the court's ruling dated 20th March, 2023 pending hearing and determination of the instant application.
 - c. Stay of execution of the ruling delivered on 20th March, 2023 pending hearing and determination of the intended appeal to the Court of Appeal.
2. Learned Counsel B. Omanga representing the Applicant swore an affidavit deponing inter alia that the court on 20/3/2023 upheld the Objector's preliminary objection and struck out the Applicant's summons dated 27th October, 2022. That upon delivery of the ruling, Applicant's counsel made oral application for leave to which the court directed a formal application be filed. That he has already prepared a Memorandum of Appeal and are willing to prosecute the application.
3. The Respondent filed a replying affidavit deponing inter alia that the ruling complained of brought an end to litigation in the matter and the application has already been dealt with by the court. That the intended appeal is an escape route for the Applicant to regain control of the properties of the estate.



A. Analysis and determination.

4. The issues herein are whether the Applicant is entitled to leave to appeal and whether the Applicant ought to be granted stay of execution against the orders of 20th march, 2023.
5. The ruling of 20th march, 2023 was a determination on a preliminary objection that the application under review was *res judicata*. The court after considering the material on record struck out the summons by upholding the preliminary objection.
6. Leave to appeal against orders of this court are not automatic under the *Law of succession Act*, Cap 160 Laws of Kenya. A party intending to appeal against a decision of the court exercising its original jurisdiction must make an application to the court. This was the position in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR where it was held: -

“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.”
7. The Applicant contends that this court erred in upholding the preliminary objection and thereby striking out the summons.
8. Engrained to our constitution is the right of appeal so that in the instant case, I find no reason to deny the Applicant the right to appeal. He has annexed a Memorandum of Appeal outlining the grounds under which they intend to challenge this court’s ruling. In the circumstances leave is hereby granted to the Applicant to lodge an appeal at the Court of Appeal against the ruling of 20th March, 2023.
9. The issue of whether to grant stay is discretionary one and the Applicant must bring forth evidence outlining the need for such stay. In the instant application, the Applicant has not demonstrated how he stands to suffer any loss/harm if the order of stay is not granted. I am thus disinclined to grant him orders of stay.
10. The leave to appeal is hereby granted to the Applicant on condition that a substantial appeal is filed within 21 days from the date hereof.

DELIVERED, DATED, AND SIGNED AT KISUMU THIS 29TH DAY OF FEBRUARY 2024

MWANAISHA S. SHARIFF

JUDGE

