



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Clement Otieno Okumu (Deceased) (Succession Cause
46 of 2014) [2023] KEHC 1240 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 46 OF 2014
JN ONYIEGO, J
FEBRUARY 17, 2023**

IN THE MATTER OF THE ESTATE OF CLEMENT OTIENO OKUMU (DECEASED)

BETWEEN

BEATRICE ADHIAMBO OBIERO PETITIONER

AND

PEREZ OKUMU 1ST RESPONDENT

HENRY OKUMU 2ND RESPONDENT

RULING

1. Clement Otieno (herein the deceased) died testate on December 4, 2013. Prior to his death he had executed a will in which he appointed Perez Okumu, Beatrice Adhiambo Obiero and Henry Okumu as the executors. A grant of probate of written will was issued on June 26, 2014 and confirmed on March 10, 2017.
2. Vide a summons dated July 10, 2017, Harrison Amolloh Okumu a son to the deceased moved the court seeking; to reopen proceedings to rectify the confirmed grant so as to include and distribute three accounts with funds therein which were left out in the will; that account Nos Savings Acc No xxxxxxxxxx, fixed deposit Acc No xxxxxxxxxx and current Acc No xxxxxxxxxxxxxxxx be distributed in accordance with Section 32 of the *Law of Succession Act*; all debts accruing to the estate be paid out of the said accounts; the remaining balance be shared out equally amongst the beneficiaries of the estate; allocation of George Okumu be reflected as Kshs 500,000 and not Kshs 5,000,000 as stated in the confirmed grant; plot No 1024 be rectified to read 1094
3. In supporting the application, Harrison swore an affidavit on July 10, 2017. On the other hand, Henry Kissinger okumu and Prez Clement Okumu filed grounds of opposition stating that the application was against the wishes of the deceased expressed in his will considering that the deceased had through his will bequeathed the three accounts now sought to be distributed as an intestate estate.



4. After canvassing the application, Thande J delivered her ruling on 2nd February 2018 thus holding that; the savings in the three accounts form part of the intestate estate; proceeds of the said accounts to be used to pay off debts of the estate; Perez clement to hold life interest in the balance of the proceeds of the said accounts and upon her death or remarriage the same to devolve upon the children of the deceased in equal shares.
5. Aggrieved by the said decision, Harrison Amollo okumu, Beautrice Adhiambo Obiero(co-administratrix) and Currian Okumu filed two separate applications dated February 19, 2018 and February 20, 2018 seeking review of the ruling by Thande j delivered on February 2, 2018. In the said review applications, they sought inclusion of the deceased's former wives among them their mother Rosanael as beneficiaries of the estate and that in addition, divide the estate according to the number of children in each house. On October 19, 2019, Thande j dismissed the two applications thereby stating that the deceased had settled the issue of former wives in the will by stating that he had only one wife one Perez Clement. The court further held that the issues being raised were matters of appeal and not review. Dissatisfied with the said ruling, they moved to the court of appeal vide Civil Appeal No 27 of 2019. The court of appeal dismissed the appeal on July 9, 2021 thus upholding the ruling of Thande J.
6. Subsequently, Rosanaeli Okumu mother to Harrison and Beatrice Obiero moved to this court vide a summons dated July 20, 2021 seeking;
 - a. Spent
 - b. That there be a stay of execution of the orders made by Honorable Justice Thande on February 2, 2018 pending the hearing ad determination of this application interpartes especially in reference to the monies at Standard Chartered Bank, Treasury Square Nkurumah road within the following accounts;
 - a. Saving account No xxxx
 - b. Fixed deposit account No xxxx
 - c. Current account No xxxx
 - c. That the court grants the applicants leave to file an appeal against the ruling and orders made by Honorable Justice M Thande on the February 2, 2018.
 - d. That upon leave being granted in prayer 3 above, the notice of appeal annexed herewith be a admitted out of time and deemed to have been filed within time or the same be filed and served within 30 days from the date hereof or whatever the court deems fit.
 - e. That there be a stay of execution of the orders made by honorable Justice Thande on February 2, 2018 pending the hearing and determination of the appeal against the ruling and orders made by honorable Justice M Thande on the February 2, 2018;
 - f. That the costs of this application be in the cause.
7. The application is anchored on the grounds set out on the face of it and averments contained in the affidavit in support sworn by the applicant on July 20, 2021 thus stating that she was the first wife married to the deceased in 1965 and that they were blessed with five children three of whom are deceased. She named two of the children sired with the deceased as Harrison and Beatrice. She averred that the deceased did not provide for her in the will yet she was his first wife with whom they struggled to earn the property before marrying other wives among them Perez whose marriage with the deceased she did not oppose.



8. She went further to state that children of her late sons George and Dickson were not provided for in the will hence entitled to a share. She argued that she was aggrieved by the decision which deprived her the right to inherit her husband's estate. That for four years she was confined in bed hence the reason why she could not keenly follow the court proceedings. That during the period 2019 and 2020 her family was affected by covid hence the delay in appealing against the impugned ruling in time.
9. In support of the application Philip Otieno Okumu claiming to have been a son to the deceased swore an affidavit on October 14, 2022 thus reiterating what the 1st applicant stated. He basically supported the application.
10. In response, the 1st respondent filed a replying affidavit on September 16, 2022 thus opposing the application. She denied the claim that; the deceased had only one wife; she was the only wife recognized in the will and therefore entitled to the funds in the three accounts; the issue of former wives was dealt with by Judge Thande through the review application and subsequently the court of appeal; the applicants who were duly represented cannot revive an application which has already been exhaustively determined on merit and, the application is defective as there was no letter of authority nor power of attorney authorizing the 1st applicant to represent them in these proceedings.
11. She also stated that the application is being filed after in-ordinate delay hence the excuse of sickness by the 1st applicant does not suffice as she had filed an application in court on December 7, 2018 seeking reasonable provision thus ignoring the appeal. She went further to state that the applicants are guilty of material facts as they have already through a consent order adopted by this court benefitted from part of the kshs 50m contained in the disputed accounts. She attached the said consent marked PO-17.
12. As a rejoinder, Rosanael filed a supplementary affidavit dated on October 14, 2022 stating that; the 2nd and 3rd respondents were not represented in this case; she was not the one who filed the revision application hence cannot be faulted for filing it instead of an appeal; the 2nd and 3rd applicants have a right to appeal against the ruling since they were not parties before and that although she has since received some money from the said estate the same is not a bar to filing an appeal.
13. When the matter came up for directions, parties agreed to dispose the same through written submissions. The applicants through the firm of Martin Tindi filed their submissions dated October 14, 2022 thus adopting the content contained in the affidavits in support. Equally, the Respondents filed their submissions through the firm of Otieno and Associates who also adopted the averments contained in the affidavit in reply.
14. I have considered the application herein, response thereto and rival submissions by both counsel. Issues that arise for determination are; firstly, whether the applicants have met the threshold for grant of stay order; secondly, whether leave to appeal can issue.
15. Under order 42 rule 6 of the *Civil Procedure Rules*, an applicant seeking stay orders is duty bound to prove the following elements; That he or she is likely to suffer substantial loss in the event a stay order is not granted; that the application has been filed within reasonable time; that security for due performance of the decree or order has been deposited or a proposal to do so has been made and or, whether after taking into consideration the circumstances of the case, there is any other sufficient cause to warrant the court to issue the order of stay.
16. It must however be borne in mind that to grant or not to grant a stay of execution order is a matter of discretion by the court seized of the matter. See *Butt v Rent Restrictions Tribunal* (1979) e KLR where the court held that a prayer to grant stay of execution is discretionary and should be exercised in such away as not to prevent an appeal. In other words, the court must reasonably balance both the



- applicants' and respondents' interest and weigh on the merits and demerits in granting or not granting the order.
17. However, it is settled law that proof of likelihood to suffer substantial loss is the cornerstone for granting stay of execution orders. In the case of *Kenya Shell Limited vs Benjamin Karuga Kabiru & another* (1986) eKLR Platt J had this to say:

“... it is usually a good rule to see if order XLI rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case unless an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money.”
 18. Similar position was held in the case of *Halai and another v Thornton and Turpin (1963) Limited* (1990) KLR 365 where the court expressed itself that:

“Thus, the Superior court’s discretion is tethered by three conditions. firstly, the appellant must establish sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly the applicant must furnish security”
 19. According to the impugned ruling, the 1st applicant is to hold a life interest on the disputed amount part of which has been shared out between all the beneficiaries the applicants included through a court order. In my view, the said amount is safe in the account hence not likely to be distributed unless the 1st applicant dies or remarries. To that extent the applicants are not likely to suffer substantial loss.
 20. As regards the question of inordinate delay in filing the application, the applicants do not deny that it took them about four years to file the instant application. It is clear from the pleadings that one Beatrice and Harrison who had challenged the same ruling up to the court of appeal through a review a application are children to the 1st applicant herein. It cannot be said that the applicants who are family members with Harrison and Beatrice were not aware of these proceedings. In any event, the 1st applicant said that the delay was occasioned by covid which killed some of the relatives. I take judicial notice that even during covid times courts were operational and even litigation in respect of this case was going on. Covid therefore cannot be an excuse.
 21. Section 79G of the Civil Procedure provides that a party who is aggrieved by a court decision has a right of appeal within 30 days. In this case, it has taken the applicants herein 4 years to contemplate filing an appeal. It is trite that delay even for one day which is not justified can amount to unreasonable delay. See *Jaber Mohsen Ali & another vs Priscillah Boit & another* (2014) e KLR. Similar position was held in the case of *Charles Nyamwega v Asha Njeri Kimata & another* (2017) e KLR where the delay of about three months was found to be unreasonable hence the application for stay was rejected.
 22. Although each case is considered on its own circumstances and merits, I do not find any justification in the delay herein hence the same is unreasonable. There is no doubt that the applicants are trying their lack after their representatives failed. That is why the parties who lost up to the court of appeal are not the ones now seeking stay orders.
 23. As regards depositing of security, this is a family related matter touching on the estate hence the circumstances are not favourable to seek depositing of security as it will unnecessarily burden some family members.



24. Regarding leave to appeal, Section 75(1) of the *Civil Procedure Act* provides that an appeal shall lie as of right unless leave is specifically required. In respect to succession matters, leave is mandatory. See *Joyce Wangechi Ruga vs Hannah Gathoni Ruga* Civil Application No 41 of 2020. However, order 43 rule 1 of the *CPRs* specifies orders in respect of which the right to appeal is automatic. Order 43 (2) does provide that an appeal shall lie with the leave of the court from any other order made under these rules.
25. The order being challenged was the one that reviewed distribution of the estate set out in the certificate of confirmation of the grant. Order 43 rule 3 goes further to state that an application for leave to appeal shall be in the first instant be made to the court that made the order or by an application within 14 days. In the instant case, it took a whole four years to contemplate of appealing. In my view, this period is unreasonable. In the case of *Serephen Nyasani Mengev Rispah Onsase* (2018) e KLR the court declined to grant leave to appeal out of time after 3years of delivery of the impugned decision terming it unreasonable.
26. Taking into account the totality of the circumstances surrounding this matter, the applicants are acting on trial and error basis considering that the issues intended to be raised before the court of appeal are the same ones canvassed in another fashion before this court. Indeed, litigation must come to an end at some point. Accordingly, I am persuaded to hold that the application is not merited hence dismissed with no order as costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF FEBRUARY, 2023.

J.N. ONYIEGO

JUDGE

