



In re Estate of the Late Walter Kipchamdany Ngetich alias Walter Kipchamdany Arap Ngetich (Deceased) (Succession Cause 102 of 2012) [2023] KEHC 21486 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 102 OF 2012
JK SERGON, J
JULY 31, 2023**

BETWEEN

SIMON KIPKURUI LABOSO 1ST PETITIONER

GEOFFREY LABOSO NGETICH 2ND PETITIONER

AND

FAUNA CHEPKIRUI NGETICH OBJECTOR

RULING

1. The Applicants filed a Notice of Motion dated May 22, 2023 seeking the following orders;
 - (i) Spent
 - (ii) That there be stay of execution of the proceedings herein and implementation of the judgment and decree of this court delivered on February 10, 2023; pending the hearing and determination of this application
 - (iii) That there be stay of execution of the proceedings herein and implementation of the judgment and decree of this court delivered on February 10, 2023; pending the hearing and determination of the appeal.
 - (iv) The necessary directions be given
2. The Application is supported by grounds stated on the face of it and the supporting affidavit of Simon Kipkirui Laboso, The 1st Applicant Herein And On behalf of the 2nd Applicant.
3. The Applicants aver that on February 10, 2023 this honourable court rendered a judgment which *inter alia* found that the objector herein had proven long cohabitation and was thus entitled to a share of the deceased's estate and the applicants herein being aggrieved by the judgment and decree of this



honourable court have preferred an appeal and filed a notice of appeal on February 15, 2013 within the statutory prescribed time limit.

4. The Applicants aver that they filed an application for leave to appeal on March 8, 2023 to buttress their chances of appeal as emerging jurisprudence suggests that appeal on Probate and Administration matters are not lodged as a matter of right but are subject to leave of this honourable court or the Court of Appeal.
5. The Applicants aver that they have an arguable appeal with high chances of success as this court finding on long cohabitation was neither pleaded or proved by the objector and further that there was no witness called to attest to the alleged long cohabitation between the deceased and objector entitling her to a declaration of marriage by repute.
6. The Applicants were ready and willing to offer such security and/or abide by such terms the court may deem fit and just to impose.
7. The Applicants maintained that the court is vested with the discretion to grant stay of execution against the terms of the said judgment and decree delivered on February 10, 2023.
8. The Applicants contended that unless an order for stay of execution, proceedings and/or implementation of the said judgment is granted, they were apprehensive that the Respondent may imminently cause the implementation of the impugned judgment rendering the appeal nugatory.
9. The Applicants contended that unless the application is allowed, they would suffer substantial loss and prejudice as the substratum of their appeal would be lost in the event the estate is distributed and/or alienated before the Court of Appeal renders itself on the appeal.
10. The Applicants aver that the instant appeal has been made in pursuit of the interests of justice and without unreasonable delay.
11. The Respondent filed a replying affidavit and vehemently opposed the application, and contended that it was a well-orchestrated move by the applicants to continue frustrating her and a scheme to continue subjecting her to landlessness as they did over ten (10 years) prior to delivery of February 10, 2023 judgment and further that the application was an abuse of process tailored towards maintaining status quo which was prejudicial to her.
12. The Respondent avers that she is landless at the moment and relies on well-wishers for accommodation and was recently discharged from hospital after having suffered a massive stroke attack.
13. The Respondent maintained that the court delivered its judgment on February 10, 2023 recognizing her as a beneficiary of the estate together with her children and subsequently issued a grant of letters of administration on the same date and that she had already complied with the orders of this court by filing and serving summons for confirmation of grant dated March 13, 2023, whereas the applicants had not filed their summons, intent on appealing, they themselves were not ready to do equity yet they were seeking this court's equitable discretion.
14. The Respondent maintained that the intended appeal notwithstanding, the applicants must acknowledge that she is their step mother and that she is entitled to inherit the land of the deceased together with her children.
15. The Respondent conceded that the applicants have a right to appeal, however, she was entitled to being settled while the appeal is being pursued and urged the court to confirm the grant as proposed in the summons for confirmation of grant dated March 13, 2023 which in any event was not opposed or alternatively the county surveyor be directed to visit the deceased's property and demarcate as per her



affidavit in support of summons for confirmation of grant dated March 13, 2023 to enable her occupy her share and eke a living thereby ending her landlessness.

16. The Respondent contended that she would continue to suffer landlessness should she not be settled in the intervening period, hence an order for stay would be prejudicial and oppressive to her, she therefore sought to have the instant application dismissed in its entirety in the interests of justice.
17. I have considered the notice of motion dated May 22, 2023 the averments in the supporting affidavit, the replying affidavit in opposition to the instant application and the oral submissions by parties on June 19, 2023 in respect of two applications the one dated March 7, 2023 and the instant application dated May 22, 2023. I find that the sole issues for the courts determination is whether to grant leave to appeal and whether to issue stay of execution judgment and decree issued by this court on February 10, 2023 pending an appeal in the superior court of record.
18. On the first issue on leave to appeal, I have perused the draft Memorandum of Appeal and noted that it has raised substantive points of law for consideration by the Court of Appeal. The respondent will not suffer any prejudice. In view of the age of the matter, I opine that it is in the interest of all the parties that the dispute is brought to an end expeditiously. Section 47 of the Law of Succession Act which empowers this court to make such orders as may be just and expedient. I opine that the applicant should be given an opportunity to pursue the appeal. In Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR the Court of Appeal made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction: “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 original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”
19. On the second issue on stay pending appeal, I find that this court is empowered to issue orders for stay of execution pending appeal as sought by the applicants under rule 63 and 73 of the Probate and Administration Rules as well as section 47 of the Law of Succession Act, the main aim of stay in this case being preservation of the estate pending the hearing and determination of the appeal.
19. Accordingly, I find that this application has merit and is allowed.
 - (i) The applicant is granted leave to appeal against the Judgment of this court dated February 10, 2023
 - (ii) Stay of execution of the proceedings herein and implementation of the judgment and decree of this court delivered on February 10, 2023; pending the hearing and determination of the appeal.
 - (ii) Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 31ST DAY OF JULY, 2023.

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J.K. SERGON

JUDGE

In the presence of:



C/Assistant - Rutoh

Miss Chepkorir holding brief for Langat for the 3rd Petitioner

Miss Sang holding brief for Koech for Applicant

