



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. E002 OF 2021

IN THE MATTER OF THE ESTATE OF ERASTO KIWINGA TOLE (DECEASED)

PETER TOLE KIWINGA.....APPLICANT

VERSUS

ELISTON MNGOLA KIWINGA

PATRICK MGHALU KIWINGA

HANNINGTON MWADIME KIWINGA.....RESPONDENTS

RULING

1. Vide succession cause petition No 38 of 2018 Wundanyi, Eliston Mngola Kiwinga, Patrick Mghalu Kiwinga and Hannington Mwadime Kiwinga petitioned for a grant of representation in respect of the intestate estate of one Erasto Kiwinga Tole (deceased). On 4th April, 2019, one Peter Tole Kiwinga filed an objection for making a grant to the petitioners. However, on 4th July, 2019, parties agreed for a grant of letters of administration intestate to be issued to the petitioners jointly with the objector as the 4th administrator.

2. Upon filing the application for confirmation of the grant, the administrators failed to agree on the mode of distribution hence the court directed for the dispute to be canvassed by way of affidavit evidence. Among the contentious issues was the prayer by the 1st, 2nd and 3rd administrators distributing part of the estate being L.R Werugha/Werugha/ /1468 to the daughters of the deceased who had not inherited any property of the deceased a fact that the 4th administrator was opposed to on grounds that Taita customs do not allow a female child to inherit property from a deceased parent. Secondly, that being the only son to the first wife to the deceased, he should get a bigger share and not equal portion like the rest of the children who are all children born by the deceased's second wife.

3. After considering the evidence and submissions of both parties, the court in its ruling of 25th November 2020 found that sons to the deceased had received their respective shares from their father as gifts intervivos during his lifetime. The court further found that the daughters were entitled to inherit the father's estate hence could not be discriminated against on account of gender. As a consequence, the court distributed the assets to the daughters.

4. However, none of the parties filed an appeal against the said ruling until 20th January 2022 when Peter Tole filed an application by way of a notice of motion dated 24th September 2021 and filed on 28th September 2021 pursuant to Section 97G and 95 of the Civil Procedure Act and order XLIX rule 5 of the Civil Procedure rules seeking orders that;

a. Spent

b. That the proposed appellant be granted leave to appeal out of time against the whole ruling of the honourable E M Nyakundi resident magistrate delivered on 25th November 2020 at Wundanyi in succession cause N38/2018 in the matter of the estate of Erasto Kiwinga Tole.

c. That pending interpartes hearing of this application this honourable court be pleased to stay the orders issued on 26th November 2020.

d. That the notice of appeal and memorandum of appeal annexed hereto be deemed as duly filed and served

e. That this honourable court be pleased to issue any order it deems fit and just in the circumstances.

f. That the costs of and incidental to this appeal be costs in the intended appeal.

5. The application is premised upon grounds stated on the face of it and averments contained in the affidavit in support sworn on 24th September 2021 by Peter Tole Kiwinda the applicant herein. It is the applicant's case that, he could not file the intended appeal within the required period of 30 days due to the illness of his lawyer one Mr Hayanga.

6. That the appeal has high chances of success and if the prayer for stay is not granted the appeal will be rendered nugatory. He further averred that the delay was not inordinate.

7. In reply, Mr Samuel Mwakandana Kiwinda counsel for the appellant swore an affidavit on 7th December 2021 and filed on 9th December 2021 stating that there has been inordinate delay in filing the intended appeal. That the intended appeal is not arguable and has no high chances of success considering that the appellant is challenging distribution of the estate to daughters. He further contended that the draft memorandum of appeal does not raise any triable issues and that litigation must come to an end.

8. When the matter came up for hearing, parties agreed to canvass the same through written submissions.

Applicant's submissions

9. The applicant filed his submissions on 20th January 2022 through the firm of Lawrence Obonyo who submitted on three issues namely; whether stay of execution can issue; whether there is good ground for extension of time and, whether the application is frivolous and vexatious. Learned counsel reiterated the averments contained in the affidavit in support of the application contending that the applicant is likely to suffer substantial loss if the order for stay is not granted and that there is a possibility of the appeal being rendered nugatory.

10. Counsel further contended that although the prayer to grant a stay of execution order is discretionary, the governing principle is the consideration whether the appeal will be rendered nugatory and that the applicant will suffer substantial loss. In support of this proposition, the court was referred to the holding in the case of **JMM VS PM (2018) e KLR**, **Butt vs Rent Restriction Tribunal Nairobi civil appeal No 6 of 1979** and **Carter and Sons Ltd vs Deposit Protection Fund board and 2 others CA No 291 of 1997**.

11. According to Mr Obonyo, there are special circumstances to warrant stay of execution orders in this case as the applicant is likely to suffer substantial loss in the event the subject property is transferred to a 3rd party.

12. Concerning enlargement of time, counsel invited the court to consider the following; whether there was justifiable cause for the delay in filing the application; whether there will be any prejudice suffered by the respondent if the orders are granted; whether the application has been filed without unreasonable delay and, whether the appeal is arguable. To buttress this submission, reliance was placed in the case of **Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 others (2014)**.

13. It was counsel's submission that the cause for delay in filing the appeal in time was as a result of old age of the applicant and the sickness of his counsel. On the question whether the appeal is arguable with high chances of success, counsel was of the opinion that the intended appeal is arguable details and merits of which shall be argued during the main appeal hence urged the court to apply its discretionary powers. In this regard the court was referred to the holding in the case of **Banco Arabe vs Bank of Uganda (1999) 1E.A 22**.

14. Concerning the aspect of whether the appeal is frivolous and amounts to abuse of the court process, counsel opined that the applicant has a good case whose merits should be determined on appeal.

Respondent's submissions.

15. The firm of SM Rigah and company advocates appearing for the respondent filed their submissions on 24th January, 2022 thus adopting the content contained in the affidavit in reply. It was counsel's submission that the case was determined on merit and no appeal was preferred over one year now hence litigation must come to an end. Reliance was placed in the holding in the case of **Waruingi Kamau vs Karuga Kamau (2017) e KLR**.

16. Learned counsel submitted that there was no good explanation given for the delay in filing the appeal. That no medical evidence was attached to show that Mr Hayanga counsel for the applicant was sick. It was contended that the appellant did not seek leave to appeal from the trial court pursuant to Order 43 rule 1 hence the appeal is incurably defective and fatal to the applicant's case. To advance this proposition, the court was referred to the holding in the case of **Philemon Kiogora Munjuri vs Wiliam Kamunge Gakui (2019) e KLR** and **Serephen Nyasani Menge vs Rispah Onsase (2018) e KLR**.

17. Learned counsel contended that the appeal herein does not have high chances of success as the impugned ruling was based on merit considering that the applicant is the greatest beneficiary out of the deceased's estate.

Determination

18. I have considered the application herein, response thereto and oral submissions by both counsel. Issues that render themselves for determination are.

a. Whether the applicant has met the threshold for grant of stay of execution orders

b. Whether the applicant has met the threshold for enlargement of time to appeal out of time.

19. The impugned ruling herein was delivered on 25th November 2020 and the instant application filed on 24th September 2021 about 10 months down the line. Under Section 79G of Civil Procedure Act, an appeal from a subordinate court to the high court should be filed within a period of 30 days from the date of the decree or order appealed against provided that an appeal shall be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

20. Before a court can grant a stay of execution order, one must comply with conditions set out under order 42 rule 6 (2) of the civil procedure rules which requires proof of the possibility that the applicant will suffer substantial loss if the order sought is not granted; application has been filed without undue delay and that, security for due performance of the decree has been furnished.

21. It is incumbent upon the applicant to prove to the satisfaction of the court that he is likely to suffer substantial loss if the order of stay is not granted; the application has been filed timeously and that sufficient security has been deposited or is proposed to be deposited. See **Shell Ltd vs Kibiru and another (1986)**. However, whether to grant or not to grant an order for stay is a matter of discretion of the presiding judge or magistrate. This position was succinctly espoused in the case of **Butt vs Rent Restriction Tribunal (supra)** where the court held that grant for an order of stay is a matter of discretion by the court seized of the case and that the discretion should be exercised in such a way as not to hinder an appeal or render it nugatory.

22. It is trite that proof of substantial loss is the cornerstone for grant of stay of execution orders. This position was clearly stated in the case of **James Wangalwa and another vrs Agnes Naliaka Cheseto (2012) e KLR**.

23. Before I address the issue of stay of execution based on the ground of likelihood to suffer substantial loss, I wish to address the issue of whether the court should enlarge time for filing the appeal. This issue can simultaneously be dealt with the issue of whether the application for stay was filed within reasonable time. It is not in dispute that the impugned ruling was delivered 10 months earlier before the instant application was filed. The onus is on the applicant to show that the delay was reasonable, justified and that the respondent will not suffer any prejudice if the order is not granted. See **Nocholas Kipotoo Korir Arap Salat vs IEBC (Supra)**.

24. In the instant case, the excuse given is that the applicant is elderly and that his advocate Mr. Hayanga was sick hence could not have time to interpret the ruling. From the record, I am unable to discern the age of the applicant although that is not a good reason to delay in filing the appeal in time. As regards the sickness of the applicant's counsel, there was no proof of such sickness. At least, Mr Hayanga should have sworn an affidavit to that effect.

25. Indeed, what amounts to unreasonable delay will depend on the individual circumstances of each case and whether the delay would amount to unreasonable delay? In the case of **Jaber Mohsen Ali and another vs Priscillah Boit and another E and L No 200 of 2012 (2014) e KLR** the court held that;

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that the application ought to have come before expiry of the period given to vacate”.

26. The court went further to state that a delay of one month and 4 days was unreasonable given that the court had given 30 days' time line for the applicant to vacate the disputed land.

27. In the instant case, the 10 months' delay has no justification. There is a purpose why 30 days' window to lodge an appeal was given. Where there is no good explanation given for 10 month's delay, the court will not exercise its discretion in aid of an indolent party. Although a litigant has a right to exhaust his legal redress up to the highest available appellate level, the same is not absolute. A successful litigant equally should not be hindered unnecessarily from enjoying the fruits of his judgment.

28. For the reasons stated, there is no good reason given why an appeal was not filed in good time. Accordingly, the prayer for enlargement of time is disallowed on grounds that delay was inordinate.

29. As concerns stay of execution, the same is subject to enlargement of time to file an appeal out of time which has been disallowed. Technically, the prayer for stay is spent as stay cannot operate in the absence of an appeal in place hence no need to delve so much on proof of likelihood to suffer substantial loss nor furnishing security.

30. As to whether the appeal is arguable and has high chances of success, I do not think so. In any event, it is not necessary to delve into detail on the grounds of appeal as there is no appeal nor leave to file the same out time. However, from a glimpse of the draft memorandum of appeal and the submissions, the dispute revolves around distribution of the estate to daughters against Taita customs. I do not find this to be an arguable ground as distribution of an estate is legally made to children, spouse/s or any other dependant. The issue of gender is irrelevant. To that extent I do not find the appeal arguable.

31. In view of the above holding, the application herein is dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2022

J. N. ONYIEGO

JUDGE