



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 359 OF 2014

IN THE MATTER OF THE ESTATE OF ROLF ROBERT MEIER (DECEASED)

JAPHETH PHIDELIS LUMERENI MWALIMO.....APPLICANT

VERSUS

STEPHEN NICK OMONDI ODONGO.....RESPONDENT

RULING

1. The deceased herein died intestate on 26th June, 2013. A grant of letters of administration intestate was issued to Josphat Phidelis Mwalimo who claimed to have been a friend to the deceased. A grant of letters of administration was issued on 30th June, 2015 and confirmed on 18th September, 2017. However, one Nick Omondi Odongo filed an application for revocation dated 20th November, 2019 on his own behalf and that of his siblings in their capacity as step children to the deceased hence dependants of the deceased and therefore entitled to a share of the estate. They claimed that the grant was obtained fraudulently without disclosure of material facts to the effect that the petitioner was a stranger to the estate.
2. Upon canvassing the application, the court rendered its judgment on 30th September, 2021 thus revoking the grant and appointed the public trustee to administer the estate. The petitioner was declared a stranger to the estate and the estate to be shared out between Grace Akinyi and Nelly Anyango both step children to the deceased.
3. Having delivered its judgment, the petitioner orally prayed for leave to appeal. Leave was then granted. Subsequently, the petitioner (Appellant) one Mwalimo moved to this court vide a summons dated 1st November, 2012 seeking stay of execution of the orders made on 30th September, 2021 together with its consequential orders. The application is predicated upon grounds set out on the face of it and averments contained in the affidavit in support filed on 2nd February, 2021.
4. It is the appellant's contention that he lodged a notice of appeal on 14th October, 2021 with the intention of challenging the impugned judgment. The crux of the application is that unless the orders of 30th September, 2021 are stayed, the appeal will be rendered nugatory. That he has an arguable appeal with high chances of success.
5. In response, the respondents filed grounds of opposition dated 3rd December, 2021 contending that the appellant has not stated any substantial loss he is likely to suffer should the prayer for stay be rejected. That the orders sought if granted will leave a vacuum in the administration of the estate thus exposing the estate to wastage and depreciation. It was further stated that the application has not been filed within reasonable time.
6. The application was canvassed orally with Mr. Muyala for the applicant adopting the grounds and the content contained in the affidavit in support of the application. Mr. Muyala submitted that the applicant has since filed a memorandum of appeal and that if the application is not allowed the grant will be rendered nugatory. In support of this proposition, counsel relied on the holding in the case of **in re estate of William Kipkosgei Kiptum (deceased) (2021) e KLR** and in the **re estate of Kanyari Matongu ((deceased) (2021) e KLR**.
7. Mr. Muriithi appearing for the respondent opposed the application on grounds that in family law, there is no automatic right of appeal. To buttress that position, Counsel referred the court to the holding in the case of **Izaak Aliaza Vs Samuel Kisiaruki (2021) e KLR**.
8. Learned counsel submitted that the applicant has not established the requisite conditions for grant of stay orders as provided under Order 42 rule (2) of the Civil Procedure Rules. In particular, counsel submitted that the applicant has not proved that he is likely to suffer substantial loss should the prayer for stay be declined. To solidify this submission, counsel referred the court to the holding in the case of **in re estate of Gurdial Kaur Sihra (deceased) (2020) e KLR**.

9. Mr Muriithi submitted that the applicant will not suffer any loss by the public trustee administering the estate and that if the orders are granted, the estate will be left in alimbo. In that regard, reliance was placed in the case of **Charles Ochieng Okoth Vs Joseph Maricky Okoth (2015) e KLR.**

10. I have considered the application herein, response there to and oral submissions by both counsel. The applicant is seeking stay of execution pending the hearing and determination of the intended appeal. The application is anchored on the grounds that the appeal has high chances of success and that if the application is not granted, the appeal will be rendered nugatory.

11. The law guiding grant of stay orders is provided under Order 42 rule 6 (2) of the Civil Procedure Rules which provides that; before an order for stay of execution would issue, the applicant must prove that he/she is likely to suffer substantial loss if the order is not granted. That the application has been filed without undue delay and that security for due performance of the decree has been furnished. See **Carter and Sons Ltd versus Deposit Protection Fund Board and 2 others C.A No 29 of 1997.**

12. However, whether to grant an application for stay of execution or not is a matter of discretion. See **TMN VS PM (2018) e KLAR** and **Butt Versus Rent Restriction Tribunal Nairobi and App. No6 of 1979** where the court held that, the power whether to grant or refuse stay of execution is a discretionary one and the discretion should be exercised in such a way as not to prevent an appeal.

13. The impugned judgment was delivered on 30th September, 2021 and the instant application filed on 2nd November, 2021 translating to a period of 32 days after delivery of the judgment. I do not find this to be unreasonable delay hence the application was filed without inordinate delay.

14. As to failure to prove likelihood to suffer substantial loss, the applicant did not endeavour to address this ground hence the same has not been established.

15. However, besides the ordinary principles stipulated under Order 42 rule 6 (2) of the CPRS, stay of execution can apply if proved that the intended appeal is arguable, has high chances of success and that the same will be rendered nugatory. As to whether the appeal is arguable and has high chances of success, it is a matter to be determined by the appellate court and not the trial court.

16. As regards the possibility that the appeal is likely to be rendered nugatory, it depends on the merits and circumstances of each case. The contentious issues in this case are the appointment of public trustee as the administrator in this case; the holding that the applicant is not a dependant nor a beneficiary to the estate and that he was not entitled to the share.

17. What will happen to the outcome of the intended appeal if the appeal succeeds yet the subject property would have changed hands to a 3rd party? Whereas a successful party is entitled to enjoy the fruits of his judgment, the court is also duty bound to balance the interests of both parties so as not to render the appeal nugatory or useless. See **Reliance Bank Limited Vs Norlake Investments Limited (2002) E.A** where the court held that;

“what may render the success of an appeal nugatory must be considered within the guidelines of each case. The term “nugatory” has to be given its full meaning. It does not mean worthless, futile or invalid...”

19 I am alive to the fact parties are entitled to exhaust their right of appeal in the spirit of Article 50 of the Constitution. However, rights are enjoyed within certain limitations. In the instant case, the applicant is entitled to the right to exhaust his right of appeal. I also do not see any prejudice if the status quo is maintained by preserving the estate pending hearing and determination of the appeal

20 However, while preservation of the estate is crucial in preserving the purpose of the appeal, the estate must have an administrator to continue managing the affairs of the estate. The estate cannot be left without an administrator. Accordingly, the remedy appealing to this court is stay of execution by halting distribution of the estate which shall remain in abeyance pending the hearing and determination of the intended appeal. For avoidance of doubt, the appointment of the public trustee as an administrator shall remain for purposes of managing the affairs of the estate without transferring any property to any beneficiary until the intended appeal is heard and determined.

21 Regarding costs, the same shall be in the cause.

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

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J. N. ONYIEGO

JUDGE