



REPUBLIC OF KENYA



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In re Estate of Jecinter Njoki Okoth (Deceased) (Succession Cause 9 of 2018) [2022] KEHC 10347 (KLR) (27 April 2022) (Ruling)

Neutral citation: [2022] KEHC 10347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 9 OF 2018**

SM GITHINJI, J

APRIL 27, 2022

IN THE MATTER OF THE ESTATE OF JECINTER NJOKI OKOTH (DECEASED)

BETWEEN

SIMON HAROLD SHIELS PETITIONER

AND

MARY AKINYI OKOTH 1ST RESPONDENT

ANTHONY OTIENO OKOTH 2ND RESPONDENT

RULING

Background

1. For determination before this court is the Applicants' Notice of Motion dated 24th November 2021 seeking the following orders;
 1. Spent
 2. That leave be granted to the firm of M/S Kithi and Company Advocates to come on record for the Respondents/Applicants herein in place of the firm of Kiyondi Nyachae and Company Advocates.
 3. That pending the hearing and determination of this application inter-parties, there be a stay of the orders issued on 16th September, 2021 and all consequential proceedings arising therefrom.
 4. That this honourable court be pleased to set aside the proceedings and subsequent orders entered against the Applicants on 16th September 2021 and all other consequential orders thereto pending hearing and determination of this application.



5. That this honourable court be pleased to stay proceedings in the case since the petitioner stands accused in Traffic Case No. 67/2018 for causing the death of Jecinter Njoki Okoth, the deceased herein.
2. The application is supported by the affidavits sworn by both Applicants separately though depose the same facts, as follows;
3. That the Respondent (petitioner) filed an application dated 2nd September 2021 seeking to evict the Applicants from White house on Plot No. 1853 (Original No. 1935/583) and which application was scheduled for hearing on 16th September 2021.
4. It was stated that on the hearing date, their erstwhile advocates failed to appear on the virtual platform leaving the Applicants unrepresented and despite the 1st Applicant's presence in open court, orders were granted in favour of the petitioner.
5. It was further stated that failure of their former advocates to attend court on the said date was not their fault and that the mistakes of their former advocates should not be meted upon them.
6. It was deponed that upon learning what transpired in court, the 1st Applicant lodged a formal complaint to the Deputy Registrar.
7. It was also deponed that the orders issued on 16th September 2021 leave the Applicants destitute and it is in the interest of justice that the same be set aside as there will be no prejudice suffered by the Petitioner which cannot be compensated by way of Costs.
8. It was also stated that it is important that the firm of Kithi and Company advocates be allowed to come on record to enable the Applicants get sufficient representation.
9. The Applicants stated that by reason that the Petitioner is an accused person in Traffic Case No. 67 of 2018 where he is charged with causing death of the deceased, it is the more reason why the orders sought should be granted.
10. That they had lodged a formal complaint with the Deputy Registrar stating the above and it would be in the interest of justice the application be allowed.
11. The Petitioner/Respondent filed a Replying affidavit dated 20th December 2021 stating that in the judgment dated 15th July 2021 by this honourable court, the court awarded him the matrimonial properties comprised in the deceased's estate as he was the lawful husband of the deceased. That the judgment was neither appealed nor reviewed by the applicants herein.
12. Further, the court confirmed the grant on 16th August 2021 whereof the property known as White House Plot No. 4843, UK PLAZA on plot No. 16419 and Mitsubishi L200, KCH 389Y were all allocated to him. Still, the applicant never reviewed nor appealed the confirmation of grant.
13. That vide an application dated 22nd July 2021, the applicants applied for leave to appeal the ruling dated 15th July 2021 and a stay of orders. That the said application was never prosecuted, heard nor determined.
14. That pursuant to the confirmation of grant, he sought to take possession of the white house on Plot no. 4843. Upon visiting the said property, the 2nd applicant mobilized and incited a mob claiming that he had murdered the deceased and he was not entitled to the property.
15. He further avers that he was charged with causing death by dangerous driving contrary to section 46 of the Traffic Act and it is slanderous of the applicants to publicly state that he was charged with murder.



16. That due to the 2nd Applicant's refusal to grant him access to the matrimonial property he filed an application dated 2nd September 2021 seeking access of the same. The application was scheduled for inter-partes hearing on 16th September 2021. That the said application was unopposed. On the hearing date, the applicant's advocates were absent even before the power outage. It was on the basis of the application being unopposed and non-attendance that the same was allowed.
17. Further, the Petitioner/Respondent stated that on numerous occasions, this court has determined that the traffic case does not affect the determination of the suit herein therefore the Applicants' attempt to revisit the same is Res Judicata.
18. It was deponed that the Applicants have not disputed the Petitioner's allocation of the White house on Plot No. 4843 (Original No. 1935/5830 and their seeking stay is only meant to restrict him from enjoying the fruits of his judgment and to undertake his duties as the administrator to the Estate.

Submissions of the Parties

19. The applicants submit that they have met the threshold of setting aside an ex parte order guided by the authorities of *Esther Wamaitiba Njibia & 2 Others versus Safaricom Limited* [2014] eKLR Civil case No. 62 of 2011 and The Registered Trustees of the Archdiocese of Dar es Salaam Versus The Chairman Bunju Village Government & 11 others.
20. They further submit that it is in the best interest of justice that the court order be set aside as they were condemned unheard.
21. The applicants submitted that it is in the interest of justice that there be stay of proceedings in Succession Cause No. 9 of 2018 pending the completion of traffic Case No. 67 of 2018. To this, they relied on the case of P&A No. 13 of 2018; In the matter of the estate of Stephen Kipruto Kiprop (deceased) between Priscilla Jematia & Another and Betty Jemutai.
22. In regards to whether firm of Kithi & Co advocates are properly on record it was submitted that they are properly on record as per the Provisions of Order 9 Rule 9 of the *Civil Procedure Rules*
23. The respondent submitted that he is entitled to the suit property by virtue of uncontested certificate of grant. That the applicants have not contested the allocated assets to the respondent and by setting aside the orders issued on 16th September 2021 shall only be delaying execution of the Certificate of Confirmation. They rely on the case of *Re Estate of James Kagiri (Deceased)* (2021) eKLR.

Analysis and Determination

Issues for Determination

1. Whether the Applicants' advocates are properly on record?
2. Whether the Applicants' meet the threshold for grant of orders for stay of execution?
3. Whether the court should stay proceedings in this suit?

Whether the Applicants' advocates are properly on record?

24. I must point out that the Applicants herein sought similar prayers as in the instant application, vide the Notice of motion dated 20th September 2021 which was dismissed by this court vide the ruling dated 24th November 2021 on grounds that the Applicants' advocates were not properly on record. The Applicants' filed the instant application, this time seeking leave that their advocates be allowed to come on record as per Order 9 Rule 9. Leave to come on record was granted by this court on 6th



December 2021 guided by the consent between the firm of Kithi and Company advocates and the firm of M/s Kiyondi Nyachae. Therefore, the Applicants' advocates are properly on record.

Whether the Applicants meet the threshold for grant of orders for stay of execution?

This court enjoys the discretion to grant a stay for execution of a decree as derived from the findings in *Butt v Rent Restriction Tribunal* [1982] KLR.

“the power of the court to grant and refuse an application for stay of execution is discretionary, that is discretionary power.....”

Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

“No order for stay of execution shall be made under sub rule (1) unless-

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant

The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a. substantial loss will result to applicant if stay is not granted; and
 - b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
 - c. the application has been brought without unreasonable delay.
25. The Applicants allege that the orders issued by this court on 16th September 2021 would leave them destitute unless they are set aside.
26. I have looked at the orders issued on the said date and these orders were granted to enforce the judgment delivered by this court on 15th July 2021. To date, there has been no appeal nor review sought against the said judgment. I am in agreement with the Petitioner that the prayers sought by the Applicants are a mere delay tactic whose aim is to deny the Petitioner the liberty to enjoy the fruits of his judgment.
27. The Applicants have not demonstrated how they are likely to suffer substantial loss if stay of execution is not granted. Justice demands a decline in granting the prayer for stay of execution in this matter.

Whether the court should stay proceedings in this suit?

28. The Applicants seek that proceedings in this suit be stayed in light of the pending Traffic case against the Petitioner.

In the case of *Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokebii* Civil Appeal No. 326 of 2013 (2014) eKLR, the Court established the criteria for consideration for an order of stay of proceedings as follows:

“Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the Applicant. The Court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations”.



This court rendered itself before that the traffic case has no bearing on the current proceedings. Circumstances have not changed to inform a finding to the contrary. Therefore, the prayer to stay proceedings is equally declined.

In sum, the application fails and is dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 27TH DAY OF APRIL, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of: -

Mr Ireri for the Applicants

Firm of Khaminwa & Khaminwa are for the Respondents – absent.

Mr Ireri; I apply for leave to Appeal.

Court; -Leave to appeal is granted.

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S.M. GITHINJI

JUDGE

27/4/2022

