



**In re Estate of Magoti Mnyika (Deceased) (Succession Cause
233 of 2012) [2022] KEHC 10183 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 233 OF 2012
JO NYARANGI, J
JUNE 30, 2022
IN THE MATTER OF THE ESTATE OF MAGOTI MNYIKA (DECEASED)**

BETWEEN

MARIAM MWAGOTI APPLICANT

AND

PUBLIC TRUSTEE APPLICANT

RULING

1. These succession cause proceedings in respect of the estate herein have been before the corridors of this court for almost 28 years now without any sign of it coming to an end. It first commenced as P and A cause number 260 of 1995 wherein one Agnes Wakesho mother to Mariam Zale Mwangoti the current applicant herein petitioned for a grant of representation on July 27, 1996. A grant was subsequently issued to the said Agnes who claimed in the petition application to be the deceased's sister and the only surviving heir.
2. Upon discovery of the said succession proceedings, eleven other persons claiming to be brothers and sisters to the deceased who had predeceased his parents and had no wife nor children applied for revocation of the grant issued to Agnes. The eleven through their application dated May 21, 1997 sought to revoke the grant under section 76 of the *Succession Act*. Through one Boje Mwangesha their sibling, they swore an affidavit claiming that their sister Agnes had secretly petitioned for the grant without disclosing that there were other beneficiaries who were siblings to the deceased.
3. Upon hearing the application, Waki J as he then was rendered his ruling on July 29, 1997 thus revoking the grant on the ground that Agnes's failure to disclose the rest of the beneficiaries(siblings) amounted to non-disclosure of material information and facts. The court observed that there was serious rivalry between the siblings hence directed Agnes to hand over the administration of the estate to the public trustee who could then carry out any investigations and where necessary make any application that it could deem fit.



4. Subsequently, the public trustee proceeded to petition for a fresh grant under the current file on June 13, 2012. In total, 13 beneficiaries were listed. They gave their written consent in their capacity as either sister or brother among them Agnes Wakesho the mother to Miriam the applicant herein. A grant of letters of administration intestate was issued to the public trustee on April 23, 2014 and then confirmed on September 27, 2019 and issued on 4th October 2019.
5. Later, Miriam daughter to Agnes also filed a summons dated June 5, 2020 seeking revocation of the grant on grounds that it was obtained without disclosing that she and her brother Mwasunguchi were excluded from the list of beneficiaries; that plot numbers 26/34 and 26/41 chaani listed as part of the estate were given to the deceased by their mother who was his sister to hold in trust for them hence the only beneficiaries entitled to the two plots exclusively.
6. After canvassing the application, Thande J dismissed the revocation application vide her ruling dated January 21, 2021 and delivered February 23, 2021 on grounds that, the court had no jurisdiction to determine land ownership dispute on account of trust. That in any event, the plots in question were registered in the deceased's name hence no good reason to doubt that the deceased was the owner.
7. Aggrieved by the said ruling, Mariam moved the court again vide a notice of motion application dated July 7, 2021 seeking the following orders:
 - a. Spent
 - b. There be a stay of execution of the ruling delivered on 21st day of January 2021 and the resultant decree pending the inter-parties hearing and determination of this application.
 - c. There be a stay of execution of the judgement delivered on 21st day of January 2021 and the resultant decree pending the inter-parties hearing and determination of the intended appeal to the Court of Appeal, or for such other period as the honourable court may deem just.
 - d. The applicant be granted an extension of time to file a Notice of appeal and the notice of appeal dated July 7, 2021 be deemed as duly filed within the extended time.
 - e. Status quo be maintained on plots 26/34 and 26/41 Chaani pending the hearing and determination of this matter.
 - f. The costs of this application be provided
8. The application is premised on the grounds stated thereof and the supporting affidavit of Mariam Zale Mwangoti filed on July 8, 2021. The applicant's case is that as a result of the "judgement" delivered on January 21, 2021, there had been several people seeking to evict her and her family who include her elderly mother from their property number 26/34 and 26/41 Chaani property in which they live as a family and rent a few rooms for income to take care of their elderly and frail mother. That if evicted they will be rendered destitute hence suffer irreparable loss.
9. She further stated that due to extreme poverty and covid -19, she could not get casual jobs to enable her raise funds to appeal in time after her lawyer who was representing her on probono basis withdrew from representing her. She claimed that it was only recently that she managed to get assistance from her Ward representative who assisted in filing the instant application.
10. In response, the respondent filed a replying affidavit sworn on 13th October, 2021 by Jafred Erima Maliro Assistant Public Trustee, Mombasa who stated that; the application lacked merit, was misplaced, made in bad faith and a calculated move by the applicant, her mother and siblings to continue defrauding the estate of the deceased herein.



11. He stated that the applicant's affidavit was misleading as there was no judgement delivered on 21 January, 2021, hence no decree capable of being executed to warrant a stay of execution. It was deposed that the applicant had not come to court with clean hands as she did not disclose that she, her mother and her siblings had been intermeddling with the estate of the deceased and in fact purported to illegally sell the subject properties, Plot No.26/34 and 26/41 Chaani Site & Service and other properties forming part of the estate of the deceased to third parties.
12. The respondent averred that no sufficient reason had been given to warrant the court to grant the applicant leave to file a notice of appeal out of time. That despite being aware of the delivery of the ruling, the applicant took no initiative to file the contemplated notice of appeal as required by law nor lodge her appeal within the required time.
13. He further averred that the order for stay had been overtaken by events as the subject properties had been sold vide the order of the court on distribution through the certificate of confirmation of grant issued 4th October 2019 which fact was well within the knowledge of the applicant and her family. Further, that there was no basis for status quo to be maintained as the order of distribution of the estate was never challenged and or appealed against by the appellant and or any other interested party.
14. The respondent further averred that; the applicant was a stranger to the estate of the deceased hence lacks locus standi; the delay in filing the application was inordinate; the applicant was a person of means as she was able to file summons for revocation together with several affidavits thus the cost of filing a notice of appeal and the subsequent appeal wouldn't have been a challenge.
15. It was stated that if the orders sought are granted, they will prejudice and disrupt the distribution of the estate of the deceased considering that this matter is old and most of the delays are attributable to the applicant and her family.

Parties' submissions

16. Parties agreed to canvass the application by way of written submissions. Consequently, the applicant through her advocate Mr.Adika filed her submissions dated 28th February,2022 thus submitting on four issues namely;
 - a. Whether the appeal will likely succeed.
 - b. Whether the delay is unreasonable.
 - c. Will there be a resultant substantial loss if the court denies an opportunity for appeal.
 - d. The evidential threshold.
17. On the first issue, counsel submitted that the matter would succeed as the provisions of the law of succession were not complied with. Counsel relied on Section 39 of the *Law of Succession Act* which outlines the order of consanguinity and submitted that half-sisters and half –brothers can only inherit in the absence of parents, brothers, and sisters. That at the time of the confirmation of grant material facts were concealed from the court and a false impression formed to court to confirm the grant in contravention of section 76 (b) and (c) of the *Law of Succession Act*.
18. Counsel further submitted that for an application of stay to succeed an appellant had to demonstrate that the intended appeal was arguable and would be rendered nugatory if stay was not granted.



19. On the second issue counsel reiterated the applicant's position in her affidavit and urged the court to consider the applicant's plight as highlighted in the case of *Michael Mukhwana Wanyonyi v Republic Misc. Criminal Application E001 of 2020*.
20. In relation to the third issue, counsel reiterated the applicant's position in her supporting affidavit thus submitting that the likely eviction is capable of causing injustices that may not be healed if let to proceed without the intervention of the court. That the applicant and her family would not afford an alternative place of stay due to poverty and thus would be rendered homeless.
21. Touching on the 4th issue, counsel submitted that there is sufficient ground and evidence to persuade the court to exercise its jurisdiction in favour of the applicant. In that regard, reliance was placed on the holding in the case of *Butt vs Rent Restriction Tribunal (1982) KLR*. Unfortunately, counsel did not attach any of the quoted authorities for ease of reference.
22. The respondent through its representative Mr.Maliro filed written submissions dated November 23, 2021. On stay of execution, the respondent submitted that the applicant had not demonstrated the loss she stood to suffer if the order for stay of execution was not granted. Further, that the applicant has not demonstrated that the appeal is arguable hence likely to be rendered nugatory should execution proceed and the appeal succeeds. To support that position counsel relied on the holding in the case of *Chris Munga N.Bichage v Richard Nyagaka Tongi & 2 others (2013) eKLR*.
23. The respondent further submitted that there was nothing to stay as the application determined by the ruling of January 21, 2021 was for revocation with no orders for stay and the same was dismissed for lack of merit. That this court became functus officio when it rendered itself in its ruling of January 21, 2021hence ceased having jurisdiction to determine this application.
24. On extension of time to file notice of appeal and the intended appeal out of time, counsel submitted that the right of appeal must be balanced against that of the rightful heirs to enjoy the beneficial interest in the estate of the deceased. The respondent relied on the case of *Mohammed Salim T/A Choice Butchery v Nasserpuria Jamat* eKLR where the court upheld the decision of *M/S Portreiz Maternity v James Karanga Kabia* Civil Appeal No.63 of 1997.He reiterated the position in his affidavit and submitted that the applicant's application and intended appeal lacked merit and were both misleading, brought in bad faith and ought to be dismissed with costs.
25. Concerning maintenance of status quo, Mr.Maliro submitted that there was no basis for maintaining the same as there was an existing order distributing the estate of the deceased vide the certificate of confirmation of grant dated 4/10/2019 and the same had not been challenged and or appealed against.

Determination

26. I have considered the application herein, response thereof and rival submissions by both parties. Issues that emerge for determination are;
 - a. Whether a stay of execution should be granted
 - b. Whether an extension of time to file a notice of appeal should be granted and the notice of appeal dated July 7, 2021deemed as duly filed.
27. On whether stay of execution should be granted, order 42 rule 6 of the *civil procedure rules* provides as follows;
 - 6.



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (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.
- (3) ...
- (4) ...
- (5) ...
- (6) ...

28. Order 42 rule 6(2) clearly outlines three issues that an applicant seeking stay must establish; firstly, the possibility that he will suffer substantial loss if the order for stay is denied; secondly, whether the application has been filed within reasonable time and thirdly; whether security for due performance has been furnished. However, in exercise of this wide discretionary powers, the court ought to balance the rights of both parties without forgetting the fact that the respondent too has the right to enjoy the fruits of his judgment. See *Butt vs Rent restriction Tribunal*(1979)e KLR where the court stated that in exercise of its discretionary powers the court should consider preserving the purpose of an appeal

29. In the case of *Congress Rental South Africa vs Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee)* [2019] eKLR the court expressed itself on the element of proof of substantial loss and the need to balance parties’ interests before issuing stay orders as follows;

“I have very carefully considered that the onus of proving substantial loss lies with the applicant, and while appreciating the applicant’s undisputed right to appeal, I have to balance the applicant’s right to appeal with the corresponding right of the respondent to enjoy its fruits of its judgement; as well as the need to demonstrate that the Respondent couldn’t repay the decretal sum if the appeal is successful. The burden of proof does not shift as he who alleges must prove.”



30. Further, the court in the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnisbee)* (*supra*) while dealing with the issue of substantial loss had this to say;

“In dealing with issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of applicant as a successful party in the appeal.”

31. According to the applicant, she and her mother are likely to suffer irreparable damage by being evicted. From the record, the applicant is a niece claiming share of her uncle’s estate. The applicant’s mother is a live and has been part of litigation in this case before. The mother has already been provided for by getting her share in the estate. Agnes the applicant’s mother was given a share of 2. 247 acres in L.R number Mbale/ Mbale/1137 and 1/9 of proceeds of sale and rent out of plot numbers 26/34, 26/41, 15/11 Chaani and plot number 13/36 and 13/69.
32. Besides, the mother has 1/54 in plot number Mbale/Mbale /1122(Ngona). The applicant’s mother has not complained by either appealing or seeking review. It is trite that any claim over a share of the estate herein by the applicant a niece to the deceased can only be claimed through her mother who is a sister to the deceased in the order of consanguinity.
33. The issue regarding who the beneficiaries to the estate were was resolved in P &A cause number 260/1995 by Waki J when he revoked the grant given to Agnes. To raise the issue of wrong beneficiaries inheriting the estate again will amount to reopening the issue already litigated upon hence the doctrine of Resjudicata applies. That issue was resolved with finality under the said file. In the circumstances, the applicant has no locus to claim the estate when the mother who is entitled in priority is alive. In any event, the issue of being rendered destitute does not arise as her mother has other plots and a share of the sale proceeds out of the two plots subject of this application which distribution Agnes has not challenged
34. In view of the above finding, I do not find any substantial loss which the applicant is likely to suffer as she can only claim her share through the mother which share is already determined.
35. On the aspect of whether the appeal has high chances of success, the court is under duty to discern from the available evidence whether there is a prima facie case with a possibility of succeeding. In other words, the appeal must raise some substantive issues which are not frivolous and unmeritorious in nature. See *Global Tours & Travel Limited vs Five Continents Travel Limited*(2015)eKLR where the court held;

“...In considering whether to order a stay, the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously”

36. As already stated above, the applicant has no locus to seek a share in the estate of her uncle when her mother who is the direct heir and beneficiary is alive and has not challenged the confirmed grant. Prima facie, the applicant’s appeal is purely frivolous and not arguable. It is intended to delay completion of the administration of the estate which has been pending for the last 28 years. There is nothing to be rendered nugatory as the ruling does not affect her directly. In an event litigation must come to an end in one way or the other.



37. On whether the application was filed without unreasonable delay, it's clear that this application was filed on July 8, 2021 about 6 months after the delivery of the ruling of the court dated January 21, 2021 which the applicant refers to as the judgment and intends to appeal against.
38. According to the applicant, the reason for the delay in filing the application was extreme poverty. She claimed that she was unable to raise funds to file the intended appeal on time as her business which involved washing people's clothes suffered immensely due to Covid -19 Pandemic.
39. There is no dispute that the impugned ruling was delivered in the presence of the applicant. It is also not in dispute that she had an advocate on record. The only excuse given in delaying to file a notice of appeal was finances. Filing a notice of appeal is just but a one page affair which does not require any substantial resources. Further, there is no evidence that the appellant is a pauper who could seek exemption from paying court fees. She and her mother have all along been represented by counsel since 1995 implying that they are not paupers.
40. If a general excuse of poverty were to be entertained casually, then litigation might come to a halt as litigants will always wait until such a time they will feel sufficiently liquid to file necessary pleadings. I do not find the excuse of poverty sustainable in the circumstances of this case where the applicant admitted that she and the mother have been collecting rent from the disputed two plots.
41. Although order 42 rule 6 of the [CPRS](#) does not define the word inordinate delay, the court should be able to assess reasons and the circumstances under which an alleged delay is occasioned. Even a month can be unreasonable depending on the nature of the case and reasons given for the delay. See [Jaber Mohsen Ali & another vs Priscillah Boit & another](#) (2014)e KLR where the court held that delay can even be a day depending on the circumstances and nature of the case. In the instant case the delay was inordinate given the unjustified excuse given.
42. Regarding security, the court in the case of [Okumu Constance & another v Annah Moraa](#) [2020] eKLR while dealing with the issue of security stated thus;
- “I will not re-invent the wheel. Both counsels aptly argued that the purpose of security in a stay of execution order is to guarantee the due performance of the decree that may ultimately be binding upon the applicant. See the case of Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others [2015] eKLR, that:
- “.....the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The Rule does not, therefore envisage just any security. The words “ultimately be binding” are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost that is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2) of the [Civil Procedure Rules](#) includes costs and interest on the judgment sum unless the latter two were not granted – which is seldom. The security to be given is measured on that yardstick.”
43. In this case, none of the parties has raised the issue of security and thus I will not delve on the same. This dispute being a family matter it will not be prudent for this court to order for security.
44. On extension of time to file a notice of appeal, section 7 of the [Appellate Jurisdiction Act](#) provides;
- “The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a



certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

45. I have already held that there was no good excuse advanced to justify the delay in filing the application for stay. Equally, I do not find any reason why an appeal nor notice to appeal was not filed in good time. It is trite that courts should not aid the indolent. In the circumstances of this case, I do not find any good reason given for the delay other than to delay the process of completing the administration of the estate. For that reason, leave is denied.
46. As to maintenance of statusquo, the same will be prejudicial to the estate and the rightful beneficiaries who have legitimate expectation for expeditious delivery of justice. Accordingly, the same is declined to the extent that administration of the estate to completion should proceed uninterrupted.
47. In a nutshell, it is my finding that the application has no merit hence dismissed. This being a family matter, each shall his or her costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE 2022

J, N.ONYIEGO

JUDGE

