



**In re Estate of the Rose Akuku Aoko (Deceased) (Succession Cause
126 of 2014) [2022] KEHC 10082 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 126 OF 2014**

RPV WENDOH, J

JULY 26, 2022

IN THE MATTER OF THE ESTATE OF THE LATE ROSE AKUKU AOKO (DECEASED)

BETWEEN

PHINIAS OKELLO APPLICANT

AND

RUTH OTIENO RESPONDENT

RULING

- 1 Ruth Otieno (the ‘Applicant’) filed a Notice of Motion dated 1/2/2022. The application is based on the grounds on the face of it and it is supported by the affidavit of the applicant sworn on even date and a further affidavit dated 17/3/2022. The applicant seeks the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. The firm of M/s SAM Onyango & Company Advocates be granted leave to come on record for the Petitioner/ Applicant in place for the firm of M/S J. Soire & Company Advocates, who previously was on record for the Petitioner/Applicant.
 - iv. That the court be pleased to extend time to the Applicant within which to lodge and serve a Notice of Appeal against the judgement and decree of this Court dated and delivered on 7/7/2021 and to generally extend time for the Applicant to appeal to the Court of Appeal.
 - v. On such leave being granted, and subject to the filing of the Notice of Appeal as intended, the court be pleased to order a stay of execution of the judgement and decree of this Court dated and delivered on 7/7/2021, pending the hearing and determination of the intended appeal, on such terms as the Court would adjudge as reasonable and proportionate.



- vi. Costs of this application be provided for.
2. The applicant deponed that she was not aware when the judgement in this matter was delivered as her advocate had not informed her of the same; that she has now appointed the firm of Sam Onyango & Company Advocates in place of J.O. Soire & Company Advocates; that she was taken ill and was bedridden in the period between June and November thus could not conduct due diligence on the status of the judgement; that she only came to learn of the judgment in December; that since her advocate was unreachable, she decided to instruct another Advocate and by the time he obtained the file from her previous Advocate, time had lapsed.
 3. It was also deponed that she has now perused the judgement and she is dissatisfied with the entire decision; that she has been advised by her Advocates since the time has lapsed, this court has powers to enlarge time; that without the stay of execution the respondent will be liberty to execute the decree and she will suffer great prejudice; that she is willing to abide by this court's conditions as regard to security pending appeal. The applicant annexed "RO-1" a notice of appeal.
 4. The respondent is represented by the firm of Odondi Awino & Company Advocates. In opposing the application, he filed grounds of opposition and list of documents all dated 14/2/2022. The grounds are as follows: -
 - a) That the Notice of Motion herein is an afterthought and does not meet the requirements under Order 42 Rule 6 (2)(a) of the Civil Procedure Rules.
 - b) The grant herein of the estate of Rose Akuku Aoko was confirmed on 7/7/2021. 7 months down the line, hence, there has been inordinate delay.
 - c) The grant issued by this Court on 22/9/2021 was long executed and LR No. Suna East/Wasweta I/4358 which was hitherto in the name of the deceased is not in the name of Phinias Okello Mirembe.
 - d) This application is merely brought before this Court because of an ongoing execution proceedings in Migori CM ELC No. 126 of 2019 between one Omar Feisal M. Jamaa v Phinias Okello Mirembe & 2 others.
 5. In her further affidavit of 17/3/2022, the applicant deposed that Land Parcel Number SUNA/WASWETA I/4358 (suit property) is now registered in the name of the respondent herein; that she was taken ill and hospitalized in the period between August and October and remained on bedrest for a period of three months before using her full limbs; in that the respondent's grounds of opposition dated 14/2/2022 is not opposed to the facts she presented; that this suit and application has nothing to do with the proceedings in Migori ELC No. 126 of 2019 between Omar Feisal M. Jamaa vs Phinias Okello Mirembe & 2 Others as the proceedings are different and each case is heard on its own merit as per the law.
 6. Both parties complied with the directions of filing written submissions. The applicant filed submissions dated 23/3/2022. Counsel proposed three issues for determination. The first issue, whether the applicant has qualified for order of stay of execution sought. It was submitted that Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal, that the grant an order of stay is discretionary; that an order is granted so that the appeal is not rendered nugatory or if substantial loss will be suffered by the applicant; Counsel relied on the decisions of Butt v Rent Resolution Tribunal [1979] EA and James Wangalwa & Another v Agnes Naheko Cheseto [2012] eKLR. It was submitted that the title which is already in the name of the respondent is sufficient security in the circumstances.



7. On whether the applicant has qualified for orders to appeal out of time, it was submitted that the provisions of Rule 4 of the Court of Appeal Rules is discretionary and does not require establishment of sufficient reasons unless the applicant is guilty of unexplained and inordinate delay. Other considerations are whether the appeal will be rendered nugatory or for any other reasons; it was also submitted that failure by applicant's Counsel to notify her of the judgement date was grave but was fatal when Counsel also failed to attend court. The applicant stated that her sickness made it impossible to follow up on the issues as she was incapacitated.
8. The respondent filed submissions on 28/3/2022. It was submitted that the stay order being sought is against the Certificate of Confirmation of Grant dated 22/9/2021; that the applicant has already spent the money in Barclays Bank A/C No. 0xxxxxxx and she has also sold land parcel no. Suna East/Wasweta II/2174 and unlawfully sold land parcel no. Suna East/Wasweta I/4358 (the suit land) to Omar Feisal Mohammed Jamaa who is the person behind this litigation as is evidenced in the proceedings before the Chief Magistrate Court ELC Case No. 126 of 2019 and therefore there is nothing to be stayed. On the issue of the firm of Sam Onyango coming on record, it was submitted that there is nothing on record to show that Mr. Soire has been notified or he has consented to the same as required by Order 9 Rule 9 (a) and (b) of the Civil Procedure Rules.
9. On the issue of extension of time to lodge and serve a Notice of Appeal against the judgement and decree herein, it was submitted that, Order 42 Rule 6 (2) (a) requires that such an application be made without unreasonable delay. The respondent submitted that this is a 2014 matter, and litigation must come to an end; that the applicant has lost interest in the suit after she sold it to the said Omar Feisal M. Jamaa and the judgement in this Succession Cause gave the suit land to the respondent; that there is clearly no ground that this case is fit for an appeal; that it is not clear if the applicant is appealing against properties she has sold or against an account which she has accessed, exhausted and withdrawn all funds; that the applicant cannot claim to be unwell when she had an Advocate who represented her in court.
10. I have carefully considered the application, the supporting and further affidavits, grounds of opposition, submissions and the authorities relied on. The issues for determination are: -
 - i. Whether the firm of Sam Onyango & Co. Advocates can come on record in the place of Soire & Co. Advocates.
 - ii. Whether the Application has merit.
11. It is not disputed that all through the proceedings, the firm of Soire & Co. Advocates were on record for the applicant. The firm of Sam Onyango & Co. Advocates now seeks leave to come on record. The guiding provisions for Counsel who wishes to come on record for a party after judgement is Order 9 Rule 9 of the Civil Procedure Rules which provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

 - a) upon an application with notice to all the parties; or
 - b) upon a consent filed between the outgoing advocate and the proposed incoming”



12. The Rules of Procedure make it mandatory that for any change of Advocates after judgement to be effected, there must be an order of the court upon application with notice to all parties or upon signing of a consent between the outgoing and the proposed incoming Advocate.
13. There is no consent filed between the incoming and the outgoing firm of Advocates. The fall back therefore is on the first condition needed for compliance. The outgoing firm of Advocates must be notified of the application filed. I have carefully read the Affidavit of Service by one David Odoyo Onyango dated 14/2/2022. At paragraph 4 he deponed: -
 - " That on the 4th February 2022, at about 11.00 a.m. I served the Law firm of Odondi Awino & Co. Advocates and subsequently proceeded to Kisii to the Law Firm of J.O. Soire & Co. Advocates where by upon arrival I served the said document together with the Order dated 4th February 2022 to the said office.

That the said Application and order was received by the Secretary(s) in the said offices, who affixed their official Rubberstamps, signature and dated on the service copy of which is hereby returned duly served."
14. I have carefully scrutinized the said copy, allegedly received by Soire Advocate which the process server deposed that it was received by the Secretaries. The only rubberstamp on the face of the application is for the firm of Odondi Awino & Co. Advocates. There is no evidence of a rubberstamp from the firm of Soire & Co. Advocates, the outgoing firm of Advocates. I see some written as if somebody received on behalf of Soire, but there is no stamp referred to by the deponent. I cannot confirm who made that writing.
15. Order 9 Rule 9 of the Civil Procedure Rules does not impede a party from appointing their desirous firm of Advocates, but there is a specific procedure to be complied with and the reason was stated in the case of S. K. Tarwadi v Veronica Muehlmann [2019] eKLR as follows:-
 - " ...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."
16. There being no consent filed by the firm of Soire & Co. Advocates and the proposed incoming firm of Sam Onyango & Co. Advocates and, that this application having not been served upon the firm of Soire & Co. Advocates Sam Onyango Advocates is a stranger in these proceedings.
17. In the case of Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi [2012] eKLR the Court held as follows: -
 - " A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."
18. Having found that the firm of Sam Onyango & Co Advocate is a stranger to these proceedings, I find that this application is incompetent and there will be no need to consider the others issues.
19. From the foregone reasons, the application fails and it is hereby struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 26TH DAY OF JULY, 2022.



R. WENDOH

JUDGE

Judgment delivered in the presence of:

Mr. Singei holding brief Mrs. S. Onyango for the Applicant.

Ms Agade holding brief Mr. Awino for the Respondent.

Nyauke Court Assistant.

