



In Re Estate Of The Late Stephen Angasa Mandere (Dceased) (Succession Cause 229 of 2017) [2022] KEHC 12800 (KLR) (18 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 229 OF 2017
TM MATHEKA, J
AUGUST 18, 2022**

**IN THE MATTER OF THE ESTATE OF THE LATE
STEPHEN ANGASA MANDERE (DECEASED)**

BETWEEN

MARY NYANGUCHA ANGASA APPLICANT

AND

NATHANIEL SAMSON MANDERE PROTESTOR

AND

GRACE NYAMBOKE MANDERE 1ST RESPONDENT

DOROTHY NYAMBEKI ANGASA 2ND RESPONDENT

RULING

1. Stephen Angasa Mandere died on July 2, 2016.
2. He was survived by his ex-wife Mary Nyagucha Mandere and her four (4) children, three (3) others having predeceased him, and, his 2nd wife, Grace Nyaboke Mandere and her three (3) children. The children of Grace were listed in the letter by the chief Kirobon Sub Location dated December 20, 2016 as adopted children of the deceased.
3. On October 21, 2018 grant letters of administration intestate was made to Grace Nyaboke Mandere and Mary's first born daughter Dorothy Nyambeki Angasa.
4. In a judgment delivered on May 6, 2021, this court Ngetich LJ having found that both Mary and Grace were wives of the deceased, and that the children of Grace were children of the deceased, distributed the estate between the two (2) houses on a ratio of 6:4, 1st house – six (6) units, 2nd house – four (4) units.



5. The bone of contention in the matter before Ngetich LJ was the ex wife's assertions through her daughter that the properties that made up the estate were acquired during the marriage of her father and her mother and that the 2nd wife had come in long after this. That the 2nd house was only entitled to what was acquired during the marriage of Grace and the deceased. The other contention was that there was no evidence that the children of Grace were actually adopted children of the deceased and further that the alleged adopted children had not been established by producing any evidence that they were dependants of the deceased during his lifetime.
6. in her judgment court overruled these contentions. Consequently the deceased's ex-wife Mary Nyagucha Angasa filed a notice of motion through the firm of Nyagaka SM & Co Advocates dated July 23, 2021 and amended on November 4, 2021 seeking the following orders;
 - i. That the court be pleased to grant leave to enable counsel for the respondent/applicant to file an appeal.
 - ii. That there be stay of execution of the decree of this court issued on May 19, 2021 pending the hearing and determination of the appeal in the Court of Appeal.
7. The application is brought under "article 159 (2) (d) of the Constitution of Kenya (2010), section 3A, 3A & 7 of the Appellate Jurisdiction Act, order 42 rule 7 and order 51 rule 1 of the Civil Procedure Rules, cap 21 Laws of Kenya".
8. The grounds for the application are Grace, the 1st petitioner and (2nd wife) of the deceased had extracted the decree and taken it to the surveyors for execution despite having been served with the filed notice of appeal which would be rendered nugatory causing her to suffer substantial loss; that the application was in the interest of justice.
9. On December 15, 2021, counsel for the 1st petitioner filed notice of preliminary objection. He averred that the amended application was defective as it did not have a supporting affidavit, that applicant ought to have sought leave before seeking stay of execution, that the application was the same as the one dated July 23, 2021, that the application for leave was out of time, that no appeal had been filed by then and the sixty (60) days allowed had lapsed.
10. The applicant filed a replying affidavit on January 25, 2022 annexing the notice of appeal dated June 4, 2021, and confirmed that she filed an application dated July 23, 2021 seeking orders of stay of execution against a decree issued on May 19, 2021 pending the hearing and determination of the intended appeal in the Court of Appeal and that the amended notice of motion was properly on record as the supporting affidavit dated July 23, 2021 was in support of the said application since it was an amendment of the reliefs sought in the notice of motion; That the purpose of the application dated November 4, 2021 was for leave for a stay of execution against the decree issued on May 19, 2021 pending the hearing and determination of the intended appeal; That an appeal has already been lodged at the Court of Appeal with high chances of success.
11. The applicant went on to make reference to the judgment, and the subsequent orders of *status quo*, reiterating the points she made before the court at the hearing of the summons for confirmation of grant and protests.
12. True enough the applicant had filed notice of motion dated July 23, 2021 supported by her affidavit sworn on the same date. In that notice of motion, she only sought a stay of execution against the decree pending the hearing and determination of the intended appeal in the Court of Appeal.



13. The supporting affidavit states that she had lodged an appeal;

“before the High Court, and annexed notice of appeal. She also deponed that the appeal before the High Court has high chances of success.”

And if not granted the orders sought, the appeal would be rendered nugatory.
14. The 1st petitioner filed two (2) replying affidavits, to the original application and to the amended application. She opposed the application, for being defective stating that; That the grant was confirmed; That the matter has been in court since 2017; That the applicant had all along been meddling with the estate of the deceased and had wasted it; That the applicant was holding the entire estate for her own benefit to the exclusion of the other beneficiaries; that applicant was in contempt of orders of the court with respect to the *status quo* of the estate, and that this court ought to summon her to give account of all the proceeds of the estate that she was holding. Further, should the court be inclined to grant the application, the court should allow the beneficiaries to take up the properties as per the certificate of confirmation of grant with the caveat not to transfer their shares to 3rd parties.
15. Parties filed written submissions through their respective counsel.
16. The applicant filed submissions dated January 21, 2022 “In respect of the petitioner/respondent preliminary objection dated December 15, 2021”. Counsel relied on [*Jackline Njambi Kinyanjui vs Margaret Wairimu*](#) Civil Suit Number 464 of 2012 to argue that the amended notice of motion was not defective for lack of a supporting affidavit because the amendment did not nullify the original document, and a further affidavit would only be necessary where the amendment altered part of the pleadings requiring further sworn facts from the applicant. He argued that the amendment did not alter the pleadings to require further sworn facts.
17. Counsel also argued on the issue as to whether there was a statutory/procedural requirement for one to apply for leave before applying for stay of execution. He cited order 42 rule 6 of the [*Civil Procedure Rules*](#) and Miscellaneous Application Number 53 of 2016 [*Mursal Guleid Maslah Bus Limited vs Daniel Kioko Musau*](#). It was his position that no such requirement was to be found under order 42 rule 6 of the [*Civil Procedure Rules*](#) 2010.
18. As to whether the application had been filed without delay he relied *inter alia* on [*First American Bank of Kenya vs Gulab P Shah & 2 Others*](#) Nairobi/Milimani) High Court Civil Case Number 2285 of 2000 (2002) I EA 65 on the factors to be considered. He urged the court to find that the application was filed in time. He also argued that the appellant had already filed a notice of appeal, but had not filed the appeal because he was still waiting for proceedings.
19. On whether the preliminary objection raised pure points of law counsel relied on [*Mukhisa Biscuit Manufacturing Company Limited vs West End Distributors Limited*](#) (1969) EA 696 among other similar authorities. He concluded that the preliminary objection was unmerited and urged the court to dismiss the same.
20. Counsel for the 1st petitioner filed submissions on February 9, 2022. He reiterated the contents of her replying affidavit and urged the court to find that the application and the intended appeal were not merited at all and the same would do injustice to the beneficiaries.
21. The protestor who is the son of the applicant filed submissions on May 25, 2022. He stated that the applicant is his biological mother who was divorced from his father. While taking the position that the judgment of the court went against his father’s wishes, he still urged the court to disallow his mother’s application on similar grounds as those of the 1st petitioner. He made a further prayer urging this court



to review the orders of the judgment and align the distribution of the estate with the wishes of his father.

22. Bearing all these in mind the issue for determination is whether the application is merited. To determine this issue we have to deal with the preliminary objection, whose main thrust is that the application is not supported by an affidavit. On this one I found that the holding in Jackline Kinyanjui to be a sufficient answer.

“On the other hand, even if the applicant could have failed to expressly link the said affidavit with the amended notice of motion, the view of the court would still be that the amendment alone, did not nullify or displace the affidavit. This is because an amendment does not nullify the amended original document. It alters parts of the original pleadings so as to bring it in line to the relevant issues in dispute. If such amendment alters part of the pleadings and require support of additional sworn facts, a further affidavit in support might be called for or be necessary. In this case the additional sworn facts, a further affidavit in support might be called for or be necessary. In this case the additional reliefs sought did not probably seek such additional or fresh affidavit.”

Looking at the amendment to the notice of motion, and perusing the supporting affidavit of the original application, it is evident that there was no material change in the pleadings to warrant a further affidavit. I am therefore in agreement with the applicant that the application has not been rendered a nullity by the fact that the amendment was not supported by a further affidavit.

23. The next issue is whether the application for stay pending appeal is merited? The right to appeal from a judgment or orders of the court is a constitutional right. The applicant being aggrieved by the judgment delivered on May 6, 2021 has a right of appeal. The notice of appeal was filed on June 4, 2021. The application for stay was filed on July 23, 2021 and amended on November 4, 2021. The applicant clearly began the pursuit of her appeal in good time. There was no delay in seeking the stay of execution pending appeal, and the respondents will not suffer prejudice. I say so because the trial judge did grant an order of *status quo* after the delivery of the judgment. The judge heard the whole matter, heard the petitioner and the protestors, delivered her judgment, issued a certificate of confirmation of grant, but still granted an order of *status quo*, pending the filing of the notice of motion, and the subsequent amendment. My view is that that is indicative of the fact that from the evidence before her, the parties would not be prejudiced by the maintaining of the *status quo* that prevailed before the judgment.
24. Additionally and picking up from there, I do not find any serious objections to the application. The protestor, though against his mother’s application to appeal, is equally dissatisfied with the judgment and would like to see it reviewed. He did not file an application for review, and nothing stopped him from doing so. He cannot piggy ride on this application to seek a review because the same has its own conditions. Nevertheless, he will have an avenue to present his issue before the court of appeal if the application by his mother is allowed. This is because he raises an issue that faults the trial judge’s findings.
25. With respect to the 1st petitioner’s, she brings a complaint of alleged contempt of previous court orders by the applicant, accusations of continuing intermeddling with the estate by the applicant. However once again, the solution to her complaints is not in this application, but in her filling her own applications to prove her allegations.
26. With respect to the period when the property in the estate was acquired, it is not in dispute that the applicant is a former spouse of the deceased. It is also not in dispute that the 1st petitioner was married



after the deceased and the applicant parted ways. However the record is not clear as to when significant events took place as it is possible that the applicant and her house could have a legitimate claim in that regard. Without going into the merits of the appeal, the appellant and her daughter the 2nd petitioner may have a cause to place before the Court of Appeal. Hence, it would not be in the interests of justice to allow the application for stay of the actual distribution of the estate pending the hearing and determination of the appeal.

27. Before I conclude it is imperative to point out the errors in the application where the notice of motion. The application seeks leave to file the appeal in the “High Court”. Obviously that cannot be. It would be only in the Court of Appeal.
28. In conclusion, I find that the preliminary objection is untenable, the notice of motion amended on 4th November 2022 is merited.
29. The same is allowed in the following terms.
 - i. The applicant is granted leave to file the appeal.
 - ii. Pending the hearing and determination of the appeal in the Court of Appeal there be stay of execution of the decree of this court issued on May 19, 2021.
 - iii. The applicant to file and serve the appeal within sixty (60) days hereof.
30. Each party to bear their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF AUGUST, 2022.

MUMBUA T. MATHEKA,

JUDGE.

Court Assistant Edna

Nyagaka S. M. & Co. Advocates for Respondent/Applicant

Ogeto & Ogeto Advocates for 1st petitioner/respondent

Nathaniel Samson Mandere protestor

