



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Karungo Mwaria alias Karungo c/o Kahora (Deceased) (Succession Cause 1034 of 2010) [2022] KEHC 12467 (KLR) (17 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 1034 OF 2010
FN MUCHEMI, J
AUGUST 17, 2022**

**IN THE MATTER OF THE ESTATE OF KARUNGO MWARIA ALIAS
KARUNGO C/O KAHORA....DECEASED**

BETWEEN

NAHASHON KARUNGO MWANGI PROTESTOR

AND

BETH NYAMBURA KAHORA ADMINISTRATOR

RULING

1. This ruling is for the application dated 5th April 2022 seeking for orders for stay of judgement delivered by Ngaah , J on August 15, 2017 dismissing the protest of Mwangi Karungo Karungo now deceased and was later substituted by his son Nahashon Karungo Mwangi following his demise on 31st March 2022.
2. The grounds in support of the application are that the applicant's father was aggrieved by the said judgement and intends to appeal. His appeal may be rendered nugatory if this court does not grant orders for stay. The notice of appeal was filed within the prescribed 14 days and that the applicant has already filed an application for extension of time to lodge his appeal in the Court of appeal.
3. The respondent Beth Nyambura Kahora was substituted in place of the petitioner Joseph Kahora Karungo, her late husband who was the petitioner herein. She states that this application has no merit because the original protestor who is the applicant's father never intimated or filed any appeal. It is after his son applied to be substituted successfully that he made this application. This means that the protestor himself was not dissatisfied with the court's judgement. It is further stated that the applicant is not entitled to orders for stay because he has not yet filed the appeal. The applicant also delayed in applying for proceedings for he did so after almost two months after the judgement was delivered. The



respondent states that he has already opposed the application for extension of time to appeal through his replying affidavit dated May 17, 2019.

4. The applicant relies in the case of *Joseph Wambui & Another v Margaret Wanjiru* [2013]eKLR where the Court of Appeal held that the Law of Succession Act is a self-sufficient statute and that it is only in a few instances where it may be supplemented by the specific rules of the Civil Procedure directly imported under Rule 63(1) of the Probate and Administration Rules. It suffices to state that Order 42 which deals with the procedure in applications for stay of execution in Civil appeals is not one of the rules imported under Rule 63. However, the court in practice has borrowed some of the tenets in Order 42 Rule 6 in dealing with Succession causes. These are firstly proof that the applicant is likely to suffer substantial loss in the event that orders for stay are not granted; secondly that the application seeking the orders ought to be filed without undue delay.
5. The court if it finds it appropriate may also address the issue of security for the due performance of the decree.
6. On the issue of delay, it is noted that judgement was delivered on August 18, 2017 and that this application was filed on 05/04/2022 which is four and a half 4½ years later. The applicant in his supporting affidavit explains that he had filed an application for extension of time to appeal had been filed but his father the protestor died 31/3/2021 and the applicant embarked on substitution as a party in this case. He filed his application for substitution on January 21, 2022 which was timeous. The relevant orders were granted on 09/03/2022 about 26 days later, this application was filed. It is also noted from the record that the Court of Appeal Civil Application No. 68 of 2019 seeking extension of time was filed on May 20, 2020 which was about nine (9) months after judgement was delivered. I have confirmed from the record that the petitioner Joseph Kahora Karungu died on August 26, 2019 which was two years after the judgement. He was substituted by the respondent Beth Nyambura Kahora on 25/5/2021.
7. This history of death of both the petitioner and the protestor and their subsequent substitution contributed greatly to the delay in this case. The respondent stepped in the shoes of his late father Mwangi Karung'o Karungo after his death and had to apply for substitution in this cause and also follow up on the Court of Appeal Application No. 68 of 2019.
8. The delay of 4½ years is long but it cannot be called inordinate given the explanation by the applicant which is borne by the record of this cause. In my view, the delay has been satisfactorily explained.
9. In regard to the requirement of the applicant satisfying the court on his suffering substantial loss, he said that if the land is distributed as per the grant against which he has appealed against, it will be too costly for the parties to re-do the process if his appeal succeeds. Further that his appeal may be rendered nugatory. The original protestor is the one who filed the Court of Appeal Civil Application 68 of 2019 which was an indication that he intended to appeal against the High court judgement save for the fact that time had run out. It is not correct that the applicant's late father had no intention to appeal as argued by the respondent in his replying affidavit.
10. I am in agreement that if the intended appeal was to be allowed, then the survey and transmission process has to be done all over again and is likely to cost the parties unnecessary expenses. There is no doubt that if the process of executing the grant proceeds, then the appeal would be rendered nugatory. Order 42 Rule 6) was enacted to protect the parties from unnecessary inconveniences in the event of successful appeals. I am satisfied that the applicant has demonstrated that he will suffer substantial loss if the orders are declined.



11. As regards security, the respondent is entitled to the fruits of her judgement whose execution has to be suspended until the appeal is fully heard and determined. The applicant has the upper hand in fast tracking the appeal and is likely to drag his feet in the event that he has not deposited security. For this reason, I find that it is in the interests of justice that the applicant deposits reasonable security.
12. Consequently, I find that this application has merit and I allow it in the following terms:-
 - a. That orders for stay of execution of the grant in this cause are hereby granted.
 - b. That the applicant will deposit Kshs.150,000/= in court as security within thirty days in default of which the orders for stay herein will be vacated.
 - c. That costs shall abide in the appeal.
13. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 17TH DAY OF AUGUST, 2022

