



In re Estate of Charles Mwaniki Kamara (Deceased) (Succession Cause 533 of 2012) [2022] KEHC 12464 (KLR) (17 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 533 OF 2012
FN MUCHEMI, J
AUGUST 17, 2022**

IN THE MATTER OF THE ESTATE OF CHARLES MWANIKI KAMARA (DECEASED)

BETWEEN

MARY WANGECI KAMARA APPLICANT

AND

NELSON KAMARA MWANIKI 1ST RESPONDENT

RAHAB WANJIRU KAMARA 2ND RESPONDENT

ROSE MUTHONI KAMARA 3RD RESPONDENT

RULING

Brief facts

1. The application for determination is dated 14th October 2021 brought under Section 1A, 3 & 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Rule 73 of the *Probate and Administration Rules* seeking for orders of stay of the ruling delivered on 7th October 2021 and all the consequential orders arising from the said decision pending the hearing and determination of the application and appeal.
2. The respondent filed a Replying Affidavit dated November 5, 2021 that has articulated the grounds of opposition.

The Applicant's Case

3. The applicant states that the court delivered its ruling on October 7, 2021 revoking titles of Aguthi/Gatitu/4617, Aguthi/Gatitu/4618, Aguthi/Gatitu/4619, Aguthi/Gatitu/4620 and Aguthi/Gatitu/332. Being aggrieved by the decision of the court, the applicant lodged an appeal and filed a Notice of Appeal on October 13, 2021. The applicant contends that she stands to suffer substantial



loss for she resides and cultivates on the said properties and that cancellation of the title deeds of the said properties is likely to destabilize her possession and residence. It is further stated that the applicant is a senior citizen experiencing numerous health issues.

4. The applicant further contends that the court overlooked her overwhelming and uncontroverted evidence that no rent was collected from the tenants on the said properties by ordering that she account for rent collected on L.R Aguthi/Gatitu/332. Moreover, the applicant states that the properties L.R. No's Aguthi/Gatitu/4617-4620 were acquired and jointly held during the subsistence of the marriage of the parties and she has a right to enjoy her properties exclusively. The applicant further contends that she transferred title Aguthi/Gatitu/332 to herself as the said property was bequeathed to her in a will. She states that she was not aware of the court orders of 6th February 2013 restraining the sale or alienation of the estate property pending the hearing of the summons for extension of time to file an objection by the respondent.
5. The applicant states that the application has been brought without unreasonable delay and that she is willing to provide security as the court may deem fit.

The Respondent's Case

6. The respondent states that the L.R Aguthi/Gatitu/4617-4620 were in the names of the deceased and the applicant but did not bear the word joint and therefore were subject to succession proceedings. Furthermore, the applicant illegally and unlawfully transferred the suit properties to her name despite being aware of the position of the said properties. Moreover, title Aguthi/Gatitu/332 was in the deceased's name alone and therefore the applicant cannot create an unlawful status and then proceed to seek the illegal state of affairs to be protected.
7. The respondent contends that the ruling of October 7, 2021 caused the titles of the said properties to revert to the same status as they were at the inception and therefore no titles were revoked. Further, the orders made on June 14, 2017 in regard to title Aguthi/Gatitu/332 and accounting of the money collected therefrom is simply requesting the applicant to be open and transparent and to respect the court orders made in her presence.
8. The respondents further contend that the appeal is not an arguable appeal and the application for stay of execution is aimed at perpetuating an illegality of a criminal nature. Instead, the respondent argues that the court's orders are aimed at having the deceased's estate preserved pending the distribution. Furthermore, the respondents argues that the applicant has not demonstrated what loss she stands to suffer if the land titles are restored to their original state. It is further argued that the applicant has not shown that the appeal has any chances of success nor has she demonstrated any irreparable loss she is likely to suffer if the instant application is not granted. The respondents contend that she and the other beneficiaries stand to suffer immensely as the intended appeal will be in court for not less than five years and the applicant will be enjoying all the benefits of the estate alone. Furthermore, the respondents state that an order of stay will be prejudicial to her and the other beneficiaries.
9. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

10. The applicant submits that she has satisfied the conditions for granting of stay of execution pending appeal. On the issue of substantial loss, the applicant submits that she has been residing on the properties for a long period of time. It was her matrimonial home with the deceased and therefore execution of the orders would result in substantial loss to her. The applicant relies on the cases of *Mugah vs Kunga* (1988) KLR and *Hamisi Salim Mwaluimo vs Julius Wambugu Mombasa* H.C Civil



Appeal No. 9 of 2003 and submits that the courts have adopted a policy of maintenance of the status quo pending appeal where land is the subject matter as is the instant case. The applicant further adds that she is aged 78 years and suffers from numerous health challenges, as she is diabetic and hypertensive. The applicant state further that the properties Aguthi/Gatitu/4617-4620 were acquired jointly and registered in her name and that of the deceased. In the event that orders for stay are not granted, the applicant is apprehensive she will lose her matrimonial home and the property which she worked tirelessly for and the same is likely to destabilize her possession and residence. The applicant is apprehensive that if stay is not granted, she could be evicted from her property as the matter will proceed to distribution of the estate and the subject property could end up in someone else's hands. In the event the property reverts to the name of the deceased, the matter will proceed to distribution and the applicant states that 50% of the properties in contention will be distributed with the rest of the estate property hence the appeal will be overtaken by events. The applicant relies on the decision in *Mukuma vs Abuga* [1988] KLR 645 and submits that the effect of the titles being cancelled before the appeal has been heard and determined would render the appeal nugatory.

11. In respect of title Aguthi/Gatitu/332, the applicant contends that the administrators should take over the same and manage it jointly as the tenants have not been paying rent. The applicant further submits that any rent paid ought to be deposited in an account held in the joint names of the advocates.
12. On the issue of security, the applicant submits that she is ready and willing to furnish with such security as the court will so order. She relies on the decision of *In Re Estate of Solomon Mungura Mathia (Deceased)* [2021] eKLR to support her contention.
13. The applicant further relies on the case of Civil Appeal No. 78 of 2020 and *Dennis Mogambi Mang'are vs Attorney General & 3 Others* Civil Application No. NAI265 of 2011 (UR175/2011) and submits that she has an arguable appeal and that the same is not frivolous. As such, the applicant prays that the application be allowed as prayed.

The Respondent's Submissions

14. The respondents relies on Rule 63 of the Probate and Administration Rules and submits that sections 1A, 3, 3A of the *Civil Procedure Act* and Orders 42 and 51 of the Civil Procedure Rules are not applicable to applications under the Succession Act. The respondent states that the application is a non-starter and ought to fail. She relies on the cases of Nairobi Succession Cause No. 45 of 1994 In the Estate of Mathu Ngwaro alias Nikola and Nairobi Succession Cause No. 1930 of 1930 In the Matter of the Estate of Erastus Njoroge Gitau to support her contentions.
15. The respondents further rely on the cases of Nairobi succession Cause No. 692 of 1992 In the Matter of the Estate of Benjamin Giceha and Morris Mutuli & Another vs Alice Mutuli Kora & Others Kisumu Civil Appeal No. 236 of 2000 and submits that the applicant intends to delay the instant succession cause indefinitely as she is seeking to be allowed to continue disposing the deceased's estate without any restraint and in effect continue with her unlawful and illegal activities. Further, the respondent submits that if the applicant has not collected any rent in respect of title Aguthi/Gatitu/332 she ought to file zero returns in a bid to account to the court and the other administrators.
16. The respondents submit that the applicant has not come to court with clean hands. The applicant having filed the instant succession cause knew all along that the properties Aguthi/Gatitu/4617-4620 were registered in her name and the deceased however not jointly. Furthermore, title Aguthi/Gatitu/332 was registered solely in the deceased's name and the applicant attempted to sell the same for Kshs 50 million which provoked the joining of all the respondents in the instant succession cause. The respondent further submits that the applicant's actions are criminal in nature by virtue of the fact



that she transferred the deceased's properties to herself when she knew that the properties were subject to succession proceedings.

17. The respondents submit that the application does not meet the threshold of stay of proceedings. She relies on the case of *Global Tours & Travels Ltd vs Five Continents Travel Limited* [2015] eKLR and the Halsbury's Laws of England 4th Edition Vol 37 page 330 and 332 to support her contentions. Furthermore, the respondent relies on the decision of *James Wamalwa & Another vs Agnes Malaika Cheseto* (2012) eKLR and submits that the applicant has not demonstrated any substantial loss. As such, the respondent states that the application lacks merit and is a gross abuse of the court process and prays that the same be dismissed with costs.

Issue for determination

18. The main issue for determination is whether the applicant has met the prerequisite for grant of stay of execution pending appeal.

Analysis of the Evidence

19. The respondent has raised an objection that Sections 1A, 3 & 3A of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules are not applicable in succession matters as they are not one of those orders of the Civil Procedure Rules that have been imported by Rule 63 of the Probate & Administration Rules. Rule 63 provides:-

Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

20. It is evident from the foregoing provision that Order 42 Rule 6 of the Civil Procedure Rules is not among the orders applicable in succession matters. However, does the exclusion of Order 42 of the Civil Procedure Rules take away the jurisdiction of the court from entertaining an application for stay of execution. In my view, Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules give jurisdiction to this court to entertain an application for stay.

21. Section 47 of the Act provides:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Rule 73 of the Rules provides:-

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

22. Therefore, the court can entertain any application of whatever nature under Section 47 aforesaid and invoke its inherent power under Rule 73 and make orders for the sake of justice. In the case of *Zubheir Abdalla vs Yusuf Juma* [2018] eKLR Mabeya J stated:-

Accordingly, I make a finding that notwithstanding Order 42 of the Civil Procedure Rules not being one of those Orders imported by Rule 63(1) of the Probate and Administration Rules, this court has jurisdiction to grant orders of stay of execution under Section 47 of the Act as read with Rule 73 of the Probate and Administration Rules.

23. I am of the considered view that the application is properly before the court despite some wrong provisions of the law that have been cited. Article 159 calls upon the court not to pay undue attention



to technicalities. This court is possessed of the requisite jurisdiction to entertain this application and to grant the necessary orders if the same is found to have merit. The principles under Order 42 of the Civil Procedure Act are applicable herein given the nature of the application.

Whether the applicant has met the prerequisite for grant of stay of execution pending appeal

24. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

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 orders set aside.

2. 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 1st 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.

25. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to the applicant unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant is willing to provide security where necessary for the due performance of such decree or order as may ultimately be binding on him.

26. These principles were enunciated in Butt vs Rent Restriction Tribunal [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

27. The applicant has submitted that she resides and cultivates on title Aguthi/Gatitu/4617-4620 and that she has lived there for a long period where her matrimonial home is situated and that the properties were jointly acquired by her and the deceased. She contends that if stay is not granted, she shall be evicted from her property as the matter will proceed to the distribution of the estate and the subject property could end up in someone else's hands.
28. The applicant states that the properties in question LR Aguthi/ Gatitu4117-4120 having been acquired jointly she ought to be allowed to enjoy the fruits of the property where she has lived for many years. The purpose of the orders of the court issued on 7th October 2021, was to place all the beneficiaries at par pending distribution of the estate. In granting the said orders, the court did not in any way interfere with the ownership of the applicants share of the properties in the said properties.
29. The applicant's fear is that she may be evicted from the land and that 50% share of the properties held under the name of the deceased may be distributed to other beneficiaries. Firstly, the applicant has not demonstrated that any of the beneficiaries has attempted to evict her from the said properties. Secondly, the preservation of the estate is for the benefit of all the beneficiaries. If the applicant wishes to claim the whole share in the said properties, she is at liberty to do so during the confirmation of the grant.
30. In regard to LR Aguthi/Gatitu/332, the court gave orders for the applicant to account for the rent collected over many years since the deceased died. It is argued that the court failed to consider the applicant's evidence that no rent is collected from the tenants. The order also helps to achieve preservation of the deceased's estate for the benefit of all the beneficiaries. If the applicant is not receiving any rent, she did not explain why she continues keeping tenants who are not meeting their legal obligations. Assuming that the applicant does not collect any rent, she is duty bound to account to the other beneficiaries on Zero income. The applicant has not shown that accounting for the income from the property will result in her suffering substantial loss.
31. The applicant having failed to tender any evidence of any attempt or plans to evict her from LR. Aguthi/Gatitu/4117-4120, it is my considered view that substantial loss has not been demonstrated.
32. The will that the applicant says was the basis of transferring properties to herself has been challenged by the other beneficiaries in this court and found to be wanting in its judgement delivered on January 20, 2020. The court after hearing the parties revoked the grant of probate that had been issued in favour of the applicant and declared that the deceased died intestate. As such, the applicant should not be talking of any will because it was found not to be authentic. The court appointed 3 administrators in this case to proceed with confirmation of the grant intestate.

In view of this background, the applicant's appeal has limited chances of success.

Has the application been made without unreasonable delay.

33. The ruling in the instant succession cause was delivered on October 7, 2021 and the applicant filed the present application on October 15, 2021. I am therefore of the considered view that the application has been filed timeously.



34. It is trite law that the issue of security is discretionary and it is upon the court to determine the same in the event that the application is successful. Notably, the applicant has stated in her affidavit that she is ready and willing to provide such security as the court may deem fit.

Balance of rights of the Parties

35. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mobammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the Court upheld the decision of *Portreitz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that:

“That right of appeal must be balanced against an equally weighty rigid right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

36. The court in granting stay has to carry out a balancing act between the rights of the two parties. The orders made by the court on October 7, 2021 reverted the deceased’s estate to its original status before the succession cause. The applicant contends that she resides on L.R Aguthi/Gatitu/467-4620 and that cancelling the title deeds for the suit properties is likely to destabilize her possession and residence. The respondent on the other hand states that the applicant transferred the properties to her name to the exclusion of the other beneficiaries yet the properties were not jointly owned. The respondent states that such acts are criminal in nature and therefore granting stay will amount to protecting the illegal acts of the applicant. Moreover, the respondent states that she and the other beneficiaries stand to suffer prejudice as the appeal will take time before it is determined. In my view, I find that on a balance of interests, the applicant rights are secure even if this application for stay is not granted.

37. The applicant’s rights to inheritance have not been threatened by the court order of October 7, 2020. The order protects the interests of all the beneficiaries by preserving the estate of the deceased pending distribution. The estate is yet to be distributed and in my view, the applicant from her conduct in this matter is not in a hurry to have the distribution done for her benefit and that of other beneficiaries.

38. It is my considered view that this application has no merit and it is hereby dismissed with no orders as to costs.

39. 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.

