REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 53 OF 2019

IN THE MATTER OF THE ESTATE OF CHELAGAT CHEBASA RIBISON *alias* CHELAGAT CHEBASA (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR STAY OF EXECUTION

BETWEEN

MARIA JEBET ARAP MASOIN.....1ST APPLICANT

KIPKEMBOI EMMANUEL TOROITICH

Alias EMMANUEL KIPTANUI.....2ND APPLICANT

AND

KIPKOECH LAGAT….....1ST RESPONDENT

TOROITICH CHELAGAT.....2ND RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **30 January 2020.** The said application was filed by the two applicants, **Maria Jebet Arap Masoin** and **Kipkemboi Emmanuel Toroitich** pursuant **to Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** and **Order 42** of the **Civil Procedure Rules**. It seeks orders that:

> **[a]** Spent
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> **[b]** Pending the hearing *inter partes* of the application and the appeal thereafter, there be an order of stay of taxation of the respondents' Bill of Costs dated **4 November 2019** and/or enforcement of the Ruling of the Court given on **9 October 2019** that dismissed the applicants' application dated **7 March 2019** with costs.

[2] The application was premised on the grounds that following the dismissal of the applicants' application dated **7 March 2019** with costs, the Respondents filed their Bill of Costs dated **4 November 2019** to the tune of **Kshs. 1,016,690/=** for taxation; and that the applicants are aggrieved by the said Ruling and have preferred an appeal to the Court of Appeal vide **Eldoret Civil Appeal No. 89 of 2019**. It was therefore the assertion of the applicants that, unless stay of execution is granted as prayed, the appeal shall be rendered nugatory; and that the applicants shall suffer irreparably.

[3] In the Supporting Affidavit sworn by the 1st applicant, it was averred that the Notice of Motion dated **7 March 2019** had sought an order for the recall of Succession proceedings filed in the Chief Magistrate's Court at Eldoret to the High Court for hearing and determination on the ground that the deceased's estate is valued at more than **Kshs. 20,000,000/=** but that the said application was dismissed on technicalities. At paragraphs 7 to 24 of the said affidavit, the 1st applicant endeavoured to demonstrate that the Court erred in dismissing their application with costs and asserted that they do have an arguable appeal. They relied on the documents annexed to that affidavit which include copies of the Memorandum of Appeal and the Bill of Costs dated **2 December 2019.** The applicants also relied on the affidavit sworn on **30 January**

2020 by the 2nd applicant in which he reiterated the averments made in the 1st applicant's affidavit.

[4] The application was resisted by the respondents vide their Grounds of Opposition dated **28 February 2020**; namely, that:

[a] The application is frivolous, vexatious, incompetent, fatally and incurably defective;

[b] The application is bad and unfounded in law and is an abuse of the court process;

[c] The application lacks merit in the sense that the suit having been dismissed there is no positive order capable of being stayed.

[5] The application was canvassed by way of written submissions, pursuant to the directions given herein on **29 July 2020**. In the applicants' written submissions filed on their behalf by **Mr. Nabasenge**, they reiterated the averments set out in the Supporting Affidavit, particularly their contention that the Court erred in condemning them to pay costs in the matter when all they did was seek the transfer of the Succession Cause from the Chief Magistrate's Court to the High Court pursuant to **Section 18** of the **Civil Procedure Act**. Thus, counsel proposed the following issues for determination:

[a] Whether the instant application is bad in law;

[b] Whether the instant application is seeking to stay a negative order; and,

[c] Whether the orders sought herein should be granted.

[6] Mr. Nabasenge relied on **Order 42 Rule 6(1)** of the **Civil Procedure Rules** and **Koton Wandabe & Another vs. Lucia Kibui Muchiri** [2019] eKLR in urging the Court to find that it has the jurisdiction to grant stay of execution pending appeal. On whether the application is seeking to stay a negative order, counsel pointed out that in the impugned Ruling, costs were awarded against the applicants; and that the respondents have since filed a Party and Party Bill of Costs dated **4 November 2019** to the tune of **Kshs. 1,016,690/=** which is due for taxation. He was therefore of the view that the order for costs is a positive order capable of execution. He cited the case of **Ndungu Kinyanjui vs. Kibichoi Kugeria Services & Another** [2007] eKLR to support his contention.

[7] On whether the orders sought are deserved, **Mr. Nabasenge** made reference to paragraph 18 of the Supporting Affidavit for the deposition that the applicants stand to be committed to civil jail as they will not be able to raise the amount of costs demanded by the respondents. He further pointed out that the 1st applicant is a senior citizen aged 77 years; and that she has no means of earning a living. Accordingly, counsel urged the position that in the event that stay is not granted, the 1st applicant runs the risk of suffering a civil jail term before the hearing and determination of her appeal.

[8] With regard to the appeal, counsel submitted that, in considering stay of execution, the Court is called upon to consider whether or not the appeal is arguable; and whether the same may be rendered nugatory. He relied on **Koton Wandabe & Another vs. Lucia Kibui Muchiri** (supra) among other authorities, in support of his submissions.

[9] On his part, **Mr. Korir** relied on his written submissions dated **3 August 2020,** wherein he emphasized the fact that the impugned Ruling resulted in a negative order; and therefore incapable of either execution or stay. He relied on **Executive Estates Ltd vs. Kenya Posts & Another** [2005] 1 EA 53 and **Ndiaye vs. Africa Virtual University** [2015] eKLR for the proposition that, to be granted stay, the applicants needed to establish that execution was imminent and that it would **"…create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal..."** Thus, in **Mr. Korir's** view, the applicants have neither established substantial loss nor demonstrated that the respondents are men of straw; and therefore incapable of refunding any costs that may be paid to them herein by the applicants. He, consequently urged for the dismissal of the application dated **30 January 2020** with costs. He further urged, in the alternative and on a without prejudice basis, that an order be made for the immediate taxation of costs herein; and for the taxed costs to be deposited in a joint interest-bearing account in the names of the advocates on record pending the conclusion of the appeal.

[10] From all the matter aforestated, it is indubitable that an appeal has been preferred by the applicants from the Ruling of the Court dated **9 October 2019**. The Memorandum of Appeal, marked **Annexure MJAM-2** to the 1st applicant's Supporting Affidavit, shows that it was lodged on **16 December 2019.** Hence, the key issue for determination herein is whether a good case has been made by the applicants to warrant stay of execution. In this regard, it is noteworthy that the application dated **30 January 2020,** which concerns the estate of a deceased person for purposes of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya,** was brought pursuant to **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules;** yet **Rule 63** of the **Probate and Administration Rules** is explicit that:

"(1) Save as is 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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), … shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased person shall be those existing and in force immediately prior to the coming into operation of these Rules."

[11] I therefore subscribe to the view that, since Order 42 Rule 6 of the Civil Procedure Rules was consciously omitted in **Rule 63** aforestated and was consequently not imported for purposes of the **Law of Succession Act**, it is inapplicable to the instant application. The same viewpoint was taken in **Re Estate of Kesiah Wanjiku (Deceased)** [2020] eKLR thus:

> **"…Section 47 of the Law of Succession Act empowers the High Court to entertain any application and to make such orders as may be expedient, while Rule 73 of the Probate and Administration Rules saves 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*". Evidently, the Law of Succession Act does not expressly provide for appeals from the High Court to the Court of Appeal. Moreover, the provisions of Order 42 Rule 1 of the Civil Procedure Rules that provide for applications to stay execution pending appeal in the Court of Appeal, have not been applied by Rule 63 of the Probate and Administration Rules to succession causes. Indeed, none of the sections of the Civil Procedure Act invoked on the face of the Summons before me are applied to succession causes by that rule…"**

[12] It bears repeating that the **Law of Succession Act** was intended to be a stand-alone piece of legislation; as was observed by the Court of Appeal in **Josephine Wambui vs. Margaret Wanjiru Kamau & Another** [2013] eKLR. It stated thus:

> **"We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1)."**

[13] It therefore behooves counsel to pay attention to the applicable rules of procedure since **Article 159(2)(d)** of the **Constitution** was never intended to completely displace such rules; a point aptly made by **Hon. Kiage, JA**, in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others** [2013] eKLR thus:

> **"I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner…were ever meant toaid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice…it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."**

[14] Accordingly, the instant application is to be determined, not on the basis of the parameters set out in **Order 42 Rule 6** of the **Civil Procedure Rules,** but on the basis of whether sufficient cause has been shown for stay for purposes of **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**; which provisions are sufficient in my view to guide the exercise of the Court's discretion for purposes of stay of execution pending appeal.

[15] Moreover, authorities abound that discuss the guiding principles in such situations; such as **Samvir Trustee Limited vs. Guardian Bank Limited,** [2007] eKLR wherein **Hon. Warsame J.** (as he then was) held that:

> **"…the Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant… At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court…"**

[16] Counsel for the respondent also questioned the competence of the application; granted that the impugned Ruling resulted in a negative order, namely, dismissal. In **Co-operative Bank of Kenya Ltd vs. Banking Insurance & Finance Union (Kenya)** [2015] eKLR, the Court had occasion to restate that:

> ***'An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:***
>
> **'….. an order for stay of execution must be intended to serve a purpose …..' " (emphasis supplied).**

[17] While it is true that the applicants' application dated **7 March 2019** was dismissed, it is noteworthy that, along with the dismissal, an order was made for the payment of costs; which order is capable of execution. Hence, in **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010**, **Makhandia, J** (as he then was) acknowledged this distinction and held that:

> **"…The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution**

pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."

[18] Similarly, in Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63, a decision of the Court of Appeal for Eastern Africa that was followed by the Court of Appeal in George Ole Sangui & 12 Others vs. Kedong Ranch Ltd [2015] eKLR, it was held thus:

"But what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs…. The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction."

[19] In the instant matter, an order was made for the payment of costs by the applicants. The court record supports the applicants' assertions that the respondents filed their Party and Party Bill of Costs dated **4 November 2019** for taxation; and that the said Bill of costs had been listed for taxation on **19 February 2020**. One of the grounds of appeal is that the Court erred in condemning the applicant to pays the costs of the dismissed application. There is therefore a positive aspect of the impugned Ruling that has been challenged on appeal which is amenable to stay, and I so find.

[20] On the merits of the application, I have given due attention to the competing interests of the applicants on the one hand and the respondents on the other hand. The applicants have filed an appeal and while it is not for this Court to determine whether or not the said appeal has overwhelming chances of success, it is arguable. Accordingly, it would be in the interests of justice for the proceedings herein to be stayed pending the hearing and determination of the said appeal as no prejudice will thereby be suffered by the respondents.

[21] In the result, it is hereby ordered that:

[a] The application dated **30 January 2020** be and is hereby allowed;

[b] There be an order of stay of taxation of the respondents' Bill of Costs dated **4 November 2019** and/or enforcement of the Ruling of the Court given on **9 October 2019** as to costs pending the hearing and determination of **Eldoret Civil Appeal No. 89 of 2019**

[c] Each party to bear own costs of the application.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF FEBRUARY 2021

OLGA SEWE

JUDGE