



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2561 OF 2009

IN THE MATTER OF THE ESTATE OF WILLIAM KAMAU KAMUYU (DECEASED)

JOSEPH KAREGA KAMAU..... APPLICANT

VERSUS

VIRGINIA WANJIKU KAMUYU.....RESPONDENT

RULING

1. The deceased William Kamau Kamuyu died intestate on 6th September 2009. He was survived by his widow Serah Njoki Kamau and two sons, Francis Kamuyu Kamau and Joseph Karega Kamau (the applicant). These three survivors were granted with letters of administration intestate on 29th April 2010, which was confirmed on 10th November 2010.
2. The estate of the deceased was distributed so that the three beneficiaries were to equally share LR No. Dagoretti/Kangemi/328; Serah Njoki Kamau got LR No. Dagoretti/Kamau/330, CFC Stanbic A/C No. 01400/158057/01, 7100 shares at Barclays Bank of Kenya and motor vehicle KAX 586W; Francis Kamuyu Kamau got LR No. Dagoretti/Kangemi/329 and LR No. Dagoretti/Kangemi/331; and Joseph Karega Kamau got LR No. Dagoretti/Kangemi/332, motor vehicle KAA 248C and motor vehicle KAM 509S.
3. Serah Njoki Kamau died on 31st January 2017 and her estate is subject of **High Court Succession Cause No. 308 of 2017** at Nairobi. It is pending.
4. Francis Kamuyu Kamau died on 24th October 2016, and a grant of letters of administration intestate issued to his widow Virginia Wanjiku Kamuyu (the respondent) on 10th July 2017 in **High Court Succession Cause No. 278 of 2017**.
5. The dispute between the applicant and the respondent is over LR No. Dagoretti/Kangemi/328 and LR No. Dagoretti/Kangemi/330, and especially the substantial income that is accruing from these developed properties. LR No. Dagoretti/Kangemi/330 was developed using bank loan, and part of the proceeds are being applied to repay the loan. LR No. Dagoretti/Kangemi/328 has Block A and Block B. Each has rental units. The two blocks receive about the same amount of rent.
6. The application dated 7th September 2017 led to the ruling dated 9th November 2018 that is the subject of the appeal dated 12th November 2018 to the Court of Appeal. The application by the respondent alleged that since the death of Serah Njoki Kamau, the applicant was alone managing and utilizing the rental income from the two properties. In the course of the application the court asked for accounts from the applicant. What he gave did not impress the court. In the ruling of 9th November 2018 the court directed that the respondent manages and uses the proceeds from Block B, and that the applicant manages and gets the proceeds from Block A. It was further ordered that the sons of the late Francis Kamuyu Kamau (the late husband of the respondent) and the sons of the applicant should equally manage the repayment of the loan on LR No. Dagoretti/Kangemi/330 and also equally benefit from the proceeds from the property. These are the orders that the applicant is challenging on appeal.
7. Pending the hearing and determination of the appeal, the applicant has applied under **Order 42 rule 6** of the **Civil Procedure Rules** for stay of the execution of the orders. The applications are dated 7th October 2020 and 27th November 2018.
8. **Order 42 rule 6** provides as follows:-

“(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 hereon 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 order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the 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.”

9. The respondent has orders which she is entitled to execute. On the other hand, the applicant was aggrieved by these orders and is entitled to challenge them on the appeal. The court should make sure that the appeal, if successful, is not rendered nugatory (**Kenindia Assurance Company Ltd –v- Patrick Muturi Civil Application No. NAI 107 of 1993**). The applicant has to demonstrate that, if stay is not granted and he were to succeed on appeal, he will suffer substantial loss. He has to show that if stay is not granted, he will be irreparably affected and the core of his appeal will be negated (**James Wangalwa & Another –v- Agnes Naliaka Cheseto [2012]eKLR**).

10. I consider that, following the death of Serah Njoki Kamau, the two properties are the subject of her succession proceedings which are pending. This court cannot anticipate how these properties will devolve. What the applicant and the respondent are quarrelling over is the income from the properties. The value of that income is known, and there has been no demonstration that it is not recoverable. There is no indication in the application that LR No. Dagoretti/Kangemi/328 and LR No. Dagoretti/Kangemi/330 are in any threat of disposal.

11. More important, an application for the stay of execution of an order or decree pending the hearing and determination of an appeal entails the exercise of the court’s discretion. The court’s discretion is always expected to be exercised judicially, and to be exercised in favour of a deserving party, on the facts of the case. In this case, Justice M.W. Muigai on 9th November 2018 stated that:-

“I find that the respondent has not given a true account of the rental proceeds realized from the said 2 suit properties; LR Dagoretti/Kangemi/328 and LR Dagoretti/ Kangemi/330 in compliance with Section 83 e, f, and g of the Law of Succession Act Cap.160.....”

Is she deserving of the court’s discretion? I find not.

12. In conclusion, I find no merit in the applications dated 27th November 2018 and 7th October 2020, and dismiss each with costs.

DATED and DELIVERED NAIROBI this 23RD day of FEBRUARY 2021.

A.O. MUCHELULE

JUDGE