



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

SUCCESSION CAUSE NO.351 OF 2002

IN THE MATTER OF THE ESTATE OF M'TWARUGOJI M'KIRIMUNYA (DECEASED)

JEREMIAH M'NJOGU M'TWARUGOJI..... APPLICANT

VERSUS

MARTHA NAITORE M'MURITHI.....RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion under certificate of urgency dated 30th November 2020 by the applicant, Jeremiah M'Njogu. It seeks, in the main, stay of execution of the ruling delivered on 23rd November 2020 by Justice F. Gikonyo J pending an intended appeal. It is brought under Order 42 Rule 6, Order 50 and Order 51 of the Civil Procedure Rules and all enabling provisions of the law.

2. The application is premised on the grounds that the applicant being aggrieved with the ruling on the application dated 10th July 2018 by the respondent herein intends to file an appeal against that decision; appeal, it is contended, raises arguable points with very high chances of success and he will suffer substantial loss if the execution is not stayed pending the outcome. He further avers that the application dated 10th July 2018, on which the decision was rendered, was substantially defective and the court was miserably misled to an extent that the said ruling has pre-empted and substantially contradicted the court of appeal order and the concerned succession proceedings.

3. In his supporting affidavit sworn on 30th November 2020, it is averred that the applicant was issued with a certificate of confirmation of grant on 14th October 2009 in conformity with execution of the court of appeal consent order dated 17th May 1991. He further avers that the grant was subsequently revoked on 23rd November 2020 on grounds that it had been fraudulently obtained. It is the deponent's averment the court of appeal order dated 17th May 1991 was not fraudulently obtained and that according to the said order the suit land is legally shared in accordance with the terms of that order. The applicant avers that it is in the interest of justice that the stay sought be granted.

4. In the supplementary Affidavit sworn by the applicant on the 29th January 2021, the position taken is rather querulous and abrasive it emerging that the court and its officers is being blamed for derailing its own process of executing the court of appeal in this succession cause by inviting. There is a long narration of the history of the matter to support the allegations that the applicant has been adjudged unfairly and accused of wrongs not of his own but occasioned by contradictory orders by the court.

5. The respondent, Martha Naitore M'Murithi, has opposed the application through the replying affidavit sworn on 18th January 2021 in which she takes the position that she made the application dated 10th July 2018 seeking revocation of the grant issued to the applicant on grounds that it had been obtained fraudulently through the inclusion of a property (Ntima/Ntakira/685) which was non-existent; that the said property had been subdivided into two parcels namely Ntima/Ntakira 2488 and 2489 during the deceased lifetime and the former parcel transferred and registered in the name of Janet Tirindi; that the applicant as the administrator of the deceased estate had failed to include and transfer to her deceased husband's share of Ntima/Ntakira/2489 and that the application does not meet the threshold for grant of the orders sought but is frivolous, vexatious and an abuse of the court process.

6. It was the respondent's assertion that no loss at all will be suffered by any of the parties herein if stay of execution pending appeal is not granted as the court after revoking the grant did not issue a new one to any beneficiary and that while the matter pends the applicant continues to enjoy the status quo. The respondent relied on the decision of **In Re Estate of Atanasio Karanu (2018) eklr** for the proposition that in succession matters, an applicant seeking stay need to prove that the property subject of litigation is threatened with dissipation so as to be unavailable upon conclusion of the matter to establish a substantial loss. She urged the court to endeavour to deliver substantive justice to the parties herein and take note of the delay in settlement of this matter.

7. Being an application for stay pending appeal, the applicant invokes the discretionary powers of the court [\[1\]](#) which must be exercised judiciously pursuant to the stipulations of **Order 42 Rule 6 of the Civil Procedure Rules, 2010** which empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met by an applicant

before stay is granted as stipulated by the rules^[2] and decided cases are that:

- i) **There be an appeal whose outcome deserve being protected by an order for stay from being rendered nugatory.**
- ii) **The appeal must present arguable points**
- iii) **The applicant stands to suffer substantial loss unless the stay is granted**
- iv) **Whether security has been furnished**
- v) **Whether the application was brought promptly**

8. This determination must therefore establish if the five questions, I consider the prerequisites and threshold considerations in all applications of stay, are able to attract affirmative answers. In this matter there has not been a denial that a notice of appeal has been filed and therefore there is deemed an appeal to the court of appeal. I would thus answer the first limb of the first issue in the affirmative. The fourth consideration is however not applicable to the instant case as there is no decree capable of being secured by provision of security

9. On whether the appeal to presents arguable points, even a single one, I am guided never to second guess or preempt the mandate of the Court of Appeal. All I can say is that, that appellate court properly exercising its mandate has the discretion to uphold or reverse the findings by this court. It would preemptive and overly undesirable for this court as the court whose decision is sought to be challenged, to express a view on the merits of the appeal, especially in this matter that the judge considering stay pending appeal is not the same judge who made the impugned decision. Of course if I was sitting as the appellate court it would be an easier task but here it is this court's decision that is sought to be challenged. That however does not prevent the court from deciding whether to grant or refuse a stay as the circumstances of the case would permit to meet the ends of justice. I come to the conclusion that the arguability or otherwise of an appeal is a difficult consideration before a court whose decision is subjected to an appeal.

10. The cornerstone consideration in any application for stay pending appeal must however remain the question as to whether the applicant will suffer substantial loss if stay of execution pending appeal is not granted. Substantial loss has been defined as *a relative term and more often than not can only be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum*^[3]. In the contexts of this case, where there is no decretal sum to be paid or executed for, substantial loss must be a situation that would irreversible and that can only be avoided by the grant of stay of a threatened act. I have asked myself what it is that must be forestalled and which if not forestalled will put the applicant in such a prejudicial or disadvantaged position that would be irreversible after the appeal is heard and determined in his favour.

11. The journey and tenure of this case in court is long and indeed chequered. The current application while seeking stay of the execution of the ruling dated 23.11.2020 pending the appeal, is grounded on the assertion that the impugned ruling misinterpreted and /or contradicted the court of appeal consent of 17th May 1991. That issue was the same before the court on which the court delivered itself with the decisions of the court of appeal dated 17th May 1988 and secondly by the order of 17th May 1991 being placed before the court. It the same issue the Court of Appeal will have to determine on appeal and I have said I am hesitant to second guess what that court will determine.

12. Whether or not a substantial loss, in its many facets, would be visited upon the applicant is a matter that must be informed by the probable consequences of facilitating the ruling now sought to be challenged. That decision mandates that the court embarks on the road towards the appointment of an administrator or a number of them. That is a process that in my view cannot be executed summarily and without the impute of the applicant as a party in these proceedings. Before that process is concluded, there is no prospects of any of the assets of the estate being alienated. Accordingly, it is difficult to fathom what loss, even if not substantial the applicant stands to suffer. The Court of Appeal in **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR considered similar circumstances as those presented here and said:**

“The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined. He did not file an affidavit to refute the deposition of the respondent that he has an adjacent expansive land with a permanent house. In the superior court, it was established that the applicant has another land in Nyeri. In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.” (emphasis provided)

13. On the other hand, if stay is refused, the process will have to run its due course and I doubt if that can be concluded anytime earlier than June 2021. I say so noting that the court diary is already in June and the earliest the evidence or submissions could be taken is that month. Thereafter it would require additional time to come up with a decision. I hold the view that it is only after the decision is rendered and distribution completed that the applicant would be equipped to say if he has lost or not. That entire process I foresee to demand a year in the average. I see no prejudice that would visit the applicant if the matter gets its day in court towards completion. Once that matter is concluded or if the appeal is concluded earlier and the applicant is successful, all it would take is to reinstate the status quo before the ruling of 23.11.2020. Nothing would have been lost that would not be capable of retrieval.

14. On the flip side, if I grant stay it means the matter would be kept in abeyance until the appeal shall have been concluded. In the event the appeal fails, the parties would have to start afresh here and there would be no way of retrieving the time lost. In those circumstances, I do find that no substantial loss has been demonstrated and that to grant stay would not serve the interests of justice and those interested in the estate. To the contrary, Rule 73, of the Probate and Administration Rule invites the court to invoke its inherent power to make such orders as it may deem necessary for the ends of justice to be met or to prevent abuse of the process of the court. In this case to grant stay will affront the aspirations of that rule. It would be unjust.

15. The court of Appeal in **Shell Ltd v Kibiru and Another [1986] KLR, Platt JA** reiterated the position that where no substantial loss is shown there cannot be a basis to grant stay pending appeal. The judge said:

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

16. Here, even though the decree has no monetary obligations as yet, and it is impossible to assign any security because as yet no award has been made to any of the parties in the dispute over any asset of the estate thus making the consideration about security to be offered inappropriate, it is in my view, apt to conclude that where no substantial loss is shown, there cannot be a basis to grant stay. It is therefore my view that the applicant has failed to show that he will suffer substantial loss if stay is not granted. The impugned ruling did not give any person the powers to administer the estate of the deceased herein. In fact, it has afforded both the applicant and the respondent plus any other interested party an opportunity to iron out the issue on who a new grant should be made to and ascertain all the assets of the deceased. I still cannot fathom why the applicant would be opposed to such a chance.

17. On the need to be prompt in bringing the application, I note that the application was filed on 13th January 2021 the same day the notice of appeal was lodged. The respondent in her replying affidavit concedes that the application was filed timeously without any delay. The impugned ruling having been delivered on 23rd November 2020, and regard being to the act that time never runs between 21st December and 16th January, it cannot be said that there was inordinate delay in filing this application. I however, note that the applicant will at some stage have to contend with the question whether the notice was filed in time but that would be for the court of appeal.

18. The upshot is that the application lacks merit, I declare it ailed and thus dismiss it with costs the costs there on being in the cause

Dated, signed and delivered this 15th day of February 2021

Patrick J O Otieno

Judge

[1] In **Butt v Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal gave guidance on how a court should exercise discretion and held that:

a. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory... The court will grant a stay where special circumstances of the case so require...

[2] Order 42 Rule 6 of the Civil Procedure Rules, 2010

[3] **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**.