



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**SUCCESSION CAUSE NO. 73 OF 2017**

**IN THE MATTER OF THE ESTATE OF NOAH MELITA NKAI (DECEASED)**

HELLEN NAISERIAN NKAI.....1<sup>ST</sup> OBJECTOR

JOYCE LASOI NKAI.....2<sup>ND</sup> OBJECTOR

DEBRA SIMALOI SHININI.....3<sup>RD</sup> OBJECTOR

EMILY KAMWANKA KOIKAI.....4<sup>TH</sup> OBJECTOR

**VERSUS**

**GIDEON OLE NKAI NOAH.....RESPONDENT/APPLICANT**

**RULING**

1. The applicants took out a motion on notice dated and filed on 6<sup>th</sup> May, 2020, seeking stay of execution of this court's judgment (**Nyakundi, J**), delivered on 21<sup>st</sup> February, 2020, pending the hearing and determination of appeal before the Court of Appeal. The motion is based on the grounds on the face and the affidavit in support by Philemon Lemein also sworn on 6<sup>th</sup> May 2020.
2. According to the grounds on the face of the motion, the applicant argues that he is aggrieved in the manner the deceased's estate was distributed by the court and he has exercised his right of appeal. He is however apprehensive that should the judgment be executed; his appeal will be only of academic value. In the affidavit in support, it is deposed that the applicant is opposed to the mode of distribution adopted by the court and has therefore lodged an appeal against that decision. According to the applicant, the appeal raises weighty issues and the respondent will not suffer any prejudice should stay be granted.
3. The respondents filed a replying affidavit by Hellen Naiserian Nkai, sworn on 15<sup>th</sup> July, 2020 and filed on 16<sup>th</sup> July, 2020. She deposed that the application is incompetent, defective, bad in law and is an abuse of the court process. She stated that the application was filed and served late and that the applicant did not attach a memorandum of appeal or copy of the decree. She therefore urged the court to dismiss the motion.
4. The applicant filed written submissions dated 12<sup>th</sup> October, 2020 on 7<sup>th</sup> December, 2020 while the respondent's written submissions are dated 21<sup>st</sup> November, 2020 and filed on 5<sup>th</sup> January, 2021. Both parties agreed to dispose of the motion through those submissions.
5. It was submitted for the applicant that if stay is not granted, substantial loss will be suffered. Reliance was placed on ***Victory Construction v BM (a minor suing through next friend one PMM)*** [2019] eKLR, that what is expected is for the court to weigh the likely consequences of granting stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.
6. The applicant again relied on ***Siegfried Busch v MCSK*** [2013] eKLR that the court should recognize that its decision not to grant stay may be reversed on appeal and therefore recognize that it would be best to preserve the status quo so as not to render an appeal nugatory.
7. The applicant submitted that the judgment, the subject of the appeal, has the effect of nullifying and reversing the distribution of the deceased's estate which had been concluded many years ago and led to sale of part of the land to many parties and the proceeds shared. It was argued that If stay is not granted, execution will proceed, scuttle the status quo and render the appeal nugatory.
8. On whether the application was made within time, the applicant argued that it was made without delay. According to the applicant,

although the judgment was delivered on 21<sup>st</sup> February, 2020, the application was filed on 6<sup>th</sup> May, 2020 due to closure of courts on 16<sup>th</sup> March, 2020 as a result of Covid 19 pandemic.

9. The respondents submitted that although the applicant filed a notice of appeal, there is no evidence that a memorandum of appeal and record of appeal were filed within the stipulated period, thus the application is defective. In the respondents' view, time for lodging appeal has already lapsed and, therefore, execution should be allowed to proceed. Relying on Order 42 Rule 6, the respondents argued that the applicant is required to show that there will be substantial loss if stay is not granted. They contended that the applicant had not shown that he will suffer substantial loss given that the estate remains the same pending a fresh petition for letters of administration.

10. The respondents further argued that an application for stay should be made without delay but the applicant failed this test. According to them, the judgment was delivered on 21<sup>st</sup> February, 2020, the notice of appeal was filed on 3<sup>rd</sup> March, 202 and the application was filed on 6<sup>th</sup> May, 2020 which was unreasonable delay. They argued that limitation period for filing appeal of 60 days lapsed on 8<sup>th</sup> May, 2020 after filing of the notice of appeal.

11. The respondents relied on ***Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others*** for the argument that an applicant for stay of execution must persuade the court that the appeal is arguable and that it will be rendered nugatory if stay is not granted. They also cited ***Mohammed Salim T/A Choice Butchery v Nasser Puria Memon Jamat*** [2013] eKLR, that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour and that there must be just cause for depriving the plaintiffs that right.

12. It is the respondents' contention that the intended appeal has no chances of success and that the applicant has not demonstrated that he has satisfied the conditions under Order 42 Rule 6. They urged the court to dismiss the application with costs.

13. I have considered the application, grounds in support and those in opposition. I have also perused the judgment, the subject of this application. The court revoked the grant of letters of administration confirmed on 2<sup>nd</sup> June 2004 and directed Noa Melita Ole Nkai, the administrator to submit a detailed probate account of all beneficiaries as well as liabilities incurred by the estate. The court further directed that the deceased's estate be distributed in accordance with section 38 of the Law of Succession Act, taking into account the principle of equality.

14. Those are the orders the applicant was aggrieved with and filed a Notice of appeal, intimating his desire to appeal to the Court of Appeal against that judgment. He therefore moved this court for stay of execution pending the hearing and determination of the intended appeal.

15. I have considered arguments by both parties and the authorities relied on. Order 42 rule 6 application, the principles upon which it should be granted or denied are well settled.

16. Order 42 rule 6 provides:

***"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 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 order set aside.***

***2. No order of stay shall be made under sub rule (1) unless-***

***a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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"*(emphasis).**

17. The rule requires that an application for stay be filed timely. The applicant argued that he filed the application on time but the respondents contended that it was filed after an inordinate delay. According to the respondents, whereas the judgment was delivered on 21<sup>st</sup> February, 2020 and the notice of appeal was filed on 3<sup>rd</sup> March, 2020, the application was filed on 6<sup>th</sup> May, 2020 which was an inordinate delay. The applicant explained that courts were closed on 16<sup>th</sup> March 2020 due Covid19 pandemic and that was the reason why he did not file the application as soon as he could.

18. This court takes judicial notice that courts scaled down operations on 16<sup>th</sup> March 2020 following discovery of cases of Covid 19 in the country. The applicant filed his application on 6<sup>th</sup> of May 2020. In the circumstances, it is understandable why the applicant did not file the application immediately. The delay cannot therefore be said to be inordinate.

19. The rule also requires an applicant to show to satisfy the court that he will suffer substantial loss if stay is not granted. In ***Butt v Rent Restriction Tribunal*** (Civil App No. NAI 6 of 1979), it was held that ***the power of the court to grant or refuse an application for stay of execution is discretionary which should however be exercised in such a way as not to prevent an appeal. The court added that in exercising the discretion whether to grant or refuse an application for stay, it should consider special circumstances of the case and its unique requirements.***

20. Flowing from Order 42 rule 6 and the above decision is of the stated principle that in considering an application for stay the court exercises judicial discretion and like any other discretion, the court should act judicially. Whether or not to grant stay, the Court has also to consider unique circumstances of each case.

21. The guiding principle is that an applicant must show that he will suffer substantial loss if stay is not granted. In James Wangalwa & another v Agnes Naliaka Cheseto [2012]eKLR, the court cautioned:

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will 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....The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***(emphasis)

22. In Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR, the Court again stated that *to demonstrate substantial loss, one has to show that if the decretal sum is paid, that is; execution proceeds, the respondent will not be in a position to reimburse the amount in the event the appeal succeeds.*

23. The court again made it clear in Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] 2 KLR 63, that in attempting to demonstrate to court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. The court warned:

***“it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.”*** (Emphasis)

24. I have carefully read through the application and the supporting affidavit. The applicant spent some substantial time arguing that he has an arguable appeal and that it will be rendered nugatory should stay not be granted. He argued that the deceased’s estate had been distributed and even some portion of it sold and the proceeds shared out and therefore if the judgment is executed, it will reverse what had been done.

25. I have weighed the applicant’s fear against the orders made by the court. The court revoked the grant of letters of administration as confirmed and directed the administrator to submit a detailed probate account of all beneficiaries as well as liabilities incurred by the estate. It also directed that the deceased’s estate be distributed afresh in accordance with section 38 of the Act, taking into account the principle of equality.

26. I do not see how the above orders and directives will lead to substantial loss given that summons for confirmation of grant have to be filed heard and disposed of after giving the applicant an opportunity to participate. The applicant was required to do much more than merely stating that there will be substantial loss.

27. As this court observed in Kenya National Highways Authority v Ahmednasir Maalim Abdullahi [2020] eKLR,

***“It must be clear to an applicant seeking stay of execution, that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court’s discretion in his favour.”***

28. Having considered the of this application and weighed against the respondents’ response, I am not satisfied that the applicant has demonstrated that he will suffer substantial loss to deserve an order for stay of execution. Consequently, the application dated 6<sup>th</sup> May 2020 is declined and dismissed. Each party do bear own costs of the application.

**Dated, signed and delivered at Kajiado this 12<sup>th</sup> day of February, 2021.**

**E.C MWITA**

**JUDGE**