



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE NO. 17 OF 2001**

**IN THE MATTER OF THE LATE JOHN KIPTUM BARTILOL (DECEASED)**

**DINAH JEPKEMBOI BARTILOL.....1<sup>ST</sup> PETITIONER/APPLICANT**

**JAPETH KIPROTICH BARTILOL.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**EDNAH KANGOGO.....OBJECTOR/RESPONDENT**

**RULING:**

1. By Chamber summons dated 5<sup>th</sup> March 2020, Dinah Jepkemboi Bartilol the petitioner, seeks the following orders;

- a) That this Honourable Court be pleased to stay the proceedings in this matter pending the hearing and determination of the appeal arising from this Court's ruling delivered on 21<sup>st</sup> January, 2020.
- b) That the estate of JOHN KIPTUM BARTILOL be preserved pending the hearing and determination of the intended appeal.
- c) That costs of this application be in the cause.

2. The application is supported by the affidavit of Dinah Jepkemboi Bartilol dated 5<sup>th</sup> March 2020. In her affidavit and grounds on the face of the application, Dinah Jepkemboi Bartilol deposes as follows; on 21<sup>st</sup> January 2020 this court made a ruling on the objection proceedings and ordered parties to file their proposals on the mode of distribution of the estate which the petitioners were not satisfied with and have filed a notice of appeal and have applied for certified copies of the proceedings. She further states that the intended appeal will be rendered nugatory if the proceedings herein are not stayed in the meantime. That the respondent shall not suffer any prejudice or irreparable harm if the application is allowed.

3. The application was opposed vide the Replying Affidavits of Ednah Jepkosgei Kangogo sworn on 20<sup>th</sup> November, 2020 and Hillary Kipruto Bartilol sworn on the 11<sup>th</sup> December, 2020 respectively. In response, the respondents states that the said application despite being filed on 5<sup>th</sup> March, 2020, the same was served on their advocates on 19<sup>th</sup> November 2020. That the applicant filed the notice of appeal on 27<sup>th</sup> January 2020, and has never filed the said appeal 10 (ten) months later. That equity does not aid the indolent.

**SUBMISSIONS BY THE PETITIONERS/APPLICANTS**

4. The applicants submitted that the application is founded on the grounds that the appellants have filed a Notice of Appeal, thereby expressing their intention to appeal the decision of this court delivered on 21<sup>st</sup> January, 2020 and that there is need to preserve the estate of the late JOHN KIPTUM BARTILOL (deceased) pending the hearing and determination of the appeal. That the intended appeal will be rendered nugatory if the proceedings herein are not stayed in the meantime. They further submitted that the application was made in good faith and that no prejudice will befall the respondents or the interested parties if the orders sought are granted.

5. The applicants further submitted that the procedure for staying of execution pending appeal is provided for under order 42 of the Civil Procedure Rules. Though this is not one of the orders referred to under Rule 63(1) of the Probate and Administration rules, the practice by courts has leaned on the reliance of order 42 when dealing with stay of execution in succession matters.

6. The applicants submitted that it is not upon this court to determine whether the intended appeal has merit or not and that the applicants have annexed their memorandum of appeal in which they have set out their reasons for filing the appeal.

7. That this Honourable court in its ruling held that the objector was not a spouse or wife to the deceased but went ahead to invite her children to make proposals on the mode of distributing the estate. This was in essence elevating persons who were not objectors or parties to the suit to the status of co-administrators. The applicants humbly contend that the learned judge erred in law and in fact by failing to apply correctly the provisions of sections 35(1) (b), (2) and (30) of the Law of Succession Act.

8. That the 1<sup>st</sup> applicant being the only widow of the deceased contributed in the acquisition of the assets comprised in the estate and as such a resulting trust has to be construed in her favor. That it's for the aforementioned reasons that the applicants contend that they will suffer substantial loss if the estate is distributed before the appeal is heard and determined.

9. The applicants submitted that paragraph 8 of their supporting affidavit on record will show that they are appealing against part of the ruling but are agreeable with some part of the same.

10. On the issue of security for the due performance of such decree or order as may ultimately be binding, the applicants submitted that the objector has already been barred from participating in the affairs of the estate. The court has already found that she is not a widow to the deceased and she hasn't preferred any appeal. She no longer has locus standi to agitate this suit and that none of her children have been enjoined to these proceedings. That the proposed mode of distribution proposed by the objector is therefore incompetent for want of capacity.

11. The petitioners further submitted that this Honourable Court rendered its ruling on 21<sup>st</sup> January, 2020 and the application at hand was filed on 8<sup>th</sup> March, 2020. There was no delay in the filing of this instant application.

12. The petitioners submitted that if stay is not granted then their intended appeal will be rendered nugatory. They relied on the case of **Mugar V Kunga (1988) eKLR High Court Succession Cause No. 39 of 2007** to emphasize on their averment.

13. The petitioners further denied having approached Court with "**UNCLEAN HANDS**" because of their delay in filing the appeal. They went ahead to invite this court to take judicial notice of the fact that, immediately they had filed this instant application there was the outbreak of the dreaded Covid-19 pandemic which resulted in court activities being temporarily halted. That upon resumption of limited court activities, the petitioners herein inquired on the progress of proceedings and were informed that the computer which was used to type those proceedings malfunctioned and the proceedings could not be proofread. They also submitted that as at the time of filing these submissions, they had not obtained certified copies of proceedings from court.

14. Lastly the petitioners submitted that the respondent will suffer no prejudice if the orders sought are granted, having been found not to be a dependant of the deceased and therefore not allowed to participate in these proceedings. That the application is being prosecuted in good faith and that the petitioners have sufficiently shown that this court has jurisdiction to grant the orders sought. They cited the case of **Samvir Trustee Limited V Gaurdian Bank Limited** to buttress this argument. They prayed that the application be allowed as prayed.

#### **SUBMISSIONS BY THE RESPONDENTS/OBJECTORS**

15. The respondents relied on the provisions of order 42 Rule 6 of the Civil Procedure Rules. They submitted that the applicants filed this instant application on 5<sup>th</sup> March, 2020 and served the respondents on 19<sup>th</sup> November 2020, (9) months later. The respondents further submitted that, this delay is extreme and points out at the indolence of the applicants. That the applicants did not attempt to explain the delay in filing the application. The respondents also submitted that it is trite law that for stay to be granted, the applicant must have met the condition set out under order 42 Rule 6 of the Civil procedure Rules which provides, "**No order of stay shall be made under sub-rule (1) unless the court is satisfied that the application was made without unreasonable delay.**" The respondents relied on the case of **In Re Estate of Beth Wago Kimani (Deceased) 2020 eKLR** to buttress their argument.

16. The respondents further submitted that despite being brought under the certificate of urgency the application at hand was not certified urgent and to date no order was ever issued.

17. The respondents also submitted that, a glance at the intended appeal and the grounds of the intended appeal will indicate that the 1<sup>st</sup> petitioner wants to be the only party distributing the said estate, without taking into consideration the objector's children who are also dependants of the deceased. The respondents also submit that from the grounds of the intended appeal, the applicants were aggrieved by the directive that they account for the larger part of the estate they have been using since 1997. The respondents contend that the petitioners had a chance to counter and or dispute with the evidence before court. It is the respondents' case that the petitioners have come to court with "**UNCLEAN HANDS**" and seek stay of proceedings in order to pursue such a flimsy ground in attempt to delay and deny justice to the respondents.

18. The respondents further submitted that there being no stay of these proceedings the applicants were expected to comply with the directives issued in the ruling dated 21<sup>st</sup> January, 2020. The respondents submitted that to date the petitioners have not filed their proposed mode of distribution and no reason has been given to that effect.

19. The respondents submitted that the petitioners filed the Notice of Appeal on 27<sup>th</sup> January 2020, they filed this instant application on 5<sup>th</sup> March 2020, they requested for certified copies of proceedings for purposes of Appeal on 27<sup>th</sup> January 2020 and finally served them on 19<sup>th</sup> November 2020, a delay of 11months which is a clear ploy by the petitioners to deny the respondents fruits of justice.

20. That further, the respondents appreciate the backlog of cases in the court registry, but a delay of 11 months without any evidence of paying a deposit amount for the same and or even fixing a mention date to track progress is not only inordinate but indolence.

21. That the demeanor of the petitioners in pursuing proceedings, filing the intended appeal and most importantly little efforts in prosecuting this instant application can only be summed up by the maxim **equity aids the vigilant not those who slumber on their rights**.

They cited the case of Halal & Another V Thornton & Turpin Ltd, Catherine Mugure Njoroge & 2 Others V Lucy Njeri Muna and Victory Construction V BM (a minor suing through next friend one PMM)

#### ANALYSIS AND DETERMINATION

22. The issue which arises is whether stay of proceedings pending the intended appeal should be granted.

23. This application is primarily premised on order 42 Rule 6 (1) & (2) of the Civil Procedure Rules which provides;

*“No appeal or second appeal shall operate as a stay of execution or proceedings under the 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 and 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.”*

24. In application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. In the Case of Global Tours and Travels Ltd NRB W.U Cause No.43 of 2000 (UR) Ringera J held: -

*“As I understand the law whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice..... the sole question is whether it is in the interests of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether or not to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum maximization of judicial time and whether the application has been brought expeditiously. ” (Emphasis added)*

25. As regards delay, the applicants have submitted that at the time of filing this application, there was the outbreak of the dreaded Covid-19 pandemic and court activities were temporarily halted. The applicants further claim that upon resumption of limited court activities they did inquire on the progress of typed court proceedings and were informed that the computer which was used to type the said proceedings malfunctioned and the proceedings could not be proofread. The applicants further assert that to date they have not received copies of the said proceedings. They attached a copy of letter dated 27<sup>th</sup> January, 2020 marked as exhibit **DJB 1(a)** as evidence that they had requested for the said proceedings.

26. I take judicial notice of the fact that Covid-19 was declared not only a national pandemic but a global one. I am alive to the fact that there was temporary closure of Courts, and upon resumption of Court operations, there were challenges setting up and adjusting to the current online platforms. This Court delivered its Ruling on 21<sup>st</sup> January, 2020 and application before court was filed on 5<sup>th</sup> March, 2020. Given the circumstances, the application was made without unreasonable delay.

27. Platt, JSC in the case of Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989: observed.

*“Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency.”*

28. The applicant seeking stay of proceedings must also demonstrate that if stay is not granted then the intended appeal will be rendered nugatory. The applicants intend to challenge part of the ruling which directed parties to file their proposals on the mode of distribution.

29. In Christopher Ndolo Mutuku & Another Vs. CFC Stanbic Bank Ltd (2015) eKLR, the Court observed that;

*“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”*

30. Whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of the appellate Court.

31. Upon my perusal of the grounds of appeal raised in the Memorandum of Appeal, I find that the appeal is primarily against the decision of this court that directed parties to file their proposals on the mode of distribution of the estate.

32. I also note that if this application is not allowed, the parties herein will proceed to file their respective proposals as to the mode of distribution of the deceased's estate. It is the applicants' case that this court directed parties who were not party to the proceedings to file proposals for the distribution of the estate. If the proposed mode of distribution by the parties was to be adopted by this Court and the estate is distributed, then even if the intended appeal was to succeed, they will have nothing to share. The intended appeal will be rendered nugatory.

33. As regard security, given that the ruling appealed against is not one of monetary value, there is no need for security to be provided for.

34. I therefore find the application merited and is allowed as prayed. The applicant herein is granted 60 days to pursue the intended appeal, failure to which the stay orders herein shall stand vacated.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF APRIL, 2021.**

In the absence of:-

Mr. Murgor for the petitioners

Mr. Songok for the objector.

Gladys - Court Assistant