



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 34 of 2015

IN THE ESTATE OF PETER WALTER KOWALCZYK (DECEASED)

THOMAS KOWALCZYK.....APPLICANT

VERSUS

AGNES SILANTOI KOLII.....RESPONDENT

RULING

1. The deceased herein died intestate on 10th March 2013 leaving a will executed on 16th July, 2009 in which he appointed his wife Agnes Silantoi Kolii the respondent herein as the sole executrix. The deceased bequeathed all his estate to the respondent to the exclusion of his only son the applicant herein. On 12th February, 2015 the respondent petitioned for a grant of probate of written will. The same was gazetted on 31st December, 2015 and a grant of probate issued to the respondent (petitioner /executrix) on 30th June, 2016.
2. Subsequently, vide a summons for confirmation of a grant dated 7th March, 2017, the respondent applied for confirmation of the grant.
3. On 21st March 2019, the applicant filed a Chamber Summons dated 20th March, 2019 seeking reasonable provision for himself as the son to the deceased out of the deceased's net estate and also an order directing the respondent to provide statements of accounts in respect of the deceased's bank accounts held in Barclays bank, Equity Bank and pension scheme in Germany to enable the court value the deceased's estate. The application was duly challenged vide a preliminary objection dated 31st May, 2019. Upon canvassing the application, Lady Justice Thande delivered her ruling on 17th January, 2020 thus dismissing the application.
4. Dissatisfied with the said ruling, the applicant decided to challenge the same before the court of appeal. Meanwhile, he filed a Chamber Summons dated 28th February, 2020 seeking orders that there be a stay of proceedings in particular, hearing of summons for confirmation of grant pending hearing and determination of the application herein and the intended appeal.
5. The application is premised upon grounds stated on the face of it and averments contained in the affidavit in support sworn on 28th February, 2020 by the applicant. Principally, it is the applicant's case that he has a prima facie case and an arguable appeal which has high chances of success as can be discerned from the grounds of appeal. That the appeal will be rendered nugatory should the grant be confirmed before it is determined.
6. He further averred that, he will suffer irreparable loss which cannot be compensated in monetary terms and that on a balance of convenience, the interest of justice demands that there be stay of proceedings.
7. In response, the respondent filed a replying affidavit sworn on 10th February, 2020 in which she averred that the appeal is misconceived as the grant has never been confirmed hence no sufficient reason to infer any substantial loss likely to be suffered. That the applicant has not met the threshold for grant of stay orders.
8. When the matter came up for hearing, parties agreed to dispose the same through written submissions.

Applicant's submissions.

9. Through the firm of Khalid Salim, the applicant filed his submissions on 25th February, 2021. Mr Khalid reiterated the content in the affidavit in support of the application. He submitted that his client has preferred an appeal before the court of appeal which is yet to be determined. Counsel contended that, the question for determination before the court of appeal is whether the applicant is entitled to reasonable provision out of his late father's estate which if confirmed, will be rendered nugatory should the grant be confirmed and estate shared out before the appeal is disposed of.

10. In Mr Khalid's view, if the grant is confirmed before the appeal is determined, the respondent might dispose the assets to the prejudice of the applicant should the appeal succeed.

Respondent's submissions.

11. Mr Birir for the respondent filed his submissions on 9th March, 2021. Counsel submitted that the application has not satisfied the grounds for stay of execution as outlined in the case of **Kenya Power and Lighting Company Limited V Ester Wanjiru Wokabi (2014) e KLR** where the court emphasized on proof by a party that he stands a chance of suffering substantial loss if stay is not granted and that the application has been filed within reasonable time. Counsel further referred to the case of **Machira t/a Machira & Co. Advocates V East African Standard (2002) e KLR** where similar principles were expressed that stay cannot be based on speculation but on specific proof.

12. It was Birir's contention that the application is speculative as no application for confirmation has been filed which in any event if filed, the applicant shall be at liberty to object to the same.

13. On the aspect of proof of a prima facie case, counsel submitted that, the applicant did not file a draft memorandum of appeal although referred in the affidavit as an annexure. To the extent that no draft of memorandum of appeal was attached, Mr Birir was of the opinion that the applicant has failed to establish a prima facie and arguable case as enunciated in the case of **Global Tours and Travel Limited Nairobi winding up case No 43/2000.**

14. On the issue of security, Mr Birir submitted that the applicant has failed to furnish any security as required under Order 42 rule 6 of the Civil Procedure Rules. In support of this position, counsel referred to the holding in the case of **Congress Rental South Africa vs Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited and another (Garnishee) (2019) e KLR**.

15. Touching on whether the applicant has established any sufficient cause for grant of stay of execution orders, Mr Birir urged that none has been established to deny the respondent the fruits of her judgment. To support this position, counsel placed reliance in the case of **Machira t/a Machira & Co. Advocates (Supra).**

Determination.

16. I have considered the application herein, response by the respondent and rival submissions by both counsel. The only issue for determination is whether the applicant has met the threshold for stay of proceedings herein.

17. The applicant is seeking stay of proceedings pending hearing and determinant of the intended appeal. He attached a notice of appeal which under Order 42 Rule 6(4) of the CPRS means an appeal is deemed to have been filed. Although the applicant referred to annexure 4 as a draft memorandum of appeal, he failed to attach a copy. I believe the omission may have been a mistake which in any event does not supersede Order 42 Rule 6 (4) to the extent that the applicant has lodged an appeal by virtue of lodging a notice of appeal.

18. For the court to grant an order of stay, the appellant must satisfy the requirements set out under Order 42, Rule 6 of the Civil Procedure Rules inter alia; that he is likely to suffer substantial loss should the court decline to grant the orders; that the application has been filed timeously and, that necessary security has been deposited or for any other sufficient reason.

19. However, it is the adjudicating court that has the ultimate discretion to grant or not to grant the orders. This will however depend on the circumstances and merits of each case bearing in mind that the law is there to serve substantive justice. Therefore, it is incumbent upon the applicant to convince the court that he indeed deserves the orders. See **Kenya Commercial Bank Vs Benjoh Amalgamated Ltd and another Civil Appeal NAI Nairobi 50 of 2001**

20. While outlining guidelines for consideration in granting an order of stay of proceedings, the court in the case of **Global Tours and travel Ltd HCWC. No 43 of 2000** Ringera J, had this to say;

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings or a decree or order appealed from is a matter of Judicial discretion to be exercised in the interest of justice ...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In determining whether 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 the case, 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 utilization of judicial time and whether the application has been brought expeditiously...”

21. To echo the above holding, it was held in the case of **Kenya Wildlife Services V Jane Mutembi (2019) e KLR** that;

“stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

22. I have noted from the submissions of Mr Birir, that he has concentrated on challenging issuance of stay of execution order. In this case, the court in its ruling now appealed against never made any positive orders capable of execution. The applicant's application was dismissed and no execution can issue out of a dismissal.

23. The above notwithstanding, it is clear from the record that the orders being sought are reflected as, stay of proceedings. There is no doubt there is a grant already in place which can be filed for confirmation any time. The immediate consequence of confirmation is execution by distributing the estate. Part of the estate constitute funds in various accounts including pension in Germany. The question begging for an answer is that, what will happen if execution by transfer of funds or change of ownership of landed property takes place and the appeal succeeds thereby making provision for the applicant? Obviously, the orders will be rendered nugatory.

24. The essence of an appeal is to accord a party dissatisfied with an order of a junior court an opportunity to exhaust his right of hearing through the appellate system without undue hindrance. The subject of appeal is quite interesting in that a biological child was excluded from inheriting his father's estate due to what the father said was his son's misconduct and dishonesty meted against him. I find this to be an arguable ground of appeal on a prima facie basis but which need not necessarily succeed.

25. Although a court must guard against entertaining frivolous applications, it must also ensure that the orders of the appellate court are not rendered nugatory. See **Niazons Ltd V China Road and Bridge Corporation (Kenya) Ltd Nairobi Milimani. HCC No.126 of 1999** where Onyango Otieno J said;

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted”.

26. I do not find any prejudice in staying the proceedings to avoid a scenario where if the grant is confirmed and properties transferred to 3rd parties or funds utilized, it may be difficult, costly or cumbersome to recover them in case the appeal succeeds. It is therefore safer to secure the estate by holding confirmation proceedings to enable parties canvass the appeal. This can be done by either party fast tracking the same before the court of appeal.

27. As regards the question of time, the ruling was delivered on 17th January, 2020 and by 28th February, 2020 this application was filed translating to a period of about 40 days. I do not find this to be unreasonable.

28. Concerning the issue of depositing security, I do not find it necessary in the circumstances. There is no proof that the applicant is a person of straw who will not afford to pay costs for the suit should he lose. The subject of this case is a family dispute. Ordinarily, courts are cautious in imposing such stringent conditions in family related disputes. I therefore decline to make any order to that effect.

29. In a nutshell, I am satisfied that the application is merited and the same is allowed as prayed. The proceedings in this case are hereby stayed pending the outcome of the intended appeal. Parties shall move the court appropriately after the said outcome.

Dated, signed and delivered virtually at Mombasa this 23rd day of April, 2021

.....

J. N. ONYIEGO

JUDGE