



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 3202 OF 2014

IN THE MATTER OF THE ESTATE OF CELESTINE AGUTU OKELLO (DECEASED)

PETER WAMAE NGUGI.....APPLICANT

V E R S U S

VERONICA ACHIENG OCHIENG'.....1ST RESPONDENT

CHRISTINA ACHIENG OKELLO.....2ND RESPONDENT

RULING

1. The Appellant / Applicant herein **PETER WAMAE NGUGI** filed in Court the Notice of Motion dated **22nd December 2020** seeking the following orders:-

“1. SPENT

2. THAT there be a stay of execution of the orders/ giving effect of the decisions given vide the Judgment of 6th February 2020 and subsequently the orders vide the Ruling on the 24th September 2020 by Justice Ali-Aroni and all consequential orders be stayed pending the hearing and determination of the intended appeal to the Court of Appeal.

3. THAT leave be granted to the Applicant to file an appeal against the orders / the decision given vide the Judgment of 6th February 2020 and subsequently the orders vide the Ruling on the 24th September 2020 and all consequential orders to the Court of Appeal.

4. THAT time be enlarged for the Applicant to file his appeal out of time.

5. THAT costs of this application be cost in the cause.”

2. The Application was premised upon **Sections 47** of the **Law of Succession Act**, **Rule 73** of the **Probate and Administration Rules**, **Sections 3 and 7** of the **Appellate Jurisdiction Act**, **Article 164** of the **Constitution of Kenya**, **Rule 6** of **Order 42** of the **Civil Procedure Rules** and all other enabling provisions of the Law, and was supported by the Affidavit of even dates sworn by the Applicant, and **TRACEY WACHIRA** and Advocate of the High Court of Kenya as well as the Affidavit sworn by **JOHN MWARIRI**, Counsel for the Applicant.

3. **VERONICA ACHIENG OCHIENG** (the **1st** Respondent) and **CHRISTINA ACHIENG OKELLO** (the **2nd** Respondent) both filed Grounds of Opposition dated **23rd February 2021**. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated **28th April 2021**, whilst the Respondents relied upon their submissions dated **29th April 2021**.

BACKGROUND

4. This Succession Cause revolves around the estate of **CHRISTINE AGUTU AKELLO** (hereinafter ‘**the Deceased**’) who died testate in the **Karen** area of **Nairobi County** on **3rd October 2014**. The Deceased was survived by her second husband **PETER WAMAE NGUGI** (the Applicant herein) as well as her **four (4)** children from her first marriage (the Deceased’s first husband **Professor Haggai Okello** having pre-deceased her in the year **2004**) namely:-

i. Michael Odhiambo Okello

ii. Christina Achieng Okello

iii. Joseph Andrew Owino Okello

iv. Peter Clement Omoh Okello

5. The Applicant upon marrying the Deceased moved into her **Karen** residence together with his son whom the Deceased cared and provided for.

6. Following the demise of the Deceased the 1st and 2nd Respondents were appointed as the Executors of her Will. By the terms of that Will dated **21st October 2014** the Deceased bequeathed all her properties to her **four (4)** biological children equally save for **Kshs. 50,000/-** which was to go to her step-son and a lorry Reg. No. **KAQ 911J** which was bequeathed to her second husband.

7. The Court duly granted Letters of Administration to the two Respondents on **7th April 2015**. However on **5th July 2017** the Applicant moved the Court to have the said Grant annulled on grounds that the same was obtained fraudulently by concealment of material facts, that the Will was a forgery, that no reasonable provision had been made for the Applicant and his son and that the Respondents had failed to disclose all the beneficiaries of the estate.

8. The Summons for annulment of the Grant was heard by the **Hon. Lady Justice Ali-Aroni** who on **6th February 2020** delivered a Judgment in which she found that it was not efficacious to annul the entire Will but found that that reasonable provision ought to be made for the Applicant. The **Hon. Judge** then directed that certain properties be valued to enable her make final orders.

9. Thereafter on **24th September 2020** the Court made a Ruling in which it was directed that the following properties would go to the Applicant:-

a. A lorry

b. Property known as L.R. No. Ngong/Ngong/55271 House No. 3 Kiserian

c. Motor vehicle make Mercedes Registration No. KAU 118P.

The Court further directed that in the event that the property No. **Ngong/Ngong/55271** was still on loan, the Executors were to settle that loan before transferring the property to the Applicant.

10. The Applicant not being satisfied by the decision of **Hon. Lady Justice Ali-Aroni** filed this present application indicating his intention to file an Appeal against the same.

11. As indicated earlier the Respondents opposed the Application vide the Grounds of Opposition dated **23rd February 2021** which raised the following grounds:-

1. That the Applicant is guilty of inordinate delay and has not provided sufficient reasons for the delay in filing the application or stay of execution and appeal.

2. That the explanation advanced by the Applicant for the inordinate delay is not plausible, and the reasons for the delay have not been satisfactorily explained to this Court.

3. That the Applicant has not filed an appeal and therefore the application is bad in law and does not disclose any substantial grounds for this Honourable Court to exercise its discretion in his favour.

4. That the Applicant has not demonstrated any irreparable/ substantial loss he will suffer or the prejudice that will be occasioned if the stay orders are not granted.

5. That the application does not satisfy the legal conditions for a grant of stay pending appeal having not provided any security for costs.

6. The Applicant has not made a case that deserves this Honourable Court to exercise its discretionary powers and grant extension of time.

7. That the application is bad in law, lacks merit and does not disclose any substantial grounds for this Honourable Court to exercise its discretion in his favour.

8. That the draft Memorandum of Appeal annexed to the application has no chances of success and is only calculated to delay the conclusion of this matter which has been in Court for six years, and the distribution of the estate of the Deceased according to the wishes of the Deceased and subsequently the Judgment and Ruling of this Court.

9. That it is in the interest of justice and the overriding objective of this Honourable Court that the application is dismissed.

10. That the application is incompetent, misconceived, misplaced, an abuse of the Court process and ought to be dismissed with costs to the Respondent.

ANALYSIS AND DETERMINATION

12. I have carefully considered the present Application the various Affidavits in Support, the Respondents Grounds of Opposition as well as the written submissions filed by both parties. In my view the following are the two issues that emerge for determination:-

i. Whether orders of stay of Execution should issue in respect of the Judgment delivered on 6th February 2020 and the Ruling of 24th September 2020.

ii. Whether the Applicant should be granted leave to file his Appeal out of time.

i. Whether Orders of Stay should issue

13. The circumstances upon which an order for stay of execution may be granted are set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** as follows:-

“No order for stay of execution 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 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.”

14. The Applicant submits that in the event a stay is not granted he is likely to suffer substantial loss. That if no stay is granted and the properties are distributed in accordance with the Ruling delivered on **24th September 2020**, he will be left with no source of livelihood. The Applicants position is that the other property provided to him being **L.R. No. Ngong/Ngong/5527/House No. K03** was provided to him for use as shelter and that he requires another property as a source of income. On their part the Respondents submit that the Applicant has failed to demonstrate any irreparable / substantial loss that he is likely to suffer if the stay orders sought are not granted.

15. In the case of **JAMES WANGALWA & ANOTHER –VS- AGNES NALIAKA CHESETO [2012]eKLR** the Court held as follows:-

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silversten N. Chesoni [2002] IKLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:-

“... 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.” [own emphasis]

16. I am not convinced that the **only** way the Applicant can earn a living is through ownership of a property. There are many in this country who even without a single property attached to their names still earn a decent living and are able to provide for themselves and their families. The Applicant has failed to establish the nature of irreparable harm he is likely to suffer if the stay orders are not granted. Furthermore the Applicant made no offer of any security for the stay.

17. The Applicants main grievance is that he was not given sufficient assets out of the estate of the Deceased. Specifically the Applicant is of the opinion that another of the estate properties being Title Number **Nairobi/Block 93/965 Plainsview Estate Phase 5 in South B, Nairobi** ought to have been allocated to him. Whether this property ought to have gone to the Applicant or not is a matter for Appeal. However the Applicant has not demonstrated what nature of substantial loss he stands to suffer if no stay is granted. The property he is claiming is a tangible asset whose value is quantifiable. The property does not belong to the Applicant thus he is not currently being denied of its use and / or occupation.

18. All in all I find that the prayers for Stay of Execution is not merited and I decline to grant prayer (2) of the Notice of Motion dated **22nd December 2020**.

ii. Leave to Appeal out of time

19. In deciding whether or not to grant extension of time the factors the Court is required to consider are:-

- **The period of delay**
- **The reason for the delay**
- **The arguability of the Appeal**
- **What prejudice is likely to be suffered by the Respondent if the extension of time is grant.**

20. The Applicant concedes that he failed to file an appeal within the time specified by law. The Judgment was delivered on **6th February 2020** whilst the Ruling was delivered on **24th September 2020**. No action was taken by the Applicant until **22nd December** almost **three (3)** months **after** the Ruling he now seeks to challenge by way of an Appeal was delivered.

21. The Applicant attributes the delay to the fact that his Advocate mis-communicated to him the decision which had been made to the Court vide the Ruling of **24th September 2020**. That he did not himself log on to the Virtual Platform because he does not have a Smartphone and he is not **'tech savvy'**.

22. The Applicant averred that what his Advocate told him was that the court had given him the **Kiserian Property**, for shelter the **South 'B'** property as well as the **Mercedes motor vehicle** to move around in. **Mr. John Mwariri**, the Applicants Advocate in his Affidavit dated **22nd December 2020** averred that on the Ruling date he assigned a volunteer Advocate **Ms Tracy Wachira** to attend Court and receive the Ruling on his behalf as he was engaged before the Court in **Murang'a**. That the said **Tracy Wachira** later informed him that the Court had assigned to his client (the Applicant herein) the **Mercedes motor vehicle**; the **Kiserian** property **as well as** the property with a loan to be cleared (which he took to mean the **South B** property).

23. The Advocate conveyed this information to his client who though aggrieved by the fact that the entire Will had not been nullified decided that he could live with the provision made to him by the Court. It was only later that the Respondents' Advocate informed **Mr. Mwariri** that infact the Ruling of the court **did not** give the **South B** property to the Applicant. It is then that the Applicant instructed his Advocate to file an Appeal.

24. By the Supporting Affidavit dated **22nd December 2020**, **Ms Tracy Wachira** a volunteer Advocate with **Kituo Cha Sheria** confirmed that she attended Court virtually on **24th September 2020** and received the Ruling on behalf of **Mr. Mwariri**. That from what she heard the Court had made provision to the Applicant of the following:-

- a. **Motor Vehicle Mercedes Registration No. KAU 118P**
- b. **Property L.R. No. Ngong/Ngong/5527/ House No. KO3 Kiserian**
- c. **The property with the loan to be cleared.**

25. **Ms. Wachira** then conveyed this information to the Advocate who had requested her to hold his brief. The said **Tracy Wachira** averred that she relayed to the Advocate what she believed that she had genuinely heard and prays that the Applicant should not be denied his right to Appeal on account of her error / mistake.

26. It is clear to me that the failure of the Applicant to file an Appeal in time was based on the misinformation regarding what the decision of the Court was. As a Court I take judicial notice of the fact that since the **Covid Pandemic** began in **March 2020** Courts in Kenya have largely migrated to online / virtual hearings. However technology does have its own peculiar challenges. It is a fact that many a time parties are unable to see or hear each other clearly on the online platform. It is not entirely unfathomable that miscommunication may occur. Further the fact that no visitors have been allowed access to the Court Registry during the **Covid Pandemic** means that the Applicants Advocate could not even visit the Registry to confirm the contents of the Ruling.

27. In the case of **STANLEY KAHORO MWANGI & 2 OTHERS -VS- KANYAMWI TRADING COMPANY LIMITED [2015]eKLR** the principle upon which a Court may favourably exercise its discretion to grant leave to Appeal out of time were stated as follows:

"The principles guiding the Court on an application or extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the power of the Court in deciding such an application are discretionary and unfettered. It is, therefore, upon an Applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

....

It is upon the Applicant to place sufficient material before the Court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the Applicant with those of the Respondent. This was well stated in the case M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:-

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. [own emphasis]

28. I find that the Applicant has given a satisfactory explanation for the delay in filing an Appeal which explanation is in my view reasonable, given that the challenges often faced by parties in virtual hearings.

29. The Applicant’s intended Appeal is grounded on the fact that as a spouse he was not adequately for. In my view this is an arguable point of Appeal. Further I find that the Respondents as Executors of the estate will not suffer any prejudice if the Applicant is granted leave to Appeal.

30. Therefore I do grant to the Applicant leave to Appeal out of time. Finally the Court makes the following orders:-

i. Prayers (2) seeking Stay of Execution of the Judgment of 6th February 2020 and the Ruling of 24th September 2020 and all consequential orders is disallowed.

ii. Leave to file appeal against the Judgment of 6th February 2020 and the Ruling of 24th September 2020 out of time is granted.

iii. The period to file said Appeal is enlarged by 21 days from the date of this Ruling.

iv. Since this is a family matter I make no orders on costs.

DATED IN NAIROBI THIS 25TH DAY OF JUNE, 2021

.....

MAUREEN A. ODERO

JUDGE