REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 889 OF 2015

IN THE MATTER OF THE ESTATE OF BEATRICE WAIRIMU NGARA (DECEASED)

JOHN GIKONYO NGARA.....PETITIONER/APPLICANT

VERSUS

MARY WAMBUI NJAGI.....PROTESTOR/RESPONDENT

RULING

Brief facts

1. The application dated 15th February 2021 brought under **Rules 49 and 63 of the Probate and Administration Rules and Order 42 Rule 6 of the Civil Procedure Rules** seeks for orders of stay of any further proceedings and hearing of the summons general dated 17th June 2020 and stay of execution of decree pursuant to the ruling delivered on 28th January 2020 this cause pending the hearing and determination of the present application and the intending appeal filed herein.

2. In opposition of the said application, the respondent's advocate filed a Replying Affidavit dated 31st March 2021 and filed in court on 8th April 2021.

The Applicant's Case

3. The applicant depones that he was dissatisfied with the judgement delivered on 28/1/2020 and has filed his Notice of Appeal dated 6th February 2020 with a view of appealing against the whole judgement. He states that he applied for typed proceedings on 23rd January 2020.

4. In his draft grounds of appeal, the applicant states that he has raised meritious and weighty issues for determination by the court and if stay is not granted, it shall render the appeal nugatory. On the same breath there is a pending summons dated 17th June 2020 seeking review of the judgment delivered and the applicant is apprehensive that adverse orders may be rendered by the court in respect of the review which may prejudice the appeal.

5. The applicant contends relying on advice by of advocate that the respondent ought to have filed a cross appeal for purposes of canvassing the issues raised in the said summons general. Further, no prejudice shall be occasioned to the respondent as he is in occupation of one acre of the suit land. In any event, the pending application for review is determined, the appeal will be rendered nugatory.

6. The applicant further contends that since the purpose of stay of execution pending appeal is to preserve the subject matter, L.R No. THIEGENGE/KARIA773 & 779, if in the event that stay is not granted, the applicant stands to suffer substantial loss as he will not be in a position to get his rightful share as one of the beneficiaries of the estate of the deceased.

The Respondent's Case

7. It is the respondent's case that the application dated 17/6/2020 was filed to correct a clear arithmetical error and does not change the substance of the judgment. As such, an appeal based on an arithmetical error is clearly an abuse of the court process and a waste of judicial time. In any event, the application dated 17/6/2020 should be heard on its own merits just like the current application filed by the applicant.

8. The respondent states that the grounds of appeal enshrined in the draft memorandum of appeal cannot be rendered nugatory with the court allowing the application for review on the obvious arithmetical error. As such, the respondent states that this application lacks merit and ought to be dismissed.

The Applicant's Submissions

9. The applicant reiterates what he has averred in his affidavit and further submits that the delay in filing the current application is due to onset of the Covid 19 pandemic as he is above the age of 70 years. He says he has suffered economic hardship during the period of the pandemic. The applicant further contends that he is ready to abide by any conditions set by this court for the grant of orders of stay.

10. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules** and submits that he has satisfied the conditions set out for stay pending appeal. Further, the applicant prays that the court exercises its discretion and relies on the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417.**

11. The applicant thus submits that his application has merit and the same ought to be allowed.

The Respondent's Submissions

12. The respondent submits that the protestor Robert Ngara Gikonyo was bequeathed 2.5 acres out of Land Parcel No. THEGENGE/KARIA/773 & 779 in the judgement delivered on 13/1/2020. As such, the respondent filed an application for review dated 17/6/2020 seeking correction of the said arithmetical error. The arithmetic error arises from the fact that the total acreage of the land is 7.4 acres thus the petitioner ought to get 2.9acres and not 3.9 acres as stated by the court. The respondent relies on the cases of **Newmont Yandal Operations Pty vs The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411 and Lakhamshi Brothers Ltd vs Raja & Sons [1966] EA 313** to submit that this court is clothed with the jurisdiction to correct arithmetical errors pursuant to statutory law.

13. The respondent submits that the applicant by filing his application cannot oust the jurisdiction of the court to correct errors in judgements and rulings. Thus allowing the respondent's application dated 17/6/2020 would not in any way embarrass the intended appeal on its merits.

14. The respondent submits that on the application seeking stay, is an afterthought and should be dismissed. The application ought to have been made timeously and without delay. The court rendered its judgment on 28/1/2020 and the application was filed on 15th February 2021 which is a whole year after the judgment. The respondent adds that in the duration, he had already served the applicant with the application seeking review.

15. The respondent further contends that the Notice of Appeal was filed on 12th February 2020 and the stipulated time had expired on 10th February 2020. As such, there is no valid appeal that exists. The respondent adds that he is aware that this court may not have the jurisdiction to decide on the proprietary of the notice of appeal but it has been used as an anchorage of the current application for review. Further the respondent reiterates that the court's jurisdiction to correct arithmetical errors does not in any way infringe on the right of appeal by the applicant and thus cannot be used to found a ground for stay. As such, the respondent prays that the court allows its application dated 17/6/2020 and dismiss the applicant's application dated 15/2/2021.

Issues for determination

16. After careful analysis, I identify the issues for determination is whether the applicant has satisfied the requirements of the law to justify granting of orders for stay pending appeal.

The Law

Whether the applicant has met the perquisite for grant of stay of proceedings particularly hearing of application dated 17/6/2020.

17. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by **Ringera J in Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000:-**

> **"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 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 so, on what terms it should be granted. In deciding 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 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 utilization of judicial time and whether the application has been brought expeditiously."**

18. The applicant states that the application for review dated 17/6/2020 ought to be stayed because adverse orders may be granted in the said application which may render the appeal nugatory. The respondent on the other hand contends that the jurisdiction of a court to review a judgment is provided in the statute and as such the application for review will not in any way embarrass the appeal on its merits.

19. **Order 45 of the Civil Procedure Code** sets out the parameters for an application for review as follows:-

> **Rule 1 (1) Any person considering himself aggrieved:-**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important**

matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or order made or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.

20. Thus from the above provision it is clear that one may apply for a review on an error apparent on the face of the record. Notably, the record must speak for itself or by itself without much explanation. This principle was enunciated by the Court of Appeal in **National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996 (UR)** where it held:-

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. "

21. The applicant argues that there is an arithmetical error apparent on the face of the record. The Honourable Judge stated that the total acreage is 7.4 acres to be shared by the three siblings. Each of the two daughters of the deceased was bequeathed one acre, Robert Ngara Gikonyo was allocated 2.5 acres, which leaves 2.9 acres for the applicant and not 3.9 acres as noted by the judge. It is thus very clear that this arithmetical error falls within the purview of an error on the face of the record that the court can correct.

22. Pursuant to the above provisions it is also very clear an applicant can apply for a review during the pendency of an appeal as long as the grounds of appeal are not common to that of the applicant seeking the review. As such, the applicant for review does not in any way embarrass the appeal or the application for stay pending appeal.

23. I thus find that since the respondent has demonstrated that there was an error that this court requires to correct, it would be a waste of judicial time to stay the application seeking review. This application in my view ought to be heard interparties. It is noted that the applicant herein has not filed a response to the review application.

Whether the applicant has met the perquisite for grant of stay of execution pending appeal.

24. The principles upon which the court may stay the execution of orders appealed from are well settled. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

"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 to 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 orders set aside.

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 1st 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.

*25. Thus under **Order 42 Rule 6(2) of the Civil Procedure Rules**, an applicant should satisfy the court that:*

1. *Substantial loss may result to him unless the order is made;*

2. *That the application has been made without unreasonable delay; and*

3. *The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.*

26. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. **Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.**

Substantial loss

27. *Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of* **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages….It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…."

The honourable judge continued to observe that:-

"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.

Earlier on, Hancox JA in his ruling observed that:-

"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would…render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

"I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. "

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

28. The applicant herein states that he will suffer substantial loss if the orders sought are not granted for the reason that he is likely to lose his inheritance and that his appeal is likely to be rendered nugatory. Upon perusal of the judgment delivered on 28th January, 2020 and of the application seeking to review the same, it is clear that the respondent is not seeking to take away the inheritance of the applicant which the court gave but to correct an error in the judgment. If the said error is corrected, the appeal will not be rendered nugatory but by judgment sought to be appealed against will be corrected to reflect the intention of the court in calculation of arithmetic in way of the acreage that each party is entitled to. Once this is done, the applicant can still file his appeal depending on whether his application for stay will be successful. The correction will serve the sole purpose of saving precious judicial time as opposed to an appeal based on erroneous figures of acreage in the judgment.

29. Having considered the above facts, I find that the applicant has not demonstrated that he will suffer any substantial loss.

The application has been made without unreasonable delay.

30. The issue of the Covid-19 pandemic affected the whole country and the whole world at large. The courts were closed for just about three weeks in March, 2020 and re-opened with instructions that electronic filing of court pleadings replace the manual filing system to prevent spread of the pandemic. If the applicant was serious in filing an appeal and seeking stay, he would have done it at least by end of April, 2020. The effect of the pandemic on courts was that operations were down scaled but not shut which affected mostly cases requiring adducing viva voce evidence. Filing of pleadings was not affected except for the few weeks in March, 2020.

31. The applicant pleads that he is 70 years old and suffered economic hardship. In my view, many Kenyans especially in the private sector suffered economic hardship due to shutting down of businesses. However, the applicant has not explained how he was affected economically to the extent of failing to file this application for stay.

32. Judgment herein was delivered on 28th January, 2020 and the applicant filed the application for stay of execution and subsequent proceedings on 15th February, 2021. Notably, the applicant has not annexed his Memorandum of Appeal if any. This application has been

brought a whole year after delivery of the judgment. The applicant explains that the delay was due to the Covid 19 pandemic and being above the age of 70 years he was suffering economic hardship.

33. I reach a conclusion that the over one (1) year delay is inordinate and has not been explained satisfactorily to justify the exercise of the discretion of this court.

Security of costs.

34. The applicant is required to satisfy the condition of security of costs. In the persuasive case **of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

> **"The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.**
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> **Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal….**
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> **Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."**

35. Evidently, the issue of security is discretionary and it is upon the court to determine the same in a case where no offer has been made by the applicant. The applicant only intimated that he is ready to abide by the conditions set out by the court but did not offer any security. This being a succession cause, the court has discretion to impose conditions for security with a view of preventing prolonged delay of appeals that may be likely to cause hardships to other beneficiaries in the event that the application is successful.

Conclusion

36. Based on the reasons discussed above I find that this application dated 15th February 2021 lacks merit.

37. The application is hereby dismissed with costs.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

Ruling delivered though video link this 26th day of August, 2021.