



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1253 OF 2012

IN THE MATTER OF THE ESTATE OF KANYARI MATONGU (DECEASED)

GITHENYA MATONGU.....1ST APPLICANT

JANE NDATA MATONGU.....2ND APPLICANT

VERSUS

WILSON MUTHOMI KANYARI.....1ST RESPONDENT

DAVID GITONGA KANYARI.....2ND RESPONDENT

EVANSON MATONGU KANYARI.....3RD RESPONDENT

RICHARD GITHENYA KANYARI.....4TH RESPONDENT

RULING

Brief facts

1. The 1st applicant's application dated 25th November 2019 brought under **Section 47 of the Law of Succession Act and Rule 38, 59 and 75 of the Probate and Administration Rules** seeks for orders of stay of execution and stay of any further proceedings pending the hearing and determination of the appeal pending in the Court of Appeal.

2. In opposition of the said application, the respondents filed a Replying Affidavit dated 11th March 2020.

The 1st Applicant's Case

3. This application seems to have been prompted by the respondents' application dated 7th November 2019 seeking that this court issues orders that 1st applicant do sign all the necessary forms and land control applications to facilitate transmission of the estate. In the alternative, the respondents request the court to authorize the Deputy Registrar to sign the said documents and applications to effect registration. This application is yet to be heard in that preference was given to tis application for stay.

4. It is the 1st applicant's case that judgement was delivered on 9/5/2019 and being dissatisfied with the same filed a Notice of Appeal dated 17th May 2019. Additionally, the 1st applicant requested for typed and certified proceedings on 16/5/2019 to enable him prepare his Record of Appeal.

5. The 1st applicant contends that his appeal has high chances of success and will be rendered nugatory if transfer of the land and sub-division in terms of the grant is carried out because the respondents are likely to dispose of their respective portions. Further if distribution is done and transfers are made, the 1st applicant will be disinherited and the 2nd applicant and her children who have lived on the land for forty years will be rendered destitutes. The bone of contention in the appeal is the 1st applicant's entitlement in the estate and whether the 2nd applicant is a dependant by virtue of Section 29 of the Law of Succession Act. These issues were determined in the judgement of Matheka J, delivered on 9th May 2019 against the applicants.

The Respondents' Case

6. It is the respondents' case that the application herein is fatally and incurably defective as the law of succession does not provide for

applications by way of notice of motion.

7. The respondents contend that the 1st applicant has not filed the application timeously as judgment was delivered on 9th May 2019. The application is meant to thwart the distribution of the estate while the 1st applicant enjoys the status quo. Further, the applicant who has been allocated the biggest share of the estate wants to continue enjoying the status quo to the detriment of the other beneficiaries.

8. The respondents further contend that the right of appeal must be balanced against the right of the respondents to enjoy the fruits of their judgment and there must be just cause for depriving the respondents of that right.

9. According to the 1st respondent, the 2nd applicant was given 2 acres in Narumoru and thus will not be rendered destitute. As such the 1st respondent states that the appeal has no chances of success and the application for stay ought to be dismissed.

Issues for determination

10. After careful analysis, in my view the main issue for determination is whether the applicant has met the prerequisite for grant of stay of execution pending appeal and of any further proceedings in this cause.

The Law

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

11. 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.**

12. 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.

13. 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

14. 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 learned 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.”

15. From the foregoing, it is clear that the onus of proving substantial loss rests upon and must be discharged accordingly by the applicant. It is not enough to state that loss is likely to be suffered, but that loss will be suffered. In this case, the 1st applicant states that he will suffer substantial loss and that the 2nd applicant will be disinherited and rendered destitute.

16. It is further stated that the 2nd applicant has lived on the land with her children for forty years and that she was a dependant of the deceased. It is further stated that the appeal raises substantial issues of law relating entitlement to dependency. In the event that the orders sought are not granted, the applicants are likely to suffer substantial loss.

17. The Notice of Appeal attached was filed on 21/5/2019. However, no Memorandum of Appeal has been filed to date and this delay has not been explained. Anyhow, this court is aware that this is an inheritance matter where some parties were dissatisfied with the judgment of this court. If the grant is executed, the applicants may not be in a position to exercise their rights of appeal.

18. Consequently, I am of the view that because of the nature of the matter and the deposition of the applicants that they may be disinherited, substantial loss has been demonstrated.

Has the application been made without delay.

19. The judgement herein was delivered on 9/5/2019 and the applicant filed the application for stay of execution and subsequent proceedings on 25/11/2019 which was over six (6) months following delivery. Notably, the applicant has not explained why he filed the application after 6 months or what caused the delay. In my view I find that the delay of six months which has not been explained is inordinate and unreasonable. The applicant has failed to discharge the obligation of offering an explanation as required by law. If the application is allowed based on other reasons, the applicant may be penalised by way of costs.

Security of costs.

20. The applicant ought to satisfy the condition of security. In the persuasive decision 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.

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....

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.”

21. Evidently, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Though the parties herein did not address the requirement to provide security or make any offer to that effect. I am of the view that security is necessary as a commitment by the applicants to fast track the appeal and prevent prolonged delay in the execution of the judgment in the event that the appeal is not successful. The court will address this issue in its final orders.

Whether the applicant has met the prerequisite for grant of stay of proceedings pending appeal.

22. 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 justicethe 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.”

23. Similarly the threshold for stay of proceedings has been illuminated in the passages in **Halsbury’s Law of England, 4th Edition, Vol. 37 page 330 and 332** that:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

24. The court in an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. /This has been demonstrated in the case of **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (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...”

25. It is important to note that this succession cause has been finalised upon delivery of the judgement. The only proceedings that may be affected by the orders sought are those related to execution. There is such an application pending dated 7/11/2019 seeking for orders of execution of the transmission documents by the Deputy Registrar. I have already stated that if execution was to issue at this stage, then the appeal may be rendered nugatory.

26. In my considered view, I find that the applicants have shown sufficient cause for grant of orders for stay of any further proceedings in this cause.

27. I reach the conclusion that this application has merit and it is hereby allowed on condition that the applicants do deposit in court Kshs. 300,000/- as security within 30 days from the date of this ruling. In default, these orders will be automatically vacated.

28. The respondents will have the costs of this application.

29. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 26TH DAY OF AUGUST, 2021.