

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 9 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE MOSES CHESONDIN YATOR – DECEASED

SAMUEL KIPKOSGEI YATOR1ST PETITIONER/RESPONDENT

ALICE ADHIAMBO YATOR.....2ND PETITIONER/RESPONDENT

VERSUS

ESTHER NANDUTU 1ST OBJECTOR/RESPONDENT

EDWIN KIPCHUMBA CHESONDIN.....2ND OBJECTOR/APPLICANT

ESTHER NJERI MUNGAI3RD OBJECTOR/RESPONDENT

RULING

Moses Chesondin Yator, the deceased to whose estate these proceedings relate died intestate. Since his death, several applications have been filed in this succession cause. Firstly, to determine who the beneficiaries to the estate of the deceased are, and secondly to determine the mode of distribution of the estate to the recognized beneficiaries. In one of the applications, my predecessor, Chemitei, J ruled that Esther Nandutu (Applicant) was not a beneficiary. The said Esther Nandutu was aggrieved by the said finding of the court. She wishes to seek a second opinion from the Court of Appeal. Pending the hearing and determination of the intended appeal (she has already lodged a Notice of Appeal), the Applicant wishes to have the proceedings herein stayed.

The Applicant is apprehensive that if the proceedings herein are not stayed, she will lose out in the event that the Court of Appeal agrees with her position that she is a beneficiary. She urged the court to allow the application so as not to render the intended appeal nugatory. She pleaded with the court to consider the broader interest of justice and grant the application. In essence, the Applicant is of the view that her exclusion as the beneficiary to the estate of the deceased was not justified. She was hopeful that the Court of Appeal would find in her favour and reinstate her as a beneficiary.

The Application is opposed by the other beneficiaries. They urged the court not to find merit with the application, because, to do so would delay and frustrate distribution of the properties that compromise the estate of the deceased to the recognized beneficiaries. They were of the view that the intended appeal has no chances of success because the Applicant is still married to another man (one Mr. Shiundu) and could not therefore purport to have entered into a legally recognizable relationship with the deceased prior to his death. They urge the court to dismiss the application as it would result in the beneficiaries suffering from the delay in the administration of the estate of the deceased.

During the hearing of the application this court hear oral rival submissions made by Mr. Wanyonyi for the Applicant, Mr. Ambutsi, Ms Kibaru and Ms Khaoya for the Respondents. This court has carefully considered the said submissions. It has also had the benefit of perusing the pleadings filed by the parties herein in support or in opposition to the Application. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, for an Applicant succeed in an application either seeking to stay proceedings or stay execution pending the hearing of an intended appeal, such Applicant must establish that she will suffer substantial loss if the order is not granted. Further, the application must be filed without undue delay and finally the Applicant may must provide security that ultimately be binding upon her should the order of stay be granted.

In the present application, the Applicant is undoubtedly entitled to exercise her right of appeal to a higher court. That's her constitutional right. However, it is trite that this court cannot automatically grant an order that seeks to stay further proceedings until and unless the Applicant establishes that she will suffer substantial loss. In the present case the Applicant submits that if the order she craves for is not granted, then she will suffer substantial loss because the properties that comprise the estate of the deceased will have been distributed to other beneficiaries. The court agrees with the Applicant that the possibility that there would be nothing left for redistribution in the event that the appeal succeeds exists. However, this court is of the view that the fears expressed by the Applicant are not within the realm of eventuality. A substantial part of the properties that comprise the estate of the deceased is real estate. If the Applicant were to be successful in her appeal, the said properties will still be in existence. In the premises therefore, this court is not persuaded by the thrust of the Applicants' application that she will suffer substantial loss in the event that the order staying proceedings herein is not granted.

The main issue that influenced the court in determining the application is the likely prejudice that the other beneficiaries will suffer should the order craved for by the Applicant be granted. There are nine recognized beneficiaries and one disputed beneficiary. Some of the recognized beneficiaries are still attending school. They depend on the estate of the deceased for their education and upkeep. If this court were to grant the order staying further proceedings in this case, there will be prejudice which will be suffered by the said beneficiaries which is not comparable to any substantial loss that may be suffered by the Applicant if the order staying proceedings is granted.

In the premises therefore, this court find the Applicant's application to be without merit. The same is dismissed but with no orders as to

costs. It is so ordered.

DATED AT KITALE THIS 22ND DAY OF OCTOBER 2021.

L. KIMARU

JUDGE