



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. E035 OF 2021

PETER KOBIA ROMANO...APPELLANT/APPLICANT

VERSUS

PATRICK KAMAU ROMANO.....1ST RESPONDENT

PAUL NGARI NJERU.....2ND RESPONDENT

RULING

The Application

1. Before the Court is an application dated 1st July 2021 seeking stay of execution of the Ruling delivered on 29th April 2021 and any other consequential order including the confirmed grant issued on 6th May 2021; and leave to appeal out of time against the Ruling of 29th April 2021 delivered by Hon. Gesora (CM) in Maua Succession Cause No. 44 of 2019.

Applicant's Case

2. The application is premised on the grounds that by the Ruling delivered on 29th April 2021, the lower Court distributed the estate of the deceased to all other beneficiaries to the Applicant's exclusion. That the 1st Respondent/Administrator is in the process of transmitting the estate to himself and other parties to the Applicant's exclusion despite him being a son to the deceased and a brother to the 1st Respondent. That the Applicant stands to be disinherited and evicted from his father's estate. That the 1st Respondent and other beneficiaries are threatening violence in order to gain occupation of the suit property Land Parcel Number Kirindine 'A'/354. That the Applicant stands to suffer immeasurable loss and damage. That the Applicant's appeal has high chances of success. That there has been no inordinate delay in prosecuting the Appeal.

3. In his further affidavit sworn on 20th September 2021, the Applicant urges that the 1st Respondent has since processed titles to the suit property and has partially executed the grant. That on 9th September 2021, after registration of titles, the 1st Respondent instituted a suit against the 2nd Respondent and other parties at the Environment and Land Court in Maua seeking to evict them from the land. That the orders sought in his application are of utmost urgency to ensure that the intended appeal is not rendered nugatory.

Respondent's Case

4. The application is opposed by the 1st Respondent's replying affidavit sworn on 13th July 2021. The 1st Respondent's urges that the Application has no merit and is a means to delay the subdivision of the deceased's estate as per the confirmed grant. That the lower Court delivered its Ruling after taking evidence including the objections raised in the case and that the Applicant was found to have violated Section 45 of the Law of Succession Act by engaging in the sale of a portion of the deceased's estate without a confirmed grant and without the consent of other beneficiaries. That the lower Court noted that the Applicant's conduct was intermeddling and was tantamount to a crime and as such, the Applicant is not entitled to the benefit of inheriting as he had already sold his interest to the 2nd Respondent. That the 2nd Respondent should seek redress against the Applicant for the void and unenforceable sale agreement. That the objections by both the Applicant and the 2nd Respondent were dismissed for lack of merit. That the Applicant has not proven that he will suffer any substantial loss in case stay is not granted as he had already illegally sold his interest in the estate and has been enjoying the proceeds from the void sale.

Determination

Leave to Appeal out of time

5. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the decision sought to be challenged. Extension of time is a matter of discretion and the law gives this Court jurisdiction to extend time upon application. The law allows for such applications to be made even when the time for doing the act in question has already lapsed. Section 79 G of the Civil Procedure Act provides as follows: -

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

See also Order 50, Rule 6 of the Civil Procedure Rules, Section 95 of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act.

6. The test for determining whether or not to grant leave to appeal out of time involves an analysis on a number of key issues. These include the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to be suffered by the Respondent if the application is granted.

7. On the length of the delay, the Ruling sought to be challenged was delivered on 29th April 2021. The 30 days' window period within which the Applicant was to file a memorandum of appeal lapsed on 29th May 2021. The instant application was filed on 1st July 2021, approximately one month later. A one month delay period cannot be said to be inordinate. The Court however notes that the Applicant has not advanced any reasons for the delay.

8. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 8 grounds of appeal which urge a case for his inclusion as a beneficiary to the deceased's estate. There is a clear nexus between the Applicant's grounds of appeal and the Ruling which he seeks to appeal against. The Respondent has strongly urged in his response reasons as to why the lower Court was right in refusing to include the Applicant as a beneficiary. It is not for this Court to go into the merits of the appeal so as not to embarrass the Court that will hear the appeal. However from the face of it, there appears to be an arguable appeal. Concerning the prejudice to be suffered by the Respondent, this Court observes that the Respondent has not urged any such prejudice to be suffered should the Court grant the Applicant leave to appeal out of time.

9. Noting that the delay herein was not inordinate, that there appears to be an arguable appeal and that the Respondent has failed to demonstrate any real prejudice to be suffered should leave be granted, the Court finds that the interests of justice call for the grant of leave.

Stay of Execution/Implementation of Grant

10. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a. substantial loss will result to applicant if stay is not granted; and
- b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
- c. the application has been brought without unreasonable delay.

Arguable Appeal

11. Arguability of appeal as a condition for stay is founded on Rule 5 (2) (b) of the Court of Appeal Rules and not under the Civil Procedure Rules. This Court nonetheless has a duty to ensure that any such intended appeals are indeed arguable and not frivolous. An arguable appeal is not one that must eventually succeed. This Court observes that parties have made extensive representations on the merits of the appeal as to whether there were proper grounds for review. It is however not for this Court to go into the merits of the claim at this stage. See *Meru Misc Civil Application No. E021 of 2020 Elias Kithinji Karia vs Silas Kimathi Japhet*. See also *Omar Shurie vs Marian Rashe Yafar (Civil Application No. 107 of 2020)*. This Court considers that the law allows for appeals from orders of the Court in a succession cause and the appeal herein is thus not frivolous but arguable. This finding is supported by the annexure of a draft Memorandum of Appeal in the Applicant's supporting affidavit.

Substantial Loss

12. The Applicant claims that unless stay orders are granted he stands to be disinherited despite being a beneficiary. He claims that the 1st Respondent and other beneficiaries are issuing threats to gain occupation of the suit property and that he has set up dwellings and undertaken development on the land. The Respondent on the other hand claims that the Applicant sold his portion of the deceased's parcel of land to the 2nd Respondent and both himself and the 2nd Respondent are guilty of committing a crime against the estate and are thus not entitled to a share. This assertion by the Applicant appears to go to the root of the intended appeal and as this Court has already held above, this is not the stage to go into the merits of the appeal.

13. The Court is alive to the fact that the Applicant lays a claim on the suit property. If the grant is implemented, there is a great likelihood that title will be transferred and the property may pass to other parties through sale or otherwise. This Court finds that it would be best to stay the execution of the grant as parties await the outcome of the appeal. This will help to avoid the embarrassment of conducting retransfers and premature disturbance of the situation on the ground.

Security

14. Parties did not address the Court on the issue of security. This notwithstanding, the Court notes that Rule 63 of the Probate and Administration Rules which lists down the provisions of the Civil Procedure Rules which apply to succession proceedings does not include Order 42 of the Civil Procedure Rules. This means that the strict compliance with the provisions of Order 42 of the Civil Procedure Rules on stay pending appeal is not necessary in succession matters. The Court is therefore not obliged to order for security and even then, the subject matter of the appeal herein is not an ordinary money decree capable of being quantified.

Undue Delay

15. This Court has already dealt with the issue of delay. A delay of one month is not inordinate.

ORDERS

16. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. Leave is hereby granted to the Applicant to file his Appeal out of time on condition that he files a Memorandum of Appeal within 7 days from the date of this order.

ii. An order for stay of implementation of the Grant issued in Maua Succession Cause No. 44 of 2019 is hereby issued pending the hearing and determination of the intended Appeal.

iii. The costs of the application shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 21ST DAY OF OCTOBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Bebo & Mose Advocates for the Applicant

M/S Mutembei & Kimathi Advocates for the 1st Respondent

M/S Mbogo & Muriuki Advocates for the 2nd Respondent