



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 4 OF 2019

Consolidated with

SUCCESSION CAUSE NO. 8 OF 2019

GRACE NJERI GICHUHI.....1ST APPLICANT

GODFREY KIHUHA GICHUHI.....2ND APPLICANT

VERSUS

MOSES MUIRU GICHUHI.....EXECUTOR/1ST RESPONDENT

JENIFFER MUTHONI GICHUHI.....2ND RESPONDENT

MICHAEL GICHUHI WANJIKU.....3RD RESPONDENT

JUDY WANJIKU GICHUHI.....4TH RESPONDENT

JANE WANYUA GICHUHI.....5TH RESPONDENT

RULING

1. Before court is the notice of motion application dated 29th September, 2021. That application is filed by **Grace Njeri Gichuhi** and **Godfrey Kihuha Gichuhi**, hereinafter the applicants. By that application, the applicants seek stay of these proceedings pending the hearing and determination of their appeal at the **Court of Appeal**.
2. The applicants' said appeal is against this Court's Ruling of 28th September, 2021. By that Ruling this Court declined to grant the applicants leave to file further documents, that is, a handwriting expert report and various receipts. The applicants' application to be permitted to file those documents was made when the executor's case was part heard and particularly after the court had received the evidence of the advocate who drew the alleged will of the deceased That is the Will that is in contestation with this cause. The applicants being aggrieved by that Ruling of 28th September, 2021 filed an appeal against the same before the Court of Appeal. By the present application, the applicants seek to stay further hearing of this cause pending the hearing and determination of that appeal.
3. The deceased in this cause **Michael Gichuhi Muiru** deceased is alleged to have left a written Will. The validity of that Will is contested by the applicants.
4. In support of their application, the applicants deponed through the affidavit of **Godfrey Kihuha Gichuhi** that, the continued hearing of this cause will "completely prejudice and jeopardise" their rights. That the respondent will suffer no prejudice if stay of these proceedings is granted.
5. The application is opposed by **Jennifer Muthoni Gichuhi** and **Michael Gichuhi Wanjiku**, beneficiaries of this estate. They deponed that the "interest of justice and fairness" would be met by dismissal of the application.
6. Grounds of opposition were filed on behalf of **Moses Muiru Gichuhi** the executor of the contested Will. By those grounds, it was stated that the **Law of Succession Act, Cap. 160**, does not envisage stay of proceedings, and that the applicants had not met the threshold of granting stay of proceedings.

7. The applicants relied on the cases *In re ESTATE OF SOLOMON MUNGURA MATHIA (DECEASED) 2021* eKLR, *EZEKIEL MULE MUSEMBI VS. H. YOUNG & COMPANY (E.A.) LIMITED (2019) eKLR* and *SICHUAN UASHI DEVELOPMENT COMPANY LTD. VS. REMAX REALTORS LIMITED (2020) eKLR* by which they sought to demonstrate that the court should consider where the interest of justice lies in granting stay of proceedings and demonstrated the court should note that the applicants will suffer prejudice if stay is not granted in the event their appeal succeeds. The applicants argued that if their appeal does succeed judicial time will have been wasted since this cause shall have to begin *de novo*. Further, that if stay of proceedings is not granted the applicants' appeal will be rendered nugatory and they will suffer substantial loss.

8. One of the cases the executor relied upon was *In re ESTATE LEAH NYAWIRA NJEGA (DECEASED) eKLR* and they cited the following passage from that case:-

“Where the appeal may have serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted.

I hold the view that by declining this application, the appeal will not be rendered nugatory or the exercise futile because the suit has not been heard and determined.”

ANALYSIS AND DETERMINATION

9. The applicants in moving by their application for stay of proceedings it is clear they invoke **Rule 73** of the Probate and Administration Rule, which provides:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

10. The submission that the Cap. 160 does not envisage stay of proceedings was therefore, in error.

11. The applicants seek to stay these proceedings on the basis that if stay is not granted, they will be prejudiced. They however did not specify what that prejudice would be other than saying that their pending appeal will be rendered nugatory and that if they succeed in their appeal the judicial time would have been wasted.

12. As stated, it is alleged the deceased died leaving a written Will. The objection to the probate of that Will was filed by the applicants. The viva voce hearing of the executor's case has closed. The applicants are yet to open their case.

13. The single issue to consider in this Ruling is whether the applicants will suffer prejudice if stay of proceedings is not granted. In my consideration of that issue, I find it useful to refer to the holding of *Ringera, J* (as he then was) in the case *RE GLOBAL TOURS & TRAVEL LTD HCWC NO. 43 OF 2000* as cited in *KENYA ALLIANCE INSURANCE CO. LTD V ANNABEL MUTHOKI MUTETI [2020] eKLR* thus:-

“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, 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 matter, it should bear in mind such factors as the need for expeditious disposal of case, 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.”

14. Have the applicants brought themselves within the range to benefit from the exercise of this Court's discretion in their favour?

15. To answer that issue, I should consider what the applicants have stated to be the basis of seeking stay of proceedings. They state that they will be prejudiced by further hearing of this cause because their appeal will be rendered nugatory. But one needs to consider what is before this Court that would result in rendering the appeal nugatory. What is before court are two petitions filed by the applicants for grant of letters of administration intestate in respect to the deceased's estate and another petition by the executor for grant of probate of written Will. That is why there are two petitions set out in the title of this case which were consolidated. The court began by receiving the evidence of the executor of the Will and as stated before the executor's case was closed. The applicants were due to open their case when they applied for a stay of proceedings.

16. If this case does indeed proceed for hearing, the court will determine whether the deceased died leaving a Will or not. Once that is determined, the cause will either proceed as a petition for grant of letters of administration intestate or as a petition of grant of probate of a written Will.

17. It follows that to allow this case to proceed further for hearing, no transfer of any property of the deceased will take place because as yet, no grant, capable of being confirmed, has been issued. It is in my considered view that justice will be better served by permitting this case to proceed with hearing because there is likelihood that the deceased's estate in the present limbo state is not protected. The deceased, as the Will reveals, left a very vast estate, some of which was income generating. It is not presently clear where that income is going since the order of the court that an account for the deceased's estate be opened, seem not to have been obeyed. There is therefore the very likelihood that the estate is going to waste. To allow this matter proceed for hearing will enable the court to issue a grant and the person who will be issued with a grant will be answerable to this Court to preserve the deceased's estate until distribution. In stating so, I am aware that parties in this matter entered into a consent for Joint Limited Grant to be issued to **Godfrey Kihuha** and **Moses Muiru Gichuhi**, but the facts on the ground are

that those two persons have failed to co-operate with each other and consequently, why the deceased's estate is in danger of waste. To stay the proceedings will exasperate that already wasteful state of the estate. In this regard, I cite the case **KENYA WILDLIFE SERVICE V JAMES MUTEMBEI [2019] eKLR**, as follows:-

“[5] See also illumination on the threshold for stay of proceedings in the following 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 proceeding 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 not 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.’”

CONCLUSION

18. In the end and bearing the above in mind, I decline the applicants' prayer to stay these proceedings. Balancing the interests of justice, I find and hold that justice would best be served by this cause proceeding for hearing. Accordingly, the Notice of Motion application dated 29th September, 2021 is dismissed with costs.

19. At the reading of this Ruling, a further hearing date will be fixed on priority basis.

RULING DATED AND DELIVERED AT KIAMBU THIS 25TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice/Kinyua

For Petitioner in Succ. C. No. 8 of 2019 – Mr. Musyoka

Miss Karanu

For Petitioner in Succ. C. No. 4 of 2019 – Mr. Kirimi

For Beneficiaries:-

Jeniffer Muthoni:-

Mr. Maina Njoroge

Michael Wanjiku:-

COURT

Ruling delivered in open court.

MARY KASANGO

JUDGE