



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**SUCCESSION CAUSE NO. 163 OF 2012**

**IN THE MATTER OF THE ESTATE OF GODFREY KITUKU KILATYA AND REGINA MUKUI NDAKA (DECEASED)**

**KITUKU MUTISO KILATYA..... APPLICANT**

**VERSUS**

**JOSEPH MBEVU NDAKA .....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Mwaure & Mwaure Waihiga Advocates for the applicant**

**Khaminwa & Khaminwa for the respondent**

**RULING**

The applicant is aggrieved with the orders of **Hon. W. Korir (Judge)** dated 17.12.2018 in which he filed a notice of motion to this court seeking the following substantive order:

***(a). That the honourable court be pleased to issue orders of stay of proceedings pending the hearing and determination of the intended appeal.***

The applicant besides the grounds on the body of the motion has also filed an affidavit dated 2.4.2019.

The respondent in opposition to the application, filed grounds to challenge the relief sought dated 21.6.2019. The arguments by both counsels is contained in their respective written submissions duly filed in court.

The reasons advanced by the applicant in the affidavit:

***(a). That the applicant intends to appeal against the Ruling.***

***(b). That the applicant has a constitutional right to appeal and he ought to be given a chance to ventilate his appeal.***

***(c). That the applicant is aggrieved by the order to have properties forming the Estate auctioned as it is not for the best interest of the Estate.***

That the assets in paragraph (5) are assets owned by the applicant by his own right but the court feel short in giving directions on the same that if stay of the order is not granted the assets forming the Estate and those not part of the Estate risk to be auctioned and the intended appeal shall be rendered nugatory.

**Analysis and determination**

**The Law**

This application is primarily premised under Order 42 Rule 6 (1) which states that:

***“An appeal shall not operate as a stay of execution or of proceedings under a decree or order appealed from except in so far as***

*the court appealed from may order, stay of execution of such decree or order is satisfied.”*

That substantial loss may result to the applicant unless the order is made and that the order has been made without unreasonable delay. The English Court in **Attorney General v Emerson {1890} 24 QBD 56** the court constraining the English Order LVIII Rule 6 with similar provisions with our order 42 Rule 6 (1) held that:

*“The real question is, what is the construction of this Rule 7. It says, ‘An appeal as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from or any judge thereof, or the Court of Appeal may order, and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct,’ in all the rules, the word may has been held to mean may or may not. It has been held to give a discretion which is called a judicial discretion, but is still a discretion.”*

An application for stay of execution or proceedings is a discretionary remedy that can be made dependent on the specific facts of the case. The provision essentially being discretionary is determined judiciously and on valuable grounds.

In **Hallsburys Laws of England Volume 13, 4<sup>th</sup> Edition Learned Authors** had this to say:

*“The court has an absolute an unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances which must be deposed to an affidavit unless the application is made at the hearing.”*

The settling of a higher standard on irremediable substantive loss behoves, on the applicant to show some evidence or explanation that considerably there would be irreparable damage if stay is denied as prayed. **(See Reliance Bawn Ltd v Norlake Investments Ltd {2002} 1 EA 227, Global Tours & Travels Ltd Nairobi HC Winding Up Cause No. 43 of 2000).**

In the instant motion, the main bone of contention concerns the Ruling and orders issued by **Hon. Justice Korir** on 17.12.2018 where he directed the advocates for the administrators to jointly appoint an auctioneer to auction the properties of the Estate of the deceased as identifiable to the auctioneer either jointly or separately by the administrators to the Estate of the deceased persons.

In relation to this order, the applicant has registered fears that some of the properties which may be subject of an auction are in all circumstances not that of the Estate.

This in particular, argued the applicant there is real risk of having to suffer irremediable harm. The effect of which is the auctioneer to alienate or offer for sale property specifically earmarked for the objector.

I have seriously considered that fact and other underlying issues within the context of the application. This by itself is insufficient for this court to exercise discretion to grant stay of proceedings. There is indeed a fundamental misunderstanding of the nature of the order of the court as crafted by **Hon. Justice Weldon Korir**. The purpose of the order is to give effect to the court Ruling or 28.2.2017 by **Hon. S. Chitembwe (Judge)**.

In my view to arrive at a decision on what constitutes the property of the Estate the application of Section 3 of the Law of Succession clearly sets out the competing considerations on free property of the deceased.

It does not mandate the court not the auctioneer for that matter to include properties legally owned or which the applicant or objector have legal right or beneficial interest of ownership.

It is with some regret that I came to the conclusion that I do not agree with the applicant motion or submissions on this issue of stay of proceedings, that if not granted it would cause confusion and deprivation of ones right to property.

The applicant has in all circumstances failed to satisfy the requirements of Order 42 Rule 6 (1) & 2 (a) on substantial loss for this court to suspend the execution of court Judgments dated 28.2.2017 and 17.12.2018.

Accordingly, stay of proceedings would be unjust and unconscionable to the already determined issues in the two decisions of the court. The costs of this application be borne by the parties.

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 30<sup>TH</sup> DAY OF JANUARY 2020.**

.....

**R. NYAKUNDI**

**JUDGE**