



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**SUCCESSION CAUSE NO. 5 OF 2018**

**IN THE MATTER OF THE ESTATE OF FRANCIS WAITHANJE MUNAITHAGA Alias WAITHANJE MUNAITHAGA  
(DECEASED)**

**JUNIUS NJUE WAITHANJE.....RESPONDENT/APPLICANT**

**VERSUS**

**NANCY MUTHONI JAMES.....APPLICANT**

**R U L I N G**

**A. Introduction**

1. This ruling is for the Notice of Motion application dated 6<sup>th</sup> December 2019 in which the applicant seeks to have the order of 14/11/2019 varied to change the security from a monetary sum of Kshs. 300,000/= to the deposit of the title deed of land parcel No. Kieni/Kigumo/2144 in court pending the lodging, hearing and determination of the intended appeal.
2. It is the applicant's case that it is in the interest of justice that the instant application be allowed to enable the applicant comply with the court order with ease and that the respondent will not suffer any prejudice in the event the orders sought are granted.
3. In rejoinder, Mr. Ithiga for the respondent deposed that the instant application is defective as it does not indicate the law under which it is brought under. Further it is Mr. Ithiga's case that the applicant has not given any good reasons as to why the court should vary its order of 14/11/2019 as the order to deposit Kshs. 300,000/= was fair and in accordance with the provisions of Order 42 Rule 6(2).
4. Mr. Ithiga further deposed that the title deed relied on by the applicant is registered in the name of one Johnson Njiru W. Munaithagah and not the applicant and that the registered owner has not sworn a supplementary affidavit to confirm or give his consent and undertaking to have his title deed deposited as security and further that it is a worthless title with no proprietary value as it was among the titles revoked by the ruling and order of the court which revoked the grant issued to the applicant on 18/09/2007 and confirmed on 18/06/2009.
5. The applicant was to file submissions in support of the applications which he failed to do within the period given by the court. Mr. Ithiga did not file submissions for the respondent for he had opted to rely on the pleadings and the replying affidavit.

**B. Analysis & Determination**

6. The substantive issue that requires to be determined herein is whether the applicant is entitled to orders for substitution of the security.
7. The background facts are that the applicant filed an application under Order 42 Rule 6 for stay of execution pending hearing and determination of this appeal. The respondent conceded to the application and applied to the court to order that security for the due performance of the decree be deposited in court. The court then considered the nature of the decree and directed that the applicant deposit Kshs. 300,000/= as security within thirty (30) days. The orders were made on 13/11/2019.
8. The respondent avers that the instant application is defective as it does not indicate the law under which it is premised. Bearing in mind the provisions of Article 159(d) of the Constitution and Order 51 Rule 10 (1) of the Civil Procedure Rules, I am of the considered view that failure to quote the correct provisions is not fatal.
9. I therefore find the arguments of the respondent misplaced and find that the application is properly before the court. Section 1A and 1B Civil Procedure Act urges the Court to strive for substantial justice other than relying on procedural technicalities. My view is that the defects are curable under Article 159 of the Constitution and Section 1A and 1B Civil Procedure Act.

10. This application seeks for review of the orders made on the 14<sup>th</sup> November 2019 for deposit of Kshs. 300,000/= to be substituted with a security of a title deed. The applicant failed to comply with the said orders and filed this application on 9/12/2019. This was about twenty one (21) days after the orders were made.

11. Security in stay of execution application is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010** as follows:

**“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 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. The issue of deciding the kind or amount of security is within the discretionary power of the court based on the facts of each case.

13. The Court of Appeal in *Butt v Rent Restriction Tribunal [1982] KLR 417* gives guidance on how a court should exercise this discretion and held that:

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

2. ....

3. ....

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. 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 for costs as ordered will cause the order for stay of execution to lapse.”**

14. In essence the applicant herein seeks for a review of the orders of this court. although the provisions relied on are not indicated, this application falls under Order 45 of the Civil Procedure Rules. It was held in *Edward Mungai Waweru v Samson Ochieng Kagunda & Another [2018] eKLR* and *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR*.

15. Order 45 (1) of the Civil Procedure Rules provides that:

**“Any person considering himself aggrieved—**

**a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

16. The Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited, Civil Appeal No. 275 of 2010, [2014] eKLR* was of the view that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -

**i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or**

**ii. That there was a mistake or error apparent on the face of the record; or**

**iii. That sufficient reasons exist to warrant the review sought.**

**In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”**

17. It is trite law that such applications ought to be made without unreasonable delay. The orders sought to be substituted were made on the 14<sup>th</sup> November 2019 in the presence of counsel of both parties. The applicant herein filed the instant application on the 9<sup>th</sup> December 2019 which was less than a month following the issue of the orders. In my considered view there was no delay in filing this application.

18. It should be noted that the applicant herein has not offered this court any reason why he is unable to deposit the sum ordered. In the affidavit in support of the application sworn by Junius Waithanje, the deponent merely states, in paragraph 3, that “...I wish for the Honourable Court to vary orders of 14/11/19 to permit a change of the security from a monetary sum of Kshs. 300,000 to the deposit of the original title deed of the suit property...”

19. In Alice Gathigia Karuku v Maisha Floor Mills [2013] eKLR the Court was of the view that before the said substitution can be granted sufficient reasons for the substitution ought to be presented by the applicant. In the instant application, it is my opinion that the applicant has not offered any reason for the substitution.

20. Further the applicant is seeking to have the deposit of the decretal sum substituted with the deposit of the title deed of land parcel No. Kieni/Kigumo/2144 which he thinks will be sufficient.

21. The respondent raised the issue that the title deed sought to be deposited as security is a worthless document with no proprietary value as it was among the titles revoked by the ruling and order of the court which revoked the grant issued to the applicant on 18/09/2007 and confirmed on 18/06/2009. Indeed, this was this court’s ruling on 11<sup>th</sup> July 2019. These facts were not disputed by the applicant.

22. In the case of Absalom Dova v Tarbo Transporters [2013] eKLR the court stated that:

**“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”**

23. The court in Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR was of the view that: -

**“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”**

24. The orders for deposit so security was made for reasons similar to those in the cases of Absalom Dova (supra) and that of Mwaura Karuga (supra). In addition, this court gave due consideration to the nature of the cause. This is a succession cause that was filed on 18/09/2007 and confirmed on 18/06/2009 the respondent applied for the revocation of grant in 2010 on grounds that the appellant had disinherited the widow and children of the deceased. The grant was revoked on the 11/07/2010.

25. The court found that the appellant was not qualified to apply for letters of administration intestate under Section 66 of the Law of Succession Act. The deceased’s wife and children are alive and have been residing on the land of deceased LR. Kieni/Kigumo/2144 prior to his death.

26. The appellant wishes to challenge the decision of the court to revoke the grant with all the facts that were laid bare in the ruling of the court. as much as the applicant has a constitutional right to appeal, the respondent’s rights must be guarded in the manner that the court deems appropriate. The deposit will serve the said purpose including motivating the appellant to fast-track the appeal to prevent his security being held in court for too long.

27. The applicant is dishonest in presenting the title obtained that was revoked through a grant. The title is in the name of the applicant’s brother one Johnson Njiru. All transactions under the revoked grant were declared null and void. The court also ordered that the land LR.Kieni/Kigumo/2144 reverts to the name of the deceased. There is no affidavit by Johnson to show that he has agreed to give his title as security in this appeal. But even if there was, the security is a worthless document given the orders of the court in its ruling delivered on 11/07/2019.

28. I reach a conclusion that the applicant has not satisfied the conditions of Order 45 of the Civil Procedure Rules. He has not shown his inability to raise the deposit as directed by the court or given any sufficient cause for substitution of security.

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28<sup>TH</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Ithiga for Applicant/Respondent**

**Both parties present**