



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 4 OF 2018

COSMAS MOKUA MAGEMBE.....1ST PETITIONER

JOHN NYANGARESI MAGEMBE.....2ND PETITIONER

SABELLA MORAA MAGEMBE.....3RD PETITIONER

-VERSUS-

ELIAS ONSARIGO MAGEMBE.....1ST OBJECTOR/ APPLICANT

WILFRED NYAMBARIGA MAGEMBE....2ND OBJECTOR/APPLICANT

RULING

1. The Notice of Motion dated the 8th October 2019 the subject of this ruling is brought under Order 42 rule 6, 7 Order 51 Rule (i) of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act CAP.21 Laws of Kenya.
2. The applicants seeks a stay of the proceedings and orders issued on the 2nd July 2019 dismissing the Objectors/ applicants objection file on the 29th January 2019 pending the hearing and determination of Kisumu Court of appeal no. 174 of 2019.
3. According to the applicants they are aggrieved by the ruling dated the 2nd July 2019 and have preferred an appeal against the said decision. The applicants argue that the appeal has overwhelming chances of success and that unless the stay of proceedings is granted the appeal will be rendered nugatory. That the respondents are intent on proceeding with the administration and distribution of the estate using the disputed ruling the subject of the appeal before the court of appeal. That implementing the order of the court would occasion extreme hardship, loss and suffering and bring disharmony to the beneficiaries of the estate.
4. The application was opposed by the respondents. It was submitted that the application was filed in October 2019 yet the Ruling being challenged was issued in July 2019 that the delay in filing the application was inordinate. That the order being sought is a negative order as the objection was dismissed.

ANALYSIS AND DETERMINATION

5. Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* stated as follows whilst considering an application for stay of proceedings;

“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 matters, it should bear in mind such factors as the need for expeditious disposal of cases, 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” (emphasis added)

6. The threshold for stay of proceedings is discussed in the following passages in Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, as follows;

“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.”

7. Having considered all the above the applicant’s main concern is that if the proceedings are not stayed then the respondents will proceed to have the grant confirmed. For the respondent the proceedings cannot be stayed as there was inordinate delay and that the order being sought is a negative order. In **Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR**, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

8. The application was filed about three months after the impugned order. In my view 3 months is not inordinate delay. What will happen if the proceedings are not stayed? The respondent will proceed with the process of confirming the grant and there could be transfer of the portions of parcels of land to the beneficiaries.

9. From the draft memorandum of appeal the applicants are challenging the court’s finding that the will had not lapsed and that the objection did not have a merit. The circumstances of this case is that the applicant is desirous of challenging the decision on the deceased’s will the subject of the impugned ruling, yet on the other hand the respondents want to proceed to have the estate determined . The said ruling dismissed the objection that was raised by the applicant. Although staying the proceedings could stall the matter the applicants have raised the issue that the petitioner could proceed to have the estate distributed and the consequence could be that the intended appeal could be rendered nugatory. Bearing all that is deposed I am of the view that the applicant be granted a stay of proceedings for a period of 60 days from the date of the ruling pending filing an application before the Court of Appeal for a stay of the proceedings. I am cautious of the fact that I cannot usurp the powers of the appellants court. This will enable the parties get directions on the said application and possible time for hearing and determination of the said application and the intended appeal. In default the stay orders issued herein shall stand vacated. Costs shall be in the cause.

Dated, signed and delivered at KISII this 20th day of February 2020.

R.E.OUGO

JUDGE

In the presence of;

Mr. Kaba h/b Mr. Nyambati For the Applicant

Mr. Ochwangi For the Respondent

Ms Rael Court Assistant