



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 145 OF 2018

IN THE MATTER OF THE ESTATE OF PAUL MUCHUKU NJOROGE alias MUCHUKU NJOROGE (DECEASED)

JOHN NG'ANG'A MUCHUKU.....APPELLANT/APPLICANT

VERSUS

CECILIA WAMBUI MUCHUKU.....1ST RESPONDENT

JAMES NJOROGE MUCHUKU.....2ND RESPONDENT

RULING

1. Before is a Notice of Motion filed on 18th December, 2018 and brought under Rule 49, 73 of the Probate and Administration Rules and Order 42, Rule 6 (1)(2) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking orders to stay execution of the order given on 25th September, 2018 by Honourable J. Kituku (P.M) Chief Magistrate's Court in Kiambu Succession Cause no. 131 of 2009 pending the hearing and determination of the Appeal. By the impugned order, the Applicant was given 90 days to vacate from the asset of the estate herein, namely land parcel **No. Kiambaa/Kanunga/T.231** in default of which the administrators of the estate were at liberty to evict him. Earlier, the court had allowed the administrators of the estate to sell the said parcel which measures about 0.09 ha and to share the proceeds equally among the beneficiaries of the estate including the Applicant. Notably, the latter order has not been challenged on this appeal which is confined to the order to vacate.

2. The Application is premised on the grounds that the appeal has high chances of success and the appeal has been made without delay and that the Applicant will suffer substantial loss if he is evicted as he will be rendered homeless.

3. JOHN NGANGA MUCHUKU, the Applicant/Appellant herein swore a supporting affidavit as a beneficiary of the deceased's estate. He deposed that he has a share in Land Parcel No. **Kiambaa/Kanunga/T.231** which he has occupied and developed. He contended that he is likely to suffer as the orders appealed against are for his eviction and destruction of his structures in the subject property. He further deposed that the intended appeal raises triable issues and has high chances of success and has been brought without undue delay.

4. JAMES NJOROGE MUCHUKU one of the Administrators in the deceased's estate filed the replying affidavit on his own behalf and on behalf of his Co-Administrator, the 2nd Respondent. It was deposed that the application is a delaying tactic and that the appeal has no chances of success. He disputed that the Applicant will be rendered homeless asserting that the said Applicant also benefitted from a portion (about 0.1 ha) out of another estate asset, namely a land parcel **No. Kiambaa/Kanunga/573** being **Kiambaa/Kanunga/2534** which land he sold to a third party. It was deposed that the beneficiaries had agreed that the subject property should be sold and the proceeds shared amongst the beneficiaries as the same is too small in size to sub-divide hence the court order authorising sale. The court was urged to dismiss the application and/or grant the same with conditions.

5. The application be disposed was canvassed by way of written submissions. The Applicant submitted that if the order for stay is not granted, he will suffer substantial loss in the form of demolition of his home. He cited the case of **G.N.Muema P/A (Sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & another (2018) eKLR**. It was also submitted that the application was filed without unreasonable delay. Lastly, the applicant is desirous of depositing security though he is not a man of means. The court was urged to allow the application.

6. Counsel for the Respondent based his submissions on the principles articulated in **Halai & another v Thorton & Turpin (1963) Ltd (1990) KLR 365** as to the conditions for the grant of stay orders. It was submitted that the Applicant has not demonstrated how he will suffer substantial loss; that the Applicant is not the only beneficiary of the estate and that he enjoys no preference above other beneficiaries. In conclusion, it was submitted that the Applicant has failed to show how the appeal will be rendered nugatory and as such the court was urged to dismiss the application with costs.

7. The court has considered the material canvassed by the parties. The Appellant's motion is founded upon the provisions of Order 42 R 6(2) Civil Procedure Rules which state that:

“(2) No order for stay of execution shall be made under subrule (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”.

8. These conditions have been considered in many decisions of our superior courts including both the Applicant's and Respondents' authorities, namely, **G.N.Muema P/A (Sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & another (2018) eKLR** and **Halai & another v Thornton & Turpin (1963) Ltd (1990) KLR 365**, respectively.

9. In the famous decision of **Butt v Rent Restriction Tribunal (1979) e KLR, Madan JA** stated that:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another remedy, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in **Wilson v Church (No 2) 12 Ch D (1879) 454** at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

10. Megarry J, as he then was, followed **Wilson (supra)** in **Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448** at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the **Attorney General v Emerson and Others 24 QBD (1889) 56** at p 59.”

11. At this stage, the court is not concerned with the merits of the grounds of appeal which the Applicant has partially addressed in material. Regarding timeliness, it appears that despite the order of vacation having been issued on 25th September, 2018 (see unmarked copy of Ruling annexed to supporting affidavit), the Applicant waited almost to the end of the 90-day vacation period given by the lower court to file this application. For a party who claims to be in danger of losing his home, that is a long and unexplained period of delay.

12. Has the Applicant demonstrated likelihood of suffering substantial if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**. Holdings 2,3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.....”

13. In that case, **Platt Ag. JA** (as he then was) observed that:-

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” (emphasis added)

14. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would... render the appeal nugatory.....

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

15. In the instant case, the court is unable to appreciate what substantial loss the Applicant stands to suffer, and whether the appeal will thereby be rendered nugatory. As pointed out, the Applicant has not appealed the more substantive order authorising the sale of the suit property for the benefit of all beneficiaries including himself. Pursuant to that order, the Applicant will share the proceeds of sale by virtue of the same order, and he does not have superior rights or exclusive rights to the property as against his siblings. His greatest apprehension appears to be the likely demolition of his unspecified structures or developments to pave way for the sale.

16. Yet, until the order authorizing sale is set aside, he will always be in danger of eviction. A stay of the vacation order is hardly efficacious in those circumstances. Moreover, if his present appeal succeeds, he can be adequately compensated for any loss suffered and in the circumstances of this case, I cannot see how his present appeal will be rendered nugatory if stay is denied. In my estimation of the matter, to grant stay merely of the order to vacate is cosmetic and leaves the parties in a catch-22 situation as the substantive order for sale of the property will continue to subsist. Without a demonstration of likely substantial loss, it is difficult to justify keeping the Applicant’s siblings from enjoying the fruits of the succession cause.

17. On security, the Applicant has not made any tangible pledge and his half-hearted offer in that regard was simultaneously effectively retracted with the Applicant’s plea that he has no means.

18. For all the foregoing, the Court finds no merit in the application filed on 18th December, 2018 and will dismiss it with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Kinyanjui holding brief for Gatitu for the Appellant

No appearance for the Respondent

Court Assistant – Nancy/Kevin