



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 67 OF 2019

BEATRICE NDUNGURI MWAI

ALFRED NGAIRE NGAI-IMWE.....APPELLANTS

V E R S U S

SICILY WAWIRA TITUS

BANCY NJERI MURIUKI RESPONDENTS

RULING

1. The applicants have filed an application dated 7/11/2019 seeking orders that there be stay of execution of the Judgment in Kerugoya **C.MCC No. 172/18, Beatrice Ndunguri Mwai & Another –v- Sicily Wawira Titus** pending the hearing and determination of the appeal filed by the applicant.

2. The application is based on the grounds that the grant was confirmed on 30/8/2019 and though the applicants were dissatisfied with the judgment and opted to appeal, there is no order for stay and the respondents have already commenced execution. That the subject matter in dispute that is land parcel No. LR Kabare/Njiku/2167 is where the applicants live with their extended families, have put up permanent residential houses, extensive developments and if stay is not ordered they are likely to suffer substantial loss and damage. They further state that they are likely to be evicted from the land with their families That they have a right of appeal and if stay is not ordered they will lose the land and the appeal be rendered nugatory. The application has been brought timeously without any inordinate delays.

3. The application is supported by the affidavit of Alfred Ngaire Ngai-imwe sworn on 7/11/2019.

4. The respondents opposed the application and filed grounds of opposition stating that the application is incompetent and bad in law. It is incurably defective, is frivolous, vexatious and is otherwise an abuse of court process.

5. The parties agreed to canvass the application by way of written submissions. For the applicant, submissions were filed by Macharia Wambui & Co. Advocates dated 17/12/2019. For the respondent, submissions were filed by M/s Ngigi Gichoya & Company Advocates on 18/12/19.

6. I have considered the application and the submissions. For the applicant it is submitted that the application was filed without unreasonable delay as a similar application was made a day after the judgment of the trial court. That the appeal has high chances of success as it raises issues of law and facts and if execution proceeds the appeal maybe rendered nugatory. The applicant relies on the case of **Josephine Wambui –v- Margaret Wanjiru Kamau & Another (2013)eKLR**, a Court of Appeal decision where it was held that –

“We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1)”.

7. He submits that he associates with that exempt applicants application for stay of execution in succession matters from requirements of **Order 42 Civil Procedure Rules** as the Act is Sui generis with its own and specified procedures which regulates proceedings in probate court. He has also relied on the Court of Appeal decision in **Mugar –v- Kunga (1988) KLR** quoted with approval in High Court Succ Cause No. 38/2007 where the court stated:-

“The practice of the Court of Appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was

heard and determined.”

He further states that the applicant are likely to suffer loss and they will not be likely to recover the land if stay is not ordered.

8. For the respondent it is submitted that the applicants had filed a similar application before the trial Magistrate, Hon. Y. M. Barasa – S.R.M on 6/11/19. That the law of succession Act does not provide guidelines on filing application for stay of execution pending appeal. That the courts have relied on **Order 42 rule 6 Civil Procedure Rules**. That the applicants have not fulfilled the conditions under **Order 42 Rule (6) 2 Civil Procedure Rules**. He prays that the application be dismissed.

9. I have considered the application and the submissions. The issue which arises for determination is stay of execution. I will therefore proceed to determine the issue. For stay of execution pending appeal, the procedure is provided under **Order 42 of the Civil Procedure Rules**. Though this is not one of the orders referred to under **Rule 63 (1) of the P & A Rules**, the practice in this court has leaned on the reliance of the **Order 42** when dealing with stay of execution in succession matters. This is on the basis of Rule 73 P& A Rules which provides:

“Nothing in this 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. So since **Order 42 rule 6** deals with stay of execution pending appeal, this court has discretion to rely on the order to enable the parties in appeals arising from succession matters to apply for stay of execution of the orders or judgments of the sub-ordinate courts pending appeal. Such orders are made in the interest of justice and to prevent the abuse of the court process.

Furthermore, **Section 50(1) of the Law of Succession Act** provides:-

“An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the high Court thereon shall be final.”

11. This appeal being the only forum where the applicants can challenge the decision of the trial court as of right, it would be in the interest of justice that the court exercise discretion by ensuring that the appeal is heard and not rendered nugatory. On the other hand **Section 47 of the Law of Succession Act** gives court jurisdiction to entertain any application and determine any dispute under the Act. This section must be given a wider interpretation to include applications like the present one which seeks to preserve the status quo pending appeal. Being a first appeal the jurisdiction of the court is to determine both facts and law. As such reliance of **Order 42 Civil Procedure Rules** is in the interest of justice and to prevent the abuse of the court process. In that case I find that the application is properly before this court.

Order 42 rule 6(2) Civil Procedure Rules lays down the conditions which a party must establish in order for this court to order stay of execution. The rule provides:-

“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.”

The applicant is supposed to prove that substantial loss may result unless the order is made. That the application has been brought without unreasonable delay and such security as maybe ordered by the court.

12. There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. In the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held by the Court of Appeal in the case of **Bhutt –v- Rent Restriction Tribunal (1982) KLR 417**. The Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of execution maybe stated to be a measure to prevent the subject matter so that the right of appeal can be exercised without any prejudice to the applicant as the appeal would be rendered nugatory if stay is not ordered. An applicant in this kind of application invokes the discretionary powers of the court.

13. In this case, the applicants have stated that they are likely to suffer substantial loss as they have been living on the land and built permanent houses as well as other developments. This has not been denied. If Judgment of the lower court is executed, the applicants are likely to be evicted and will no doubt suffer substantial loss. Since they had a right of appeal, I should exercise discretion as stated in **Bhutt - v- Rent Restriction Tribunal** which I have cited above in a manner that will not prevent the appeal or render the appeal nugatory.

14. The applicant filed the application before the trial Magistrate a day after the judgment but the application was declined on 6/11/2019. This application was then filed in this court on 7/11/2019. The memorandum of appeal was filed on 25/9/2019. The applicant was vigilant and moved the court with speed. There was no inordinate delay on the part of the applicant.

15. On the issue of security, it is noted that it is the court which can order security upon application by either party or on its own motion. In this case the respondent has not argued the court to order the applicant to provide security. However, the court has discretion to order the applicant to provide security.

16. In conclusion, I find that the application meets the threshold for the grant of stay of execution. I therefore order as follows:-

- 1) There be stay of execution pending the hearing and determination of the appeal.**
- 2) The applicants shall provide security by depositing in court a sum of Kshs 20,000/- within 30 days from today.**
- 3) Costs shall abide the outcome of the appeal and shall follow the event.**

Dated at Kerugoya this 12th day of March 2020.

L. W. GITARI

JUDGE