



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 544 OF 2003

ANDREW OLEA (Suing as the attorney for EDMUND HERNANDEZ).....PLAINTIFF/APPLICANT

-VERSUS-

MINNEH WANJIRU AKA MINNEH WANJIRU SLADEK (Suing as the legal representative of the estate of KAMIL SLADEK-Deceased).....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant brought the Notice of Motion dated 8th October, 2019 in which he sought for an order of stay of execution of this court's ruling delivered on 2nd October, 2019 pending the hearing and determination of an intended appeal against the said ruling and the provision of costs thereon.
2. The Motion is supported by the grounds laid out in its body and the facts stated in the affidavit of the applicant.
3. The applicant stated in his affidavit that he is aggrieved by the ruling of this court and intends to appeal against the same, adding that he has already filed a notice of appeal in that regard.
4. It was the applicant's averment that the Motion has been brought without unreasonable delay and that unless the order sought is granted, he stands to suffer substantial and irreparable loss.
5. The applicant contended that his intended appeal raises triable issues which ought to be determined on merit and that no prejudice will be visited upon the defendant/respondent if the order for stay is granted.
6. The defendant/respondent put in a notice of preliminary objection, Grounds of Opposition and a replying affidavit to resist the Motion.
7. In her preliminary objection, the respondent raised the following grounds:
 - i. The plaintiff/applicant lacks locus standi to file the application as an attorney for Edmund Hernandez for the reason that the donor of the power of attorney is deceased as a matter of fact.
 - ii. This Honourable Court lacks jurisdiction to hear the application for the reason that the matters raised therein concern matters of probate and administration envisaged in the Law of Succession Act Cap. 160 Laws of Kenya. The issues raised by the applicant revolve around the validity of the last will and testament of Kamil Sladek, which are not civil in nature.
 - iii. The applicant has since filed an application to challenge the validity of the last will and testament of Kamil Sladek. As such, the hearing of the present application constitutes an abuse of the court process and threatens to embarrass the court.
 - iv. The firm of Muma & Kanjama Advocates is in violation of Rule 8 of the Advocate Practice Rules which bars an advocate of the High Court from appearing in any matter where such advocate has reason to believe that he/she may be required to give evidence as a witness whether verbally, by declaration or affidavit. Charles Kanjama is on record having received payments in respect to the disposition of assets belonging to the estate of Kamil Sladek from the respondent and is therefore a potential witness.
8. The aforementioned respondent's Grounds of Opposition and replying affidavit largely reverberate the notice of preliminary objection.
9. The applicant filed a further affidavit in which he stated *inter alia*, that on 24th July, 2019 the counsels for the parties herein informed the

court of the demise of Edmund Hernandez and that the court could not admit this information on the ground that it was hearsay.

10. The applicant went further on to state that in any event, the respondent fully participated at the hearing of the application which resulted in the ruling of 2nd October, 2019.

11. It was also the applicant's contention that the Succession proceedings were long concluded hence there are no pending issues in respect to the estate of Kamil Sladek and further asserted that this court ought to disregard the averments made by the respondent.

12. The respondent sought for and was granted corresponding leave to put in a further affidavit. Therein, she restated the averments earlier made in her documents in reply to the Motion.

13. At this court's directions, the parties filed and exchanged written submissions on the application. On his part, the applicant filed two (2) separate submissions to address his Motion and the notice of preliminary objection filed by the respondent.

14. In respect to the notice of preliminary objection, the applicant argued that the respondent's preliminary objection does not fit into the definition of preliminary objections as was held in *inter alia*, the case of **Muhu Holdings Limited v James Muhu Kangari [2017] eKLR** in this manner:

“For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by either side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

15. The applicant submitted that whereas the subject of *locus standi* is generally a point of law, the facts surrounding the respondent's decision to challenge the applicant's legal standing in the suit is one that would require the court to delve into the facts of the case and in the present instance, the respondent has not adduced any real evidence to show that Edmund Hernandez is deceased.

16. In addition, it was the applicant's submission that in any event, though a power of attorney is extinguished upon the death of a donor, such death does not extinguish the cause of action, hence if this court is to find that the power of attorney was extinguished, he wishes to be granted leave to substitute his name with that of the legal representative of the estate of Mr. Hernandez.

17. In addition to the foregoing, the applicant argued that where the issue of conflict of interest is raised, the same ought to be supported by way of evidence to that effect, as held by the High Court in the case of **British-American Investments Company (K) Limited v Njomaita Investments Limited & another [2014] eKLR**. In this respect, it was the applicant's submission that the argument brought forth by the respondent is purely misplaced.

18. In a nutshell, the applicant was of the view that the respondent has not brought any evidence to support any of the grounds set out in her preliminary objection and Grounds of Opposition.

19. On the merits of his Motion, the applicant submitted that the intended appeal is arguable and has high chances of success since the subject matter of the suit relates a property which relates to a succession case involving the parties. The applicant referred the court to the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the Court of Appeal held that when it comes to an application seeking an order for stay of execution, it is the responsibility of the applying party to demonstrate that his or her appeal has high chances of success.

20. The applicant then submitted that pursuant to the conditions set out under Order 42, Rule 6(2) of the Civil Procedure Rules, any evident delay in bringing the application can be explained by the time taken in applying for revocation of the grant issued to the respondent since the deponent who is based in Denmark had to have her affidavit notarized and later rectified.

21. It was the applicant's argument that unless an order for stay of execution is granted, there is the high chance that the respondent will push for the suit property to be transferred in her name and may subsequently dispose of the same, thereby rendering the appeal nugatory. The applicant therefore urged that it is of crucial importance that the suit property be preserved until the intended appeal is heard and concluded. In so submitting, the applicant borrowed from the following reasoning by the court in the judicial authority of **Mohansons (Kenya) Limited v Registrar of Titles & 3 others [2018] eKLR**:

“If the Interested Party does execute its statutory power over the suit property and goes ahead to sell the suit property to a third party, then substantial loss may be occasioned on the Applicant if she succeeds in the appeal and later on in the main suit.”

22. The applicant culminated his submissions by arguing that the respondent does not stand to be prejudiced in any manner since none of her legal rights will be violated if an order for stay is granted.

23. The respondent on her part submitted that there was evidence annexed to her supplementary affidavit to show that Edmund Hernandez who is the donor of the power of attorney herein passed away on 14th April, 2014 thus extinguishing the power of attorney previously given to the applicant.

24. The respondent then submitted that in the absence of a draft memorandum of appeal, it is difficult if not impossible to determine whether the applicant has an arguable appeal while quoting the authority of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR** where the Court of Appeal laid emphasis on the principle that for an applicant to be granted a stay of execution pending

appeal, he or she must satisfy the court that an arguable appeal exists.

25. I have carefully considered the grounds presented on the face of the Motion, the facts deponed in the various affidavits supporting and challenging the Motion, the Grounds of Opposition, the notice of preliminary objection and finally, the competing written submissions and authorities alluded to.

26. I will first address my mind to the notice of preliminary objection raised by the respondent, keeping in mind the renowned principles encompassing preliminary objections which I have already laid out.

27. Firstly, the respondent challenged the applicant's *locus standi* and this court's jurisdiction to handle the application on the basis of demise of the donor of the power of attorney.

28. It is not disputed that a power of attorney is extinguished upon the death of the relevant donor though such death does not extinguish the cause of action. The courts have numerously reiterated this position.

29. Upon looking at the affidavits filed on behalf of the respondent, I noted that the respondent did not tender any credible evidence to confirm the demise of Mr. Hernandez. Further to this, I have perused the record and noted that at the time of hearing the parties on the application which resulted in the ruling that is the subject of the application, none of the parties made any mention of the death of the donor of the power of attorney and in fact, the respondent fully participated at the hearing thereof until the very end. This court at the time of hearing the previous application and drafting the ruling in question wholly considered the material placed before it by the parties.

30. In the premises, I find that ground (i) of the Notice of Preliminary Objection fails.

31. In respect to the remaining grounds of the Preliminary Objection which equally constitute the issues raised in the grounds of opposition, replying affidavit and further affidavit, it is clear that the issues raised have no correlation whatsoever to the prayer for stay being sought in the Motion hence this court is not the forum for interrogating the said issues. In any event, this court is functus officio over any issues based on the earlier ruling and the conclusion of the suit, hence those issues ought to be raised in the appropriate forum, be it the succession cause or the Court of Appeal.

32. As it stands, this court's mandate is restricted to the prayer for stay of execution being sought in the present Motion, which remained unaddressed by the respondent.

33. The relevant provision in deciding whether to grant an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions to be met as follows:

- a) The application must be brought without unreasonable delay;**
- b) The applicant must demonstrate that substantial loss may result; and**
- c) Provision should be made for security.**

34. I will begin with the first condition on whether the application has been timeously filed. As earlier mentioned, this court delivered its ruling on 2nd October, 2019 while the present application was filed a few weeks later on 8th October, 2019. I am satisfied that the Motion was timeously filed.

35. On the second condition, it was the applicant's contention that he will suffer substantial loss should the respondent proceed to execute this court's ruling by transferring or otherwise disposing of the property known as LR NO. 209/6496/4 on the basis of confirmation of a grant issued to the respondent in respect to the estate of Kamil Sladek. There is nothing on the record to show that the said grant has been annulled or revoked.

36. In the premises, I stand by my earlier ruling delivered on 2nd October, 2019 and I find that the applicant has not satisfactorily shown that he stands to suffer substantial loss, which is deemed the cornerstone in any application seeking a stay of execution.

37. The third condition on the provision of security does not come into play since the ruling gave no monetary orders.

38. Consequently, I see no merit in the Motion and I am only left to dismiss it with costs to the defendant/respondent.

Dated, signed and delivered at NAIROBI this 5th day of March, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent