



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO 261 OF 2007

IN THE MATTER OF THE ESTATE OF MORRIS KILONZO MUSYIMI (DECEASED)

PRISCILLA MUMBUA KILONZO.....1ST ADMINISTRATOR/RESPONDENT

VERSUS

PHOEBE MBENEKA KILONZO.....2ND ADMINISTRATOR/APPLICANT

AND

BENARD MUTETI MUNG'ATA.....INTERESTED PARTY/2ND RESPONDENT

RULING

1. On 7th day of November, 2019, this Court delivered a ruling in this Cause in which it confirmed the grant of letters of administration as proposed by the 1st Administrator in the Summons for Confirmation of Grant dated 6th March, 2017 and the same were confirmed in terms of the annexed schedule of distribution.

2. The 2nd Administrator is aggrieved by the said decision and had given an intention to lodge an appeal to the Court of Appeal. In the meantime, she has filed the Notice of Motion dated 18th December seeking that there be a stay of execution/giving effect of the said decision pending the hearing and determination of the intended appeal.

3. According to the Applicant, there is an imminent danger that the 1st Administrator will proceed, any time from now and extract a Certificate of Grant and cause a subdivision and/or sharing of the property forming part of the Estate of the Deceased amongst the beneficiaries as proposed in the annexed schedule.

4. It was deposed that the subject of this claim is the Deceased's Estate comprising of the following properties: -

- a. Machakos/Kiandani/2783
- b. Machakos/Kaliluni/1754
- c. Machakos/Kiandani/2601
- d. Machakos/Kiandani/2784
- e. Nzau/Kikumini/17
- f. Nzau/Kikumini/692
- g. Plot at Kativani
- h. Plot at Masimba

5. The Applicant still insisted that the two Plots at **Kativani** and **Masimba** do not form part of the Deceased's Estate as the same are

registered in her names and as such shouldn't be included amongst the Deceased's property. She was however apprehensive that pursuant to the said ruling all that parcel of land known as Machakos/Kiandani/2783 shall be accordingly transferred and/or transmitted to **Bernard Mungata**, the Interested Party herein whom the applicant claims and holds is not a beneficiary of the Deceased's Estate. As such the Estate and/or the rightful beneficiaries of the Estate of the Deceased stand to lose the said parcel of land to the said Bernard Mungata once the Certificate of Grant, attaching the schedule of distribution, is issued.

6. It was averred that since pursuant to the said ruling all those plots at Kativani and Masimba have been declared as forming part of the Deceased's Estate, the applicant was apprehensive that she would lose these two plots which do not form part of the Deceased's Estate and that as a result, substantial loss and irreparable damage would result to herself and all other beneficiaries of the Estate unless an order of stay is made pending the hearing and determination of the intended appeal.

7. The Applicant is of the view that she has an arguable appeal with high chances of success. In his view, this Court failed to distribute the Estate in line with Section 40 of the **Law of Succession Act** Cap 160 Laws of Kenya and in holding that it does not have jurisdiction to determine the legality of the sale of all that land known as Machakos/Kiandani/2783, sold by the 1st Respondent to the 2nd Respondent.

8. The applicant's position was that her intended appeal would be rendered nugatory if the prayers sought herein are not granted. She contended that there is no ordinate delay in making this application.

9. In response to the application, the 1st Administrator deposed that Land Number Machakos/Kiandani/2783 does not form part of the deceased's estate hence the court lacks the jurisdiction to make any orders touching on that parcel. The said Respondent pointed out that the Applicant had not indicated whether she intended to appeal against the whole or part of the ruling though from the application the appeal was only directed at Land Parcel No. Machakos/Kiandani/2783 hence a blanket stay cannot be granted.

10. According to the 1st Administrator the said land was transferred many years ago and thus cannot be the subject of stay of the said ruling hence the application is misguided. Since the applicant in occupation of Land Parcel No. Nzau/ Kikumini /17, Nzau/Kikumini/692, Plots at Kativani and Masimba, the 1st Administrator stated that there was no irreparable damage demonstrated by the Applicant which she intends to suffer. According to the 1st Administrator, the Applicant has never been in occupation of Land Number Machakos/Kiandani/2783 which was transferred to the interested party and the title deed issued on 6th December, 2009.

11. The 1st Administrator contended that she had no income or child to help her and being elderly, she needed to benefit from her share of the estate since in her view this endless litigation is motivated by ulterior motives.

Determination

12. I have considered the foregoing.

13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions.

14. Therefore, the courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

15. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.

16. **Warsame, J** (as he then was) was alive to this issue when in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the

defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court... The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

17. In IL Nwesi Company Limited & 2 Others vs. Wendy Martin Civil Application No. Nai. 291 of 2010 [2011] eKLR the Court of Appeal held that:

"Finally, the court has considered the provisions of sections 3A and 3B of the Appellate Jurisdiction Act which the applicants have also invoked. These are fairly recent amendments in the law requiring that the court, in exercise of its powers or in the interpretation of the provisions of the Act, shall facilitate the just, expeditious, proportionate and affordable resolution of the matters before it. Such is the overriding objective of the Act. There has, however, been considerable learning on the application of those provisions. The jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes *inter alia*, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in the court's view, calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases. That, however, is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles."

18. The gist of the Applicant's application as can be gleaned from the supporting affidavit is that the two Plots at **Kativani** and **Masimba** do not form part of the Deceased's Estate as the same are registered in her names and as such shouldn't be included amongst the Deceased's property. She was also apprehensive that pursuant to the ruling which she intends to appeal against, land parcel no. Machakos/Kiandani/2783 shall be accordingly transferred and/or transmitted to **Bernard Mungata**, who is not a beneficiary of the Deceased's Estate.

19. In the present application, though the applicant contends that she intends to appeal against the whole ruling, presumably even the favorable parts of the said decision, the applicant has not mentioned the reasons why the parcels not mentioned by her should similarly be stayed. In the Schedule, the 1st Administrator had proposed that Machakos/Kaliluni/1754 be wholly registered in her name. That parcel is not mentioned in this application. Land Parcel Nos. Nzaui/Kikumini/17, Nzaui/Kikumini/692, Plots at Kativani and Masimba were proposed to be registered in the Applicant's name in trust for herself and her children while Land Parcel Nos. Machakos/Kiandani 2784 and 2601 were proposed to be registered in the names of Elizabeth Kanini Mulumbi and Shadrack Musyoki respectively. The contentious Machakos/Kiandani/2783 was to be registered in the names of **Bernard Muteti Mungata**. From the application, no issue has been taken as regards Machakos/Kaliluni/1754, Nzaui/Kikumini/17, Nzaui/Kikumini/692 and Machakos/Kiandani 2784 and 2601. In an application of this nature, this court in arriving at its decision must strive to balance the interests of the parties and in doing so the Court should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

20. It is incumbent upon an applicant to convince the court why the whole decision ought to be stayed pending an intended appeal, assuming it will ever be filed. Unless that is done there would be no basis for granting of stay. In this case there is no basis upon which I can stay this court's decision as regards Machakos/Kaliluni/1754, Nzaui/Kikumini/17, Nzaui/Kikumini/692 and Machakos/Kiandani 2784 and 2601.

21. In the premises, I hereby grant stay of the decision in so far as it affects Plots at Kativani and Masimba and Machakos/Kiandani/2783. In other words, the status quo in so far as the said properties are concerned shall be maintained. Since the appeal is yet to be filed, the said stay will be in existence on condition that the intended appeal is filed within 45 days from the date of this ruling and in default, the stay will lapse.

22. Only to that extent does this application succeed. Otherwise the same is dismissed. There will be no order as to costs.

23. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 27th day of April, 2020

G V ODUNGA

JUDGE

Delivered at 9.30 am in the absence of the parties having been notified through their known email addresses.

CA Josephine