



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PROBATE AND ADMINISTRATION

SUCCESSION CAUSE NO. 123 OF 2013

IN THE MATTER OF THE ESTATE OF FELIX MATHENGE (DECEASED)

PRISCILLA WAMBUI MATHENGE..... PETITIONER/APPLICANT

VERSUS

MARY WAIRIMU MATHENGE..... ..RESPONDENTS

RULING:

1. The application pending before this court dated 7th August, 2019 under certificate of urgency by the applicant seeks for the following orders;

(i) Spent

(ii) **That** the Honourable court be pleased to order stay of execution of the orders made on 3rd December, 2009 until the appeal before the Court of appeal is heard and determined.

(iii) **That the** Honourable court be pleased to order stay of proceedings in **BARICHO SPM CC NO. 25 OF 2019** until the hearing and determination of the appeal before the Court of Appeal.

(iv) **That** the costs of this application be provided for.

2. The applicant is basing this application on the judgment of this court delivered on 15th July, 2019 against the applicant. She was aggrieved and dissatisfied against the same judgment and has filed a notice of appeal dated 27th July, 2019, on 29th July, 2019 in order to appeal in the Court of Appeal against the whole judgment of the lower court.

3. The respondent on the other hand filed a replying affidavit sworn on 23rd August, 2019 opposing the said application.

4. The respondent opposed the appeal and filed a replying affidavit sworn on 25th August, 2019. The parties canvassed the appeal by way of written submissions.

5. I have considered the application and all the submissions. The issue which arises for determination is stay of execution;

6. The applicant also seeks an order of stay of proceedings and is also seeking an order for stay of proceedings in Baricho SPMCC No. 25 of 2019.

7. The applicant seeks to stay execution of the order made on 3rd December, 2009 and also seeks an order of stay of proceedings in Baricho SPMCC No. 25 of 2019.

8. However, on the grounds under which the application is brought the applicant states that he is aggrieved and is dissatisfied with the Judgment of 15th July, 2019.

9. That when the applicant filed an application for revocation of grant, Honourable W. Karanja issued an order on 24th May, 2010 for stay of execution of the orders made in favour of the respondent on the 3rd of December, 2009.

10. This application has some problems. The applicant seeks to stay proceedings in Baricho Court Succession cause no. 25 of 2019 and one of the parties is not a party in this proceedings.

11. The application is brought under Order 42 Rule 6 (1) (2) and Order 49, and 73 of the probate and administration rules. This application as submitted by the counsel for the respondent is defective as the order sought to be stayed is not annexed to the application for stay dated 7th August, 2019

There is no appeal filed from the order sought to be stayed that is the order issued on 3rd December, 2009 and the applicant is urging this court to issue other orders from its own orders or to fail to give effect to its judgment.

12. The counsel for the respondents submits that, there is no valid appeal or notice of appeal on record. That the appeal cannot operate as a stay of execution of an order issued on a different date that is on 3rd December, 2009.

13. The applicant has issued notice of appeal against the judgment of this court dated 15th of July, 2019 and in the circumstances the notice of appeal is issued against the judgment of this court, while the applicant states that there be stay of execution of the order made on 3rd December, 2009, so in essence the Notice of appeal from the Judgment of 15th July, 2019 cannot be a basis for seeking stay of an order issued on a different date that is 3rd December, 2009.

14. There is no appeal filed arising from the order issued on 3rd December, 2009. Application is incompetent. As held in the case cited by the respondent, *Raymond M. Ombunga -vs- Austin Pyan Maranga Kisii HCCA No. 15 of 2010* where it was stated the court cannot see how it can order stay of decree that is not the subject of an appeal. The decision is persuasive, and It states the correct position with regard to order of stay of decree. As stay of execution of a decree must relate to the order appealed against. Order 42 Rule 6 (1) (2) deals with stay of execution.

Order 42 Rule 6 (1) (2) of The Civil Procedure Rules, which provides:

“ (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may, for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

16. The grant of orders for stay of execution is discretionary, and the party must establish that substantial loss may result to the applicant unless the order is made.

17. Secondly the application is brought without unreasonable delay and such security as to cost for the due performance of the decree or order as may ultimately be binding on the applicant has been given.

18. There has been unreasonable delay in seeking an order of the order issued on 3rd December, 2009, now 10 years ago. This order has also been overtaken by events, the order issued by Hon. Justice W. Karanja stayed execution of orders issued on 3rd December, 2009 pending the hearing and determination of the main application for revocation of grant. The order has not been annexed however the application has already been overtaken by events.

19. The respondent has deponed that a grant was duly executed and the estate distributed to the beneficiaries and the suit land was transferred to Gerald Muthingani way back in year 2014. Therefore, as emphasized by counsel for the respondent, what is sought to be stayed has already taken place and the application is brought late and overtaken by events.

20. This court is been asked to act in vain and issue orders in vain. The court cannot hear appeals from its own orders.

21. I agree that this court cannot issue the order of stay as prayed as it would be an exercise in futility. There is nothing to stay in this proceedings.

Secondly the applicant seeks orders of stay of proceedings against persons who are not parties in this case. Gerald Muthingani is not enjoined as a party In this case and yet the orders sought will affect him as he is registered owner of land parcel number Mwerua/ Kagioni/881, it is not clear why the applicant is seeking stay of the proceedings in Baricho Court in this court. The application ought to have been made before the trial court to give the party an opportunity to be heard.

22. Who has filed the suit in Baricho Court is the owner of land parcel **Mwerua/ Kagioni/ 881** and he ought to be given an opportunity to be heard, as he is the plaintiff before the proceedings in the Baricho Court.

It would be against the rules of natural justice to stay the proceedings without giving him an opportunity to be heard, and yet he is the owner of the land whose right of the property is protected **under Article 40** of the Constitution which provides that;

“ Subject to Article 65 every person has the right either individually or in association with others to acquire and own property.”

23. He is seeking to enforce his rights over his property by filing the suit in Baricho Court.

It would be fair to abruptly stop such proceedings without giving an opportunity to be heard.

24. The applicant has not indicated that he has applied for stay of proceedings before in Baricho court and they have been denied, so he has no basis of coming to this court to seek orders of stay of the proceedings.

25. The court exercises discretion to order stay of proceedings, and it is trite that discretion must be exercised judiciously.

26. It would not be a fair exercise of discretion by staying the proceedings without giving the party an opportunity to be heard.

27. There is no appeal in this court emanating from the orders issued by Baricho Court and therefore this court would have no reason to interfere with the suit before Baricho court and the proper forum is Baricho court itself and if orders are denied the applicant is still free to seek reliefs from this court.

28. The applicant has not demonstrated that she will suffer substantial loss.

In the exercise of discretion the consideration is whether Substantial loss may result.

See: **Machira T/a Machira & Company Advocates -versus- East African Standard (No. 2) H.C.C. No. 612 of 1996** where it was held that in such application for proceedings the court cannot proceed on an issue presumption that the appeal or intended appeal shall succeed and so prima facie the applicant is the preferred party.

The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interest of one party.

29. In order for a successful party to obtain a suspension of further proceeding or execution he must satisfy the court on affidavit or other evidential material that substantial loss may result.

In this kind of application for stay it is not enough for the applicant to merely state that substantial loss will result, he must provide specific details and particulars.

Where no peculiarly or attachable loss is shown to the satisfaction of a court.....”

30. The consideration is whether the conditions set out under Order 42 of Civil Procedure Rules have been met and these conditions are meant to guide the court in the exercise of that discretion.

31. The applicant has not demonstrated that she will suffer substantial loss, nor has she demonstrated that the appeal will be rendered nugatory of stay of execution and of the proceedings is not ordered.

32. The orders she intends to appeal against has been overtaken by events.

33. I therefore dismiss the application with costs.

Dated, signed at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE