



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 43 OF 2019

JAMES MWANGI KARINGI.....APPELLANT

VERSUS

ONESMUS NJIRU NYAGA.....RESPONDENT

(Being an appeal against the judgment and Decree of the Hon. G.K. Odhiambo, RM delivered on the 31st May, 2019 in Gichugu Principal Magistrate's Court Succession cause No. 151 of 2016)

BETWEEN

ONESMUS NJIRU NYAGA.....PETITIONER

VERSUS

JAMES MWANGI KARINGI.....PROTESTOR

RULING

1. The application pending before this court is the one dated 11th July, 2019 and seeks orders that there be stay of execution of the judgment delivered on 31st May, 2019 by delivered in the Judgment Succession cause number 151 of 2016 in The estate of Agnes Kagundu (deceased) at the Principal Magistrate's court Gichugu and all consequential orders emanating therefrom pending the hearing of **Kerugoya High Court Civil Appeal No. 43 of 2019** amongst other players.

The application is based on the following grounds;

1. The Honourable Magistrate G. K. Odhiambo Judgment on the 31st May, 2019 and the appellant/ applicant being aggrieved by the same, lodged an appeal at the court of Appeal at Kerugoya, same being Civil Appeal No. 43 of 2019.
 2. The filed appeal raises serious triable issues on points of law and fact with overwhelming chances of success and that if stay is not granted the said appeal will be rendered nugatory.
 3. It is just, mete and in the wider interests of justice that the applicant herein be given an opportunity to pursue the appeal herein to its logical end without same being rendered nugatory by execution of the decree herein.
 4. This application has been brought without delay
 5. No prejudice whatsoever or at all shall be occasioned upon the respondent if orders sought herein are granted.
2. The application is also supported by the affidavit of James Mwangi Karingi sworn on 11th July, 2019, his contention is that he was dissatisfied with the judgment of the trial magistrate and has lodged this appeal.
 3. The appeal bases serious triable issues of law and fact and has overwhelming chances of success and if stay of execution is not granted, the said appeal will be rendered nugatory.
 4. That the respondent will not suffer any prejudice and the court has unfettered discretion to allow the applicant to challenge the court's decision on appeal by granting the stay of the Judgment.

5. The application was opposed by the respondent Onesmus Njiru Nyaga who filed a replying affidavit sworn on 23rd July, 2019.

He depones that the orders sought herein are not available to the applicant as he has not demonstrated any intention by himself to execute the Judgment delivered on 31st May, 2019.

6. That other siblings who were the beneficiaries of the estate of the deceased have not been made aware of this application, he further depones that there is no intention on his part to execute the Judgment. He depones that the application is incompetent, bad in law and an abuse of the court process and is premature, and he prays that the application be dismissed.

7. He has filed a further affidavit and depones that the other parties in the case are aware of this application and although the respondent depones that he has not started execution, and it is not true does not intend to execute as he has invited surveyors to the property to cause sub-division long after he was served orders for stay of execution.

8. The application was disposed of by way of written submissions.

9. I have considered the application and the submissions. The issue for determination is stay of execution.

Stay of execution is provided under **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.

10. 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.

11. 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.

12. The matter involved in the appeal arises from the Judgment in estate of the late Agnes Nyaga who died on the 20th March, 1999 where it is submitted that the appeal is intended to reverse irrelevant information which the honourable court considered in the distribution of the property **L.R. No. Kabare/Ngiroche/ 17** among the beneficiaries / children of the late Agnes Kagundu Nyaga.

13. It is the contention by the applicant the estate was distributed inequitably as the sons of the deceased had obtained their share from the parents long before the demise of the deceased. This is a fact that was ignored by the learned magistrate.

14. He further submitted that the evidence tendered by the appellant and other beneficiaries was not considered and not incorporated in the determination which led to an erroneous/ arbitrary distribution formula to the disadvantage of the appellant and other beneficiaries to the Estate. That this was in breach of the rules in contemplation of the Laws of Succession Act.

15. The applicants are alleging that the distribution of the estate as per the judgment of the trial magistrate was discriminatory to some of the beneficiaries.

They have relied on the case of; **In Re-estate of Francis Mwangi Ndaria (deceased) (2018) eKlr.** and **In Re-estate of Solomon Ngatia Kariuki ((deceased) (2008) eKlr** where the court made a strong statement on the issue of discrimination against daughters in Succession matters.

16. The Contentions by the respondents are that;

They submit that the appeal does raise triable issues and the appeal has no minimal chances of success.

The GRANT of orders of stay of execution are discretionary and they are not based on a consideration as to whether a party has an appeal which raises triable issues.

In the case cited by the respondents: **Steve Omondi Odero & Another -versus- ESS(suing on behalf of a minor EJZ (E) 2019 eklr** at Paragraph 17. The court stated.....

“ A stay of execution under Order 42 of Civil Procedure Rules is interim order to suspend the rights of one party who is aggrieved with the Judgment of trial court or Tribunal and wishes to exercise his or her of appeal.

It's main objective is to protect the substratum of the suit by delaying of the execution process until determination of the appeal.

Being a discretionary remedy the applicant must demonstrate that he or she has approached the courts of equity with clean hands.....”

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.

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.....”

17. 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.

18. This appeal arises out of a determination in a Succession matter which involves members of the same family an appeal has been filed.

19. If execution is done and some members of the family may be deprived of their rightful share of the estate they are likely to suffer substantial loss is likely to result and if the estate is sub-divided and distributed in accordance with the Judgment of the trial magistrate the appeal will be rendered nugatory.

Restitution may not be possible as nothing will prevent the beneficiaries from dealing with their shares as they deem fit including parting with ownership and possession.

The issue of substantial loss is therefore a key consideration in granting stay as stated in the case of; **Machira T/a Machira & Company Advocates -versus -East African Standard (Supra)**

20. It would be in the interest of Justice that stay of execution is granted until the issue of distribution of the estate is determined to its finality.

21. The applicant has already filed this appeal and it is therefore mete and just that he be given an opportunity to pursue his appeal to its logical conclusion.

22. In the circumstances I will exercise discretion and order stay of execution pending the hearing and determination of this appeal.

23. The respondent is not likely to suffer any prejudice as he has deponed that there is no intention on his part to execute the judgment as alleged by the appellants.

The court has discretion to order the applicant to provide Security. However, in the circumstances of this case which involves members of the same family and the most important thing is the preservation of the estate. I will not order the applicant to provide security.

24. I therefore make an order that the application is allowed. There will be stay of execution of the judgment of the trial magistrate in Succession cause number. 151 of 2016 of the Principal Magistrate's court at Gichugu pending the hearing and determination of this appeal.

Dated, Signed at Kerugoya this 29th Day of May 2020

L.W. GITARI

JUDGE