



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 16 OF 2019

JAMES NJAU NJOGU.....APPLICANTS

V E R S U S

VIODORA WAMIRU NDAMBIRI.....1ST RESPONDENT

RAPHAEL MBUI NDAMBIRI.....2ND RESPONDENT

RULING

1. The applicant filed an application dated 10/7/2019 under **Order 42 Rule 6 of the Civil Procedure Rules** seeking orders that the court be pleased to stay the succession cause No. 14/2014 at the Principal Magistrate's Court Wang'uru pending the hearing of this application. That the court do issue an order staying the proceedings in succession cause No. 14 of 2014 Wang'uru pending the hearing and determination of this appeal.

2. It is based on the grounds that the applicant has filed an appeal against the ruling of Hon. G. Mutiso at Wang'uru Principal Magistrate's which revoked the Letters of Administration without offering the appellant the right to be heard. That the appeal has a high chance of success. He further contends that the respondents have since filed an application dated (6/5/19) seeking to have the grant of Letters of Administration intestate issued to them jointly. That the applicant is likely to suffer substantial loss and damage as he has greatly invested in the property in question. That the appeal will be rendered nugatory if stay is not ordered and it is therefore meet and just that this application is allowed.

3. The respondents opposed the application and filed a replying affidavit sworn by Raphaella Mbui Ndambiri sworn on 26/7/2019. He deposes that the application is frivolous vexatious and an abuse of court process and same does not lie. He deposes that the appellant had secretly and fraudulently and without the consent of the respondents acquired Letters of Administration in the estate of the deceased and the grant was later confirmed in his favour on 13/11/2017. The entire estate of the deceased was registered in his favour and hence disinheriting the legal beneficiaries of the deceased including his mothers. That is when the respondents moved to court seeking revocation of grant. They contend that the appellant was aware of the hearing of the application for revocation of grant but chose not to be present in court without a good reason, a fact well captured in the submissions. It is the respondents case that the court had jurisdiction to revoke the grant under **Section 76 of the Law of Succession Act**. That the application does not satisfy the legal threshold for granting the stay. That the application lacks merits. That the applicant will have an opportunity to ventilate his case. The respondents pray that the application be dismissed.

4. The parties agreed to proceed with the application by way of written submissions.

5. I have considered the application and the submissions. The issue which arises for determination is stay of proceedings. It should be noted that stay of proceedings should not be confused with stay of execution pending appeal which is provided for under **Order 42 Civil Procedure Rules**. Stay of proceedings calls for the exercise of discretion. It is a grave judicial action as it interferes with the litigants right to conduct his litigation and impends on the right of the litigant to access justice right, to expeditious disposal of the dispute and ultimately the right to fair trial. It follows that the test for stay of proceedings is high. In the case of **Global Tours & Travels Limited: Nairobi H.C Wingling up cause No. 43/2000 Ringera J** stated –

“As I understand the law, whether or not to grant a stay of proceedings or further proceeding on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ----- the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought expeditiously.”

6. The authority is persuasive and that it properly expresses the considerations the court ought to take when exercising discretion to order stay of proceedings.

7. Further guidance on the threshold for stay of proceedings is stated in **Hulsbury's Laws of England 4th Edition Vol 37 page 330 and 332** where it is stated:-

“The stay of proceedings is a serious, grave and fundamental interruption of the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubts ought not be allowed to continue”. “This is a power which it has been emphasized should be exercised sparingly and only in exceptional cases”.

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for stay on this ground must show, not merely that the plaintiff might not, or probably would not succeed but that he could not possibly succeed on the basis of pleading and the facts of the case.”

8. In this, it would not be in the interest of justice to exercise discretion in favour of the applicant to order stay of proceedings. A such action will only lead to delay of the proceedings in the lower. The matter before the lower will be heard on merits.

9. The applicant has not demonstrated that he has an arguable appeal. The impugned ruling of the trial Magistrate considered the replying affidavit of the applicant. The trial Magistrate properly addressed his mind to the facts and the law.

10. In conclusion, I find that this application lacks merits and is dismissed.

Dated at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE