



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.24 OF 2017

IN THE MATTER OF THE ESTATE OF MARGARET NJAMBI THUO (DECEASED)

CECILIA WANGARI THUO.....OBJECTOR/APPLICANT

-VERSUS-

PHYLIS WANGUI KIBURI.....PETITIONER/RESPONDENT

R U L I N G

By the Notice of Motion dated 9/9/2019, the objector/applicant seeks an order of stay of execution of this Honorable court's Judgment/decree dated 19/7/2019 pending the hearing and determination of the intended appeal which has been preferred against the court's judgment.

The application is expressed to have been brought pursuant to Order 42 Rule 22 and Order 51 Rule 1 of Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The grounds upon which the application is premised are found in the body of the application and the supporting affidavit of the applicant Cecilia Wangari Thuo, dated 9/9/2019.

On 19/7/2019, this court delivered Judgment in this matter. The applicant is dissatisfied with the said Judgment and has filed a Notice of Appeal dated 24/7/2019. The applicant contends that if the said Judgment is not stayed, it is likely to be executed and the applicant will suffer substantial loss; that the deceased's estate comprising *Nyandarua/Silibwet/793* should be retained as security and it is only fair that an order of stay be granted as the respondent will not suffer any prejudice; that the applicant moved the court without delay.

Mr. Murimi, the applicant's counsel also filed written submissions on 21/10/2019 which he highlighted.

Counsel submitted that he erroneously brought the application under Order 42 Rule Civil Procedure Rules though it should have been under Rule 73 of the Probate and Administration Rules; that the court has inherent powers to do justice to the parties.

Counsel submitted that the applicant has met all the principles for grant of an order of stay which are that:

- (1) The applicant has to move the court timeously;*
- (2) That applicant has to provide security as a condition for stay pending appeal;*
- (3) The applicant has to demonstrate that substantial loss will be suffered if stay is not granted.*

On the first requirement, counsel urged that Judgment was delivered on 19/7/2019 and the Notice of Appeal was filed on 24/7/2019 within 14 days while this application for stay was filed on 9/9/2019; that the application was filed timeously.

On provision of security, counsel submitted that the subject property Plot.793 is the best security that can be provided in that the land parcel will remain intact pending the hearing of the appeal and should not be wasted or disposed of.

On the issue of substantial loss, it is the applicant's case that the applicant and her children have been living on the land since 1965 and that if it is shared equally as per the court's order and it is subdivided and titles issued to each, then the respondent may get rid of the land if the Judgment is not stayed; that if titles are issued, the appeal will be rendered nugatory. Counsel further urged that the court can give timelines within which to prosecute the appeal. Counsel relied on the following decisions:

1) *Inder Singh Gill Ltd v Njoroge Gichara NRB.H.C.2411/1990*; and

2) *Butt v Rent Restriction Tribunal C.A.6/1979*.

The appeal was opposed and Phylis Wangui, the respondent filed a replying affidavit dated 6/11/2019 in which she deponed that these proceedings were commenced in 2012 and the respondent was always been precluded from benefiting from the deceased's estate and this application is meant to further delay the applicant from enjoying the use of the said land.

The respondent further deponed that she was born in 1943 and is aged 76; that the appeal may not be disposed of quickly to enable her enjoy the fruits of her judgment; that the parcel was subdivided and she intends to do some commercial farming on the land. However, the respondent has been unable to access the land; that the land can be secured by the applicant lodging a restriction on her portion of land; that the applicant has not shown what prejudice will be suffered if the order is not granted; that if an order of stay is granted, it is the applicant who stands to benefit to the respondent's disadvantage.

Mr. Maina Kairu, counsel for the respondent filed submissions on 2/3/2020 which he highlighted.

Counsel submitted that there was unreasonable delay in bringing the application, that is, two months after the Judgment was read; that by that time, the respondent had started the execution process.

On the question of security, the applicant has offered the estate as security and the value of her share is not determined.

Whether substantial loss will result, counsel submitted that the respondent wants to cultivate her share of the land as she has been precluded from use since 2000 and she is now 76 years old and has very little time left to enjoy the land; that if stay is granted, she will still be locked out of the estate.

Counsel urged the court to allow execution to proceed save that each party should not be allowed to sell their share. Counsel relied on the decision of *Charles Nyamwega v Asha Njeri Kimata & another (2017) eKLR* which cited case of *Housing Finance Co of Kenya v Sharok Kher Mohamed Ali Hirji & another (2015) eKLR*.

Counsel also urged that the applicant is not properly before this court and did not move the court under the correct provisions of law and hence the application should be dismissed.

I have considered the application, rival submissions by counsel and cited cases.

I will first address the provisions of law that the applicant invoked, that is, Order 42, 22 Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Law of Succession Act is 'sui generis' or self sufficient with its own unique and special procedures which regulate the procedures in Probate and Administration matters. The Law of Succession Act provides for exceptional instances when the Civil Procedure Rules will apply to Succession matters, under Rule 63 of Probate and Administration Rules.

In the case of *Josephine Wambua Wanjiku v Margaret Wanjiru Kamau & another (2013) eKLR* the Court of Appeal stated as follows:

"We hasten to add that the Law of Succession Act is a self sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63(1)."

Under Section 47 of the Law of Succession Act, the court has wide powers to entertain any application and determine any dispute under the Law of Succession Act. Rule 49 of the Probate and Administration Rules also provides that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules, shall file a summons supported, if necessary by an affidavit.

There is therefore no specific provision for grant of an order of stay under the Law of Succession Act or Probate and Administration Rules but the court has been granted wide powers to entertain any such application, make any order under the above Rules in order to do justice to the parties. Order 42 of the Civil Procedure Rule does not therefore apply to Succession matters.

In view of the above provisions, and Article 159(d) of the Constitution, although the applicant should really adhere to the Rules of procedure in approaching this court, the court will not lock the applicant out of the seat of justice and will go ahead to consider its merits.

Whether there was unreasonable delay in seeking stay:

The Judgment that is appealed against was delivered on 19/7/2019. The applicant then prepared Notice of Appeal dated 24/7/2019. It is not clear when it was filed. However, this application was not filed until 26/9/2019, about 2 months after delivery of the Judgment. The applicant has not bothered to explain the delay of two months. What is considered as unreasonable delay will vary from case to case. In *Jaber Mohsen Ali's case*, the court said as follows:

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after Judgment could be unreasonable delay depending on the Judgment of the court and any order given thereafter." The Judge went ahead to state that *"In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC No.919 of 2012 the applicant had been given 14 days to vacate the suit land. He*

filed an application one day after the 14 days. The application was denied. The court holding that, the application ought to have come before expiry of the period given to vacate the land.”

So far, the delay has not been explained and in my view, two months delay is unreasonable in the circumstances.

Whether the applicant will suffer substantial loss:

The applicant’s case is that she has been on the land with her children since 1965; that the court ordered subdivision into two equal parts and that if that were to happen and the respondent disposes of her share, then the substratum of the appeal would dissipate.

In *Charles Nyamwega v Asha Njeri (Supra)* the court cited the Court of Appeal decision, *Housing Finance Co-operation Kenya (Supra)*, where it was stated:

“..the mere fact that there are strong grounds of appeal would not, in itself justify an order for stay...the applicant must establish a sufficient course; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly, the applicant must furnish security, and the application must, of court, be made without unreasonable delay.”

The court in considering the issue of substantial loss has to consider the rights of each of the parties. Whereas the applicant is exercising her Constitutional right of appeal, the respondent is entitled to enjoy the fruits of her judgment. The court ordered that the respondent and applicant share the land equally. Their mother died in 2000, twenty years ago and only the applicant has been in use and possession of the land to the exclusion of respondent. The respondent is now 76 years.

I have also considered the decision in *Inder Singh Gill Ltd (Supra)* and *MM Butt Case (Supra)*. Justice CB Madan said as follows:

“Stay ought to be granted so that an appeal, if successful may not be nugatory. A stay which would otherwise be granted ought not be refused because the Judge considers that another which in his opinion will be a better remedy will become available for the applicant at the conclusion of the proceedings.

It is the discretion of the court to grant stay or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its discretion in a way so as not to prevent the appeal if successful from being nugatory.

I will share my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal if successful, is not nugatory.”

Guided by the above finding, I am convinced that substantial loss would be suffered if the land was subdivided and the respondent disposed of her portion. However, in this case the respondent states that all she wants to do on the land is farm it.

Security costs:

The applicant has offered the subject land as security for costs. The total acreage of the land is 5.58HA or about 13.78 acres. As per the court’s Judgment, the applicant’s entitlement is half of the land which translates to about 6.8 acres. In my view, an order that the subject land be shared but should not be disposed of or interfered with during the pendency of the appeal is sufficient security for the due performance of the decree.

Although the unreasonable delay was not explained, I find that the applicant is deserving of an order of stay on terms that the court will grant.

The respondent has been excluded from benefiting from the land for 20 years. It is unknown how long it will take the court to hear and determine the appeal. The court will therefore grant an order of stay as prayed but on condition:

- (1) That the land be surveyed, subdivided into 2 equal parts with the surveyor having regard to the area where the applicant has developed, that is, built houses and allocate the applicant there;*
- (2) Meanwhile, pending the hearing and determination of the appeal no titles should be issued;*
- (3) The respondent be allowed to use her share of the land for cultivation only, pending the hearing and determination of the appeal.*

Costs will abide the appeal.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28TH DAY OF MAY, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Muui for objector/applicant

Mr. Ndegwa Wahome – absent

Eric – Court Assistant