



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KISII

SUCCESSION CAUSE NO. 537 OF 2015

IN THE MATTER OF THE ESTATE OF SAMUEL OBITO GETABU

ZACHARIA NYAKUNDI..... PETITIONER/ APPLICANT

VERSUS

HAGGAI OGOTI

KENNEDY OSORO.....OBJECTORS/ RESPONDENTS

RULING

1. Zachariah Nyakundi the petitioner/ applicant herein has filed an application dated 20th January 2020 seeking a stay of the proceedings on a ruling this court delivered on the 2/7/2019 pending the determination of an appeal. This application was filed by his previous lawyer Mwamu & Company Advocates. The applicant has chosen to proceed with the application. The applicant in his affidavit in support of the application claims that the court made a wrong decision in allowing the objectors application. That there was a delay in typing the proceedings, the delay is not inordinate. That leave should be granted as the application is made in good faith.

2. The application was opposed. The respondent filed a replying affidavit on the 12th February 2020 and a further affidavit on the 13th July 2020. The respondents aver that the stay under Order 42 rule 6 is conditional and that the applicant must come within the provisions of the said Rule. That the applicant has failed to satisfy the conditions of the said Rule. That the applicant's affidavit is merely attacking the court's ruling and has not stated why the court should grant a stay. That the applicant has failed to show the substantial loss he is likely to suffer in case the order is not granted. That the court ruling was delivered on the 2nd July 2019 and the application filed on the 29th January 2020 a period of six months. That the application is an afterthought and should be declined. That they have complied with the court's orders as per the ruling and filed an application to confirm the grant. That the Notice of appeal was lodged on the 29th October 2019 way beyond the requisite time. That there is no appeal as the applicant has not shown that he sought an extension of time in the Court of Appeal.

ANALYSIS AND DETERMINATION

3. I have considered the applicant's affidavit. He is currently acting in person. I have also considered the respondents' response. The relief sought by the applicant is a discretionary one. The test to be applied for stay proceedings was stated by Ringera J in the case of *Global Tours & Travels Limited: Nairobi HC Winding Up Cause No. 43 of 2000* as follows;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings 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 or not 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 an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

4. As stated above the decision whether to grant a stay of proceedings is discretionary. As stated by Justice Ringera in the above cited case, in deciding each case whether to order a stay the court has to weigh the pros and cons of granting or not granting the order. The applicant has to demonstrate that the application was made without delay. The impugned Ruling was delivered on the 2nd July 2019 and the application was filed six months later. The applicant claims that he had sought the court proceedings delayed supplying the proceedings. They attached a receipt dated 28/10/2019 for proceedings. Proceedings were sought about 3 months from July 2019. It is not clear when the applicant got the proceedings. I will however give the applicant the benefit of doubt that the delay was caused by the court registry. The applicant has also to demonstrate that if the stay is not granted then the appeal will be rendered nugatory. The applicant intends to challenge the Ruling which revoked the grant and brought on board the 1st respondent as a co administrator. Though the irreparable loss is not sufficiently explained, I do note from the draft Memorandum of Appeal attached that the applicant is intending to challenge the court's finding that the respondents

too are entitled to benefit from the deceased's estate. Matters of inheritance which involve land are quite emotive.

5. After considering the pros and cons in this matter I find that in the interest of justice it is necessary that I exercise my discretion and stay the proceedings for a period of 45 days only from the date of this ruling to enable the applicant move to the Court of Appeal. This matter will be mentioned before this court on the 21st of September 2020 to find out if the applicant has moved to the Court of Appeal and for further directions. Costs shall be in the cause.

Dated, signed and delivered at KISII this 5th day of August 2020

R.E. OUGO

JUDGE

In the presence of;

Applicant in person

Mr. Momanyi for the Respondents

Kennedy Osoro Present

Ms. Rael Court Assistant