



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 25 OF 2019**

**JOHN GITARI MUNYI.....APPELLANT/APPLICANT**

**VERSUS**

**MARY WAMURANGO JOHN.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This is a ruling to the application dated 8/10/2019 brought under certificate of urgency. The applicant sought for orders of stay for execution of the Certificate of Confirmation of Grant as well as the ruling and the orders issued on 7/02/2019 by Hon. L.K. Mwendwa in SRM's court at Runyenjes in Succession Cause No. 294 of 2017 pending the hearing and determination of the appeal.

2. The grounds in support of the application are that the applicant's application for revocation of grant in Runyenjes Succession Cause No. 294 of 2017 was dismissed on 7/02/2019 as a result of which he filed this appeal. That the respondent was likely to execute the grant and dispose of the subject matter of this suit. That the disposal would be to the applicant's detriment as the respondent would not afford to compensate him in the event that the intended appeal is successful for the property involved is worth over 22 million Kenya Shillings. He further averred that the suit land had been awarded to him in Embu HC Succession Cause 151 of 2018 and further that the Grant was subject to an application for revocation in Embu CMC Succession Cause No. 229 of 2017 and as such, the suit property was a subject matter in two different courts. For that reason, the applicant argues that it will be in the interests of justice that the application be allowed pending determination as to the ownership of the suit property. Further that his appeal was arguable and that the respondent would suffer any prejudice.

3. The application was opposed by the respondent herein vide her replying affidavit sworn on 30/10/2019 wherein she deposed that the instant application was misplaced and aimed at delaying the course of justice and that the stay orders wouldn't serve any purpose as there was a pending suit at the Embu CM Succession Cause No. 229 of 2017 which suit was pending transfer to this court for determination and which determination would conclude the entire suit and appeal herein. She further deposed that the intended appeal has no chances of success as the grounds therein were not arguable and that grant of the prayers sought would occasion further delay in the distribution of the estate which the Applicant was intermeddling with and wasting the same. The respondent argues further that the person's financial status does not form a basis of stay of execution as stated by the applicant.

4. The parties took directions for disposal of the matter by way of written submissions. In compliance of thereto, each party filed its submissions in support of its position in the pleadings herein.

**B. Issues for determination**

5. I have considered the application herein, the Respondent's reply and the rival submissions filed herein and it is my opinion that the main issue for determination is whether this application has merit.

**C. Applicable law and determination of the issues**

6. At this preliminary stage, I note that the applicant relied on Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The application, as I have noted, substantively sought stay of execution of a Certificate of Confirmation of Grant together with the ruling and grant of which orders is governed by Order 42 of the Civil Procedure Rules.

7. As a rule, in proceedings under the Law of Succession Act, provisions of the Civil Procedure Act and Civil Procedure Rule do not apply as the Law of Succession Act is *sui generis* with its own unique and special procedures which regulate proceedings in probate courts. The only provisions of the Civil Procedure Rules which apply are provided under Rule 63 of the Probate and Administration Rules. (See **Josephine Wambui Wanyoike -vs- Margaret Wanjiru Kamau & Another [2013] eKLR**). Under Rule 63 the said Orders are Orders V, X, X1, XV,

XV111, XXV, XL1V, and XL1X and which Orders in the amended Civil Procedure Rules 2010 are Orders dealing with *service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time.*

8. As such, it is clear that pursuant to the express provisions of the Probate and Administration Rules, the provisions of the Law invoked by the applicant do not apply to probate matters. Further under Rule 59 of the Probate and Administration Rules, an applicant is required to move the court by way of summons and not notice of motion. As such it is clear that the instant application is brought under provisions of the law which are not applicable to succession matters and in the wrong form.

9. However, pursuant to the provisions of Section 47 of the Law of Succession Act, this court has jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Further, I note that the applicant herein invoked the provisions of Rule 73 of the Probate and Administrative Rules and which Rule preserves the inherent jurisdiction of this court while dealing with matters succession. The wording of that Rule is *pari materia* with *Section 3A of the Civil Procedure Act on inherent powers of this court.*

10. *It is my view that notwithstanding Order 42 of the Civil Procedure Rules not being one of those Orders imported by Rule 63(1) of the Probate and Administration Rules, this court has jurisdiction to grant the orders by invoking its inherent powers under Rule 73 and maker orders for the sake of justice. Article 159 of the Constitution obligates this court to administer justice without undue regard to procedural technicalities. As such the application is proper before the court.*

11. Order 42 deals with stay of execution pending appeal. As such, as a prerequisite, there must be a pending appeal. The operating words therefore are “*pending appeal.*” The applicant herein has filed a memorandum of appeal and thus he has the *locus standi* before this court.

12. The power to grant of orders of stay of execution pending appeal is a discretionary power and which must be exercised judiciously. Further, in the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits (See **Bhutt –v- Rent Restriction Tribunal (1982) KLR 417.**).

13. **Order 42 rule 6(2) Civil Procedure Rules** lays down the conditions which a party must establish in order for this court to order stay of execution and basically the applicant must satisfy the court: -

*i. that substantial loss may result to the applicant unless the order is made*

*ii. that the application has been made without unreasonable delay; and*

*iii. that the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.*

14. The said conditions were also set out by the Court of Appeal in **Halai and Another vs. Thornton & Turpin (1963) Ltd [1990] KLR** as follows: -

***“In Rasiklal Somabhai Patel v Parklands Properties Ltd the Court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules under which the Applicant had to satisfy the Court of two matters application is granted, which prima facie means that if the appeal succeeds, the Respondent would not be in a position to make full restitution. Secondly, the Applicant had to give such security as the Court may order. Those are the requirements under Order XLI Rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior Court and not those to this Court, although in sub-rule (1) of the same Rule reference is made to the Court to which the appeal is preferred. It is, however, worth noting that as to the court to which the appeal is preferred it is at liberty to consider the application made to it and make such order thereon as may, to it, seem just.....”***

15. As for the likelihood to suffer substantial loss if the stay is not granted, the applicant deposed to the effect that he stands to suffer irreparably in the event the respondent disposes off the property as she was an elderly lady with no means of income to be able to compensate the applicant in the event the appeal succeeds. On her part, the respondent deposed to the effect that grant of the orders of stay will only delay the distribution of the estate which the applicant was wasting and intermeddling. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR:** -

***“the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.***

16. *I note that the Applicant brought out the issue of having been given the suit property by court in Embu HC Succession Cause 151 of 2018 and which grant was subject of an application for revocation in Embu CMC Succession Cause No. 229 of 2017. It is the same land parcel which was subject to the proceedings in Runyenjes Succession Cause No. 294 of 2017. In my view, the applicant has a right to be heard if her appeal is arguable. There is the likelihood of the respondent disposing of the suit property using the grant issued and confirmed in Runyenjes Succession Cause No. 294 of 2017. I note that the suit property’s value is quite high going to over Kshs. 20,000,000/= as per annexed valuation report.*

17. Despite the Applicant deposing to the effect that the Respondent had no means of income and thus she could not afford to compensate him in the event of success in the appeal, there was nothing which was tendered in evidence by the Respondent to controvert these assertions.

In the Court of Appeal decision in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** the court was of the opinion that *once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. (See also ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 Of 2002 [NRB]). The Respondent failed in her duty to prove that she was in a position to make good the loss which might be suffered by the Applicant in case the appeal would succeed.*

18. It is my view that any disposal or dealing with the property in execution of the grant issued to the respondent herein may lead to the applicant losing substantially. Land matters are emotive and if the respondent was to execute the grant, the applicant stands to lose his inheritance should the appeal be successful. Such a loss is in my considered opinion proof of substantive loss.

19. Further that the appeal would be rendered nugatory in the event that the applicant succeeds in the appeal and it is unlikely that the respondent will not be in a position to compensate him. As was held in **Hassan Guyo Wakalo vs Straman EA Ltd (2013) eKLR**: -

***“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.***

20. As to the delay in bringing the application before the court, I note that the ruling forming the foundation of the intended appeal was delivered on 6/02/2019. On 18/2/2019, the applicant herein filed the application for stay of execution in the trial court and the application was dismissed vide the ruling delivered on 1/08/2019. In my view, the time within which the applicant ought to have filed the instant application before this court did not run until when the application for stay in the trial court was decided on 1/08/2019. The applicant proceeded to file the instant application on 8/10/2019 about two (2) months later. It is my considered opinion that the said delay was not inordinate. As such, the requirement as to timeliness in bringing the application was met.

21. The parties did not raise the issue of requirement to provide security for the due performance of the decree. However, the court has discretion to order the applicant to provide security and the court is never tied as to the amount it can order as security. The court in **Butt v Rent Restriction Tribunal (supra)** held that: -

***“...5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”***

22. It is my opinion that, even in the absence of any application for costs and the applicant having not proposed for the same, this court can order the applicant to provide security. The kind or amount of security is within the discretionary power of the court based on the facts of each case.

23. I note that, and it was not disputed that there appears to be two grants issued by two different courts, the subordinate and High Court that relate to the same property. In the subordinate court's grant, the suit property was given to the respondent herein while in the grant issued by this court, the suit property was given to the applicant herein which is subject to revocation proceedings. The processes of acquiring the two grants are being challenged in court one being through an appeal and the other by way of summons for revocation. Staying the execution of the ruling which is subject of the instant application and the intended appeal will mean that the respondent cannot transfer the land to her name. However, this will leave the applicant with the liberty of transferring the suit land into his name using the grant issued by this court to the applicant. This in my view will not only expose the respondent to detriment but also to other beneficiaries.

24. It is my opinion that, this court ought to invoke its inherent powers under Rule 73 of the Probate and Administration Rules and issue an order of stay of execution of the Certificate of Confirmation of Grant issued on 14/10/2016 in Embu HC Succession Cause No. 151 of 2008 giving the suit land to the Applicant. The stay ought to be pending the hearing and determination of the intended appeal herein and further the hearing and determination of the application for revocation of grant in Embu CMC Succession Cause No. 229 of 2017, Miscellaneous Application No. 2 of 2019 and or any subsequent proceedings in relation to the same.

25. I am guided by the Court of Appeal's decision in **Kenya Power & Lighting Company Limited -vs- Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, where it was held that the inherent jurisdiction of the court is a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them and the same is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.

26. Upon considering all the foregoing, I hereby allow the application dated 8/10/2019 in the following terms: -

***i. That the ruling by the Senior Resident Magistrate Runyenjes delivered on 7/02/2019 in Runyenjes Succession Cause No. 294 of 2017 is hereby stayed pending hearing and determination of this appeal.***

***ii. Costs in the cause.***

27. It is hereby so ordered.

**DELIVERED, DATED and SIGNED at EMBU this 21<sup>st</sup> day of October, 2020.**

**F. MUCHEMI**

**JUDGE**

Ruling delivered through video link in the presence of Ms. Muriuki for Andande for Respondent