



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 74 OF 2017

ALEXANDER DISMAS KOSGEI.....APPELLANT

-VERSUS-

GRACE CHEBOR MUHERIA.....1ST RESPONDENT

KIPKERING ARAP CHUMO.....2ND RESPONDENT

-AND-

JACOB BUHANGI ELAKI & 16 OTHERS....INTERESTED PARTIES

RULING

[1] This ruling is in respect of the application dated **21 September 2020**. The said application was filed by the appellant pursuant to **Section 63 of the Law of Succession Act, Chapter 160 of the Laws of Kenya and Rules 45, 49, 72 and 73 of the Probate and Administration Rules**, for orders that:

[a] spent

[b] There be stay of execution of the Judgment delivered herein on **13 August 2020** pending the hearing and determination of the appeal;

[c] That the estate of the late **Kipkorir Arap Lagat** be preserved pending the hearing and determination of the intended appeal;

[d] That the order be served upon the Officer Commanding Kaimosi Police Station;

[e] That costs be provided for.

[2] The application was predicated on the grounds that the appellant has filed a Notice of Appeal, thereby expressing his intention to appeal the decision of the Court delivered herein on **13 August 2020**; and that there is need to preserve the estate of the late **Kipkorir Arap Lagat** (the deceased) pending hearing and termination of the appeal. It was further averred that the application has been made in good faith and that no prejudice will befall the respondents or the interested parties if the orders sought are granted.

[3] The application is supported by the averments in the Supporting Affidavit filed therewith, sworn on **21 September 2020** by **Alexander Dismas Kosgei**, the appellant herein; and **John Muyesu Chiti**, one of the interested parties. They averred that they are aggrieved by the Judgment delivered on **13 August 2020** and that they have filed a Notice of Appeal. They also averred that they have applied for certified copies of the proceedings and paid for the same to enable them file the appeal; and that there is great danger of rendering the 17 interested parties and their families homeless unless the orders sought are granted.

[4] At paragraph 12 of the Supporting Affidavit, it was averred that the Nandi County Surveyor has already written a letter dated **9 September 2020** in a move towards execution of the Judgment dated **13 August 2020**. Thus, the deponents urged the Court to grant the prayers sought to forestall the imminent eviction of the families of the interested parties. They added that the orders sought will not prejudice the respondents at all; and that the application has been made in good faith to enable the aggrieved parties exhaust the existing and available avenues of litigation to their satisfaction. In support of the application, the deponents annexed copies of the Notice of Appeal dated **26 August 2020**; the letter dated **25 August 2020** addressed to the Deputy Registrar of this Court, requesting for certified copies of proceedings;

the letter dated **9 September 2020** by the Nandi County Surveyor; and a draft Memorandum of Appeal.

[5] The respondents are opposed to the application and, to that end, they filed Replying Affidavits in response. In the 1st respondent's Replying Affidavit, sworn on **28 September 2020**, it was averred that the 2nd respondent was the only *bona fide* purchaser, having bought 6 acres of the deceased's land during the deceased's lifetime; and that the 12 interested parties have no valid claim to the deceased's estate. The 1st respondent further asserted that the application is therefore an afterthought and is designed to deny her the fruits of her judgment; and should be dismissed with costs.

[6] The application was canvassed by way of written submissions, pursuant to the directions issued herein on **29 September 2020**. Thus, in the appellant's written submissions dated **26 October 2020**, it was submitted that, at stake is the welfare of about 100 persons who are members of the respective families of the interested parties. Thus, it was the submission of counsel for the appellant that the interested parties and their families are bound to suffer substantial loss unless the orders sought are granted. He refuted the respondents' assertions that the application is merely calculated at denying the 1st respondent her rightful share of the estate of the deceased; or that the same is an abuse of the court process. Counsel accordingly urged the Court to find that the proposed appeal is arguable; and that it is in the interest of justice to maintain the *status quo* pending the hearing and determination of the appeal. Reliance was placed on several decisions of the Court of Appeal as well as on persuasive judgments of the High Court and courts of equal status as per the List and Bundle of Authorities dated **26 October 2020**.

[7] The 1st respondent's counsel, **Ms. Luseria**, relied on her written submissions dated **21 October 2020** wherein she proposed the following six issues for determination, and made submission along those lines:

[a] Whether the applicant has a right to appeal to the Court of Appeal in this matter;

[b] Whether the applicant has met the requirements as per the law to warrant being granted orders of stay;

[c] Whether the applicant has proved substantial loss;

[d] Whether the applicant is willing to offer such security as the Court shall require for the due performance of the decree;

[e] Whether the applicant has an arguable appeal that may be rendered nugatory; and,

[f] Whether the orders sought herein are prejudicial to the respondents.

[8] **Ms. Luseria** relied on **Section 50(1)** of the **Law of Succession Act** to support her submission that there is no right of appeal available to the appellant in this matter and therefore that the instant application is untenable. She further pointed out that, in any case, no leave was applied for or obtained by the appellant for purposes of **Rule 39** of the **Court of Appeal Rules**. On the merits of the application, counsel took the view that the appellant utterly failed to prove the three conditions set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. In her submission, the appellant is the author of his own misfortune and should not even allege substantial loss; for the reason that he has kept the respondents out of the suit property as he intermeddles with the estate for his own personal gain. Counsel. She relied on **Re Estate of Atanasio Karanu** [2018] eKLR among other decisions in urging the Court to dismiss the application with costs.

[9] This appeal arose from the decision of the Senior Resident Magistrate at Kapsabet in **Kapsabet Succession Cause No. 1 of 2012**. Accordingly, and as correctly pointed out by counsel for the respondent, no second appeal to the Court of Appeal would arise therefrom, for **Section 50(1)** of the **Law of Succession Act** is explicit that:

“An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.”

[10] Nevertheless, as to whether or not the proposed appeal is competent from the standpoint of **Order 50(1)** of the **Law of Succession Act** is not for this Court to determine or pronounce itself on; and cannot therefore be a basis for determining the competence of the instant application. This is because **Rule 84** of the **Court of Appeal Rules, 2010**, is explicit that:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.”

[11] While **Section 47** of the **Law of Succession Act** gives the Court the jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient, **Rule 63** of the **Probate and Administration Rules** is explicit that:

“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), ... shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased

person shall be those existing and in force immediately prior to the coming into operation of these Rules.”

[12] Hence, although extensive submissions were made herein along with copious authorities on the prerequisites for stay as provided for in **Order 42 Rule 6** of the **Civil Procedure Rules**, I subscribe to the view that, since the said provision was consciously omitted in **Rule 63** aforestated and was not imported for purposes of the **Law of Succession Act**, it is inapplicable to the instant application. It has to be borne in mind that the **Law of Succession Act** was intended to be a stand-alone piece of legislation; as was observed by the Court of Appeal in **Josephine Wambui vs. Margaret Wanjiru Kamau & Another** [2013] eKLR. It stated thus:

“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 the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1).”

[13] Accordingly, the instant application is to be determined on the basis of whether sufficient cause has been shown for stay for purposes of **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**. In this regard, I would echo the expressions of **Hon. Warsame J.** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited**, [2007] eKLR that:

“...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court...”

[14] Thus, I have given due attention to the competing interests of the appellant and the respondents. The respondents have demonstrated that they have been kept out of the suit property by the appellant who has instead been intermeddling therewith to their detriment. The 1st applicant in particular averred that prior to the death of their mother, she used to reside with her on the suit property; and that she was thereafter evicted by her brother, the appellant, in **2012**. She averred that she has since been residing in rented premises and has had to struggle to pay rent, given that she is unemployed. Annexed to the 1st respondent’s Further Replying Affidavit is a letter marked **Annexure GJM 1**, written by the area chief to back up the 1st respondent’s assertions.

[15] On the other hand is the appellant, who is out to protect the interests of the interested parties to whom he sold portions of the suit property in disregard of the law. It is noteworthy that he resides on the suit property and is in no danger of being evicted. In those circumstances, it is my finding that no sufficient cause has been made by the appellant to warrant stay of execution. Accordingly, his application dated **21 September 2020** is completely devoid of merit. The same is hereby dismissed with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF NOVEMBER 2020

OLGA SEWE

JUDGE