



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
SUCCESSION CAUSE NO. 98 OF 2016
IN THE MATTER OF THE ESTATE OF GEORGE CHIWAI BARUA (DECEASED)
AND
IN THE MATTER OF AN APPLICATION TO REVOKE A GRANT

MIRIAM JEROP.....OBJECTOR

Coram: Hon. Justice R. Nyakundi

Odhiambo Advocate for the applicant

Katsoleh Advocate for the objector

RULING

This is an application in which the applicant seeks the discretion of the Court by way of a notice of motion dated 3.3.2020 for stay of execution of the Judgment of the Court dated 16.1.2020. In this application, it is averred that the applicant being dissatisfied with the decision has lodged an appeal to the Court of Appeal.

The notice of motion is supported by the affidavit of **Elizabeth Barua** dated 3.3.2020. The affidavit alleges as follows inter alia: That the applicant appeal has high chances of success and therefore grant of stay is necessary so as not to render the appeal nugatory.

The respondent filed grounds of opposition of the application dated 12.10.2020. The appeal was disposed of by way of written submissions of both counsels.

Determination

I have considered the notice of motion, in this matter together with the written submissions of both counsels. The issue for determination by this Court is whether or not stay of execution has merit.

The Law

The application on stay of execution essentially rests on Order 42 Rule 6 of the Civil Procedure Rules which provides:

“That an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, unless the Court or the appellate Court so orders and subject to such terms as it may deem fit.”

In considering whether to grant stay of execution, the Court takes cognizance of certain key factors:

- (a). ***Whether the appeal was filed without undue delay.***
- (b). ***Whether the applicant has demonstrated substantial loss may result and finally***
- (c). ***The need to deposit security for due performance of the decree.***

(d). *Whether if the stay is not granted the appeal if successful would be rendered nugatory.*

The general rule is that the Court is not in the business of depriving a successful litigant of the fruits of his or her Judgment (**See RE Annol Lyte {1886} 11PD 114**). However, with full benefit of the evidence placed before the Court, in enhancing the right to a fair trial, the Court has unfettered discretion to grant stay where the appeal filed if successful is not rendered nugatory. In **Ms. Port Reiz Maternity v James Karanga Kabia CA No. 3 of 1997** the Court stated:

“That right of appeal must balance against an equally weight right that of the plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

Likewise, the Court in **Chris Munga Bichage v Richard Nyadaka Tongi & 2 others {2013} eKLR** held as follows:

“The Law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the Court on two limbs which are first, that his appeal or intended appeal is arguable; that is to say it is not frivolous, secondly, that if the application is not granted, the success of that appeal, were it to succeed, would be rendered nugatory.”

The Court in **James Wangalwa & Another v Agnes Naliaka Cheseto {2012} eKLR** also looked at the category factor on substantial loss as the cornerstone relevant in answer to the question on grant or refusal of stay of execution.

Applying the above principles to the facts of the instant case, it is clear that the applicant moved the Court without undue delay. With regard to substantial loss, it bears emphasis that the appellant base her appeal squarely on the Judgment of the Court to the **Succession Cause No. 98 of 2016** in which she was appointed a co-administrator with **Miriam Cherop** to the Estate of the deceased.

The Court notes that the applicant is dissatisfied with the decision and approach of the Court to have joint administrators to the Estate of the deceased with one **Miriam Cherop** suggested not to be a spouse to the deceased. The applicant relied heavily on the record of proceedings and other material exhibited on the contentious issues and substantial questions of fact and Law adjudicated by the Court.

In my view, the affidavit evidence plainly has not demonstrated substantial loss in relation to the orders of the Court with regard to the Estate of the deceased on dependants as defined in Section 29 of the Law of Succession.

Secondly, the applicant has not shown that if a stay of execution is not granted, the appeal if successful would be rendered nugatory. It is incumbent on the applicant to disclose in her affidavit the grounds on which she relies upon to support her application for stay of execution. The only grounds on which the applicant relies upon to support the remedy on stay of execution is an averment that the said **Miriam Cherop** is a person of interest suspected to have been involved in the death of the deceased and there is an **Inquest No. 9 of 2020 at Kilifi Magistrates Court**.

Further, that the appeal has high chances of success and as a result without stay there is a possibility of rendering it nugatory. The Court observes and on appraisal of affidavit evidence that it does not contain any cogent material which can support an arguable grounds of appeal.

In my view, the applicant’s notice of motion and affidavit falls short of satisfying the Court that the applicant would suffer substantial loss. Secondly, that there is a substantive questionable of Law to be adjudicated upon by the Court of Appeal.

Thirdly, that if stay is not granted, the appeal if successful, would be rendered nugatory. This approach was adopted in **Osi v Elen Woke {1998} 6 NWLR 554**, where the Nigeria Court of Appeal held in respect to stay of execution:

“On the grant of an order of stay of proceedings, the Learned Authors of Halsbury’s Laws of England 4th Edition Vol. 37 paragraph 442 at page 330 write: “The stay of proceedings or execution is a serious, grant and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantial merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

It cannot be denied that the applicant is seeking stay against the order of joint appointment of administrators to the Estate of the deceased **George Barua**. Primarily, the Succession Cause proceedings are yet to be initiated by petitioning for grant of letters of administration as directed by the Court. The initial grant of letters of administration pursuant to the Ruling of the Court determined on 16.1.2020 stands revoked in terms of Section 76 of the Law of Succession.

The appeal which forms the basis of the instant notice of motion for stay of proceedings/execution must be incompetent in so far as there is no administrator empowered by the Court through a grant of letters of administration to the Estate of the deceased. Therefore, such issues as to *locus standi* and propriety of the cause of action stand on the way of the applicant to succeed in this application.

For the reasons canvassed, the notice of motion is denied and dismissed for want of merits, with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

NB: *This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.*