



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 304 OF 1994

IN THE MATTER OF THE ESTATE OF STEPHEN KIURI KAGUIRI (DECEASED)

AND

JANE WANJIRU KIURI.....1ST PETITIONER

ALEX MWANGI KIURI.....2ND PETITIONER

VERSUS

GERALD KIMARU KIURI.....1ST PROTESTOR

BETH NJERI MWANGI.....2ND PROTESTOR

JOHNSON MWANGU TUMBU.....3RD PROTESTOR

RULING

The application before me is the Summons General dated 9th November 2018 brought under Section 48 of the Law of Succession Act, and rule 49 P&A rules and all other enabling provisions of the law. It seeks orders:-

1. That this Honourable Court be pleased to certify this Application as urgent and that the same be heard exparte in the first instance due to its urgency.
2. That the Honourable Court be pleased to stay execution of the ruling delivered on 12th October, 2018 pending the hearing of prayers 3 and 4 here below.
3. That the Honourable Court be pleased to stay execution of ruling delivered on 12th October, 2018 pending the hearing and determination of the appeal lodged by the Applicants in the Court of Appeal.
4. The cost of this application be provided for.

The grounds for the application are set out on the face of the application as:-

- a. That ruling was delivered on 12th October, 2018 in favor of the respondents.
- b. That the Applicants were aggrieved and dissatisfied with the judgment of the Honourable Court and filed a notice of appeal dated 19th October, 2018.
- c. That the Respondents are in the process of executing the ruling of the court without notice or reference to the applicant.
- d. That should the ruling of the court be so executed, the Applicants would stand to suffer substantial loss.
- e. That it is in the interest of justice to allow the application herein.

It is also supported by the affidavit of Johnson Mwangi Tumbu sworn on the same date. He contends that he entitled to inherit LR Githi/Igana/116 and get his father's share. That if the application is not allowed he will suffer irreparable loss, his family will be rendered destitute and in any event the respondents will not suffer any prejudice, and his appeal has high chances of success.

The application is opposed by replying affidavit of Alex Mwangi Kiuri sworn on 3rd December 2018 mainly that the applicant has not filed any appeal, that his intended appeal if at all has no chance of success, as he is not a beneficiary/dependant of the deceased's estate and in any event he will not be rendered destitute because his family has its own land Githigi/Igane/174.

There is also the affidavit of Gerald Kimaru Kiuri the 1st respondent opposing the application on similar grounds that the applicant has not demonstrated he will suffer any substantial loss, that matter has been in the courts for 25 years and needs to come to a close.

Counsel for parties agreed to file written submissions which I have considered.

For the applicant they were filed on the 17th December 2018 by the firm of Wanjiru Waweru Advocates. He relies on Order 42 rule 6 of the CPR, 2010, and the case **Richard Muthusi Vs. Patrick Gituna Ngomo & Another (2017)eKLR** and in particular the passage from the case of **Chris Munga N Bichage v Richard Nyagaka Tongi and 2 Others [2013] eKLR** where the Judges stated:

“..... 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 the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

The only issue is whether the applicant has discharged his burden to warrant the orders sought.

It is argued for the applicant that he has complied with the requirements set down by Order 42 rule 6. That he has filed the application within reasonable time without delay, that he will suffer substantial loss because he does not have any other parcel of land except Githi/Igana/116, where he alleges he was raised, that he is willing to comply with any conditions on security, as the court may deem fit. And that he has an arguable appeal.

The 1st respondents were filed on 14th January 2019 by Kebuka Wachira and Co Advocates. The counsel lay out the brief history of the case- and especially the manner in which the applicant herein evolved in his claim from being a nephew of the deceased to being an adopted son, and also from his reliance on a determination of the Land Dispute's Tribunal that never became a judgment of the court, and the realisation that part of the land he was claiming under the estate of the deceased LR Githi/Igana/174 was registered in his mother's name. The 1st respondent's view is that the intended appeal has nil chances of success. That the respondents' families stand to be prejudiced as the matter has stayed in the courts for 25 years and the applicant will not suffer any loss.

The 2nd respondents were filed on 23rd January 2019 by the firm of Muchiri wa Gathoni Advocates. His view was that even the 28 days within which application was filed were inordinate in that the applicant could have sought stay in court orally when the ruling was delivered, instead of causing everyone else to incur these costs. That that delay had not been explained. Relying on **Jacinta Wairimu Njoroge Vs. Julia Wanjiru & 4 others (2008)eKLR** it is argued that the court cannot operate on the assumption that the applicant has filed or intends to file an appeal. There is no appeal to warrant the orders sought.

It is also argued that there is no arguable appeal. The applicant having not annexed any draft memorandum of appeal defeats the nature of his application.

Section 48 of the Laws of Succession Act deals with jurisdiction of magistrates- it is not clear why it was cited in this application. Rule 49 is for applications otherwise not provided for.

Order 42 rule 6 provides;

6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from

whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the

order is made and that the application has been made without unreasonable

delay; and

(b) such security as the court orders for the due performance of such decree or

order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

The applicant filed Notice of Appeal on the 31st October 2018 at the Court of Appeal Registry, Nyeri. Rule 6 (4) states: *For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.* It is not indicated whether the same was served on the intended respondents as it simply states that 'It is intended to serve copies of the notice upon the applicant/sub. petitioner'. It is only one party who is targeted by this Notice, yet the parties involved are more than one. Without notice having been given to the intended respondents, can it be said that the applicant has complied with Rule 6(4) of Order 42? I do not think so.

The applicant must also demonstrate compliance with the other provisions of Order 42 rule 6.

Was the application brought without undue delay? In this case judgment was read on 12th October 2018. The application was brought on 9th November 2018. The Notice was filed on 30th October. He had already filed the Notice of Appeal by the time he filed this application. Why did the applicant not file the application earlier? There is no explanation given at all. It has been argued for the respondents that there was unreasonable delay which has not been explained. The applicant was under an obligation to explain why he had not applied earlier.

Is there an appeal? Is it arguable? There is no memo of appeal and except for the notice of appeal there is nothing to show that the applicant has any intention to file any appeal. In the **Jecinta Wairimu Njoroge** case above the Court of appeal had this to say:

Of course it is now old hat that under that rule, the matters which the Court considers when deciding the issue of whether or not to grant an order are only two, namely, whether the appeal, if one has been lodged, or the intended appeal, where one has not been lodged, is an arguable one, i.e. one which is not frivolous, and secondly whether the success of such an appeal, were it to be successful, would have been rendered nugatory by the refusal to grant the order of stay. Of course, underlying the two principles is the assumption that the party applying for an order of stay has either appealed or intends to appeal. Even if an appeal is an arguable one and even if the success of the appeal would be rendered nugatory by a refusal to grant a stay, all those issues become irrelevant if no appeal is lodged or is intended to be lodged. ...There cannot be an order of stay to a party who has not appealed or does not intend to appeal. We think this applicant does not intend to appeal.

Even a draft memorandum of appeal would have demonstrated some seriousness on the part of the applicant. What would persuade the court that he had an intention to file an appeal? Not just filing the notice.

The other ground is demonstration that applicant will suffer substantial loss. The applicant's ground here is that he will be rendered destitute. In this case no such demonstration has been made by the applicant. He land registered in his mother's name, and he is not destitute and will not be rendered destitute if stay is not granted.

Finally, it is also my view that this matter having been in the system for the last 25 years it is not in the interest of justice/public interest to grant stay without a demonstration that there is an intention to file an appeal or that the appeal is indeed arguable. That will only go to keep this case in the system for longer for no good reason.

I need not consider the issue of security.

I am of the view that the application is unmerited. The same is dismissed with costs.

Dated, delivered and signed at Nyeri this 14th March 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Kebuka Wachira for 1st protester

Kiminda for 2nd protester

Muchiri wa Gathoni- Ms.Muthoni holding brief.

Asimwe holding brief for Wanjiru Waweru for applicants.

Mumbua T. Matheka

Judge

14/3/19