



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
SUCCESSION CAUSE NO. 72 OF 2016
(FORMERLY CHUKA SPM'S COURT SUCC. CAUSE NO.45 OF 2016)
IN THE MATTER OF THE ESTATE OF THE LATE MAXWELL
RWIGI MUGERA alias MAXWELL RWIGI MUCERA (DECEASED)

AND

CAROLINE KEERU RWIGI.....1ST ADMINISTRATRIX/APPLICANT

VERSUS

AGGREY NYAGA RWIGI.....2ND ADMINISTRATRIX/APPLICANT

R U L I N G

1. Before me is an application dated 19th December, 2018 brought by way of summons under **Rule 49** and **73** of **Probate and Administration Rules** for the following orders/reliefs namely:-

i. That this application be certified urgent (spent)

ii. That this honourable court be pleased to grant stay of execution of the Judgment dated 13th December 2018 pending the hearing and determination of the intended appeal at the Court of Appeal in Nyeri

iii. That this honourable court be pleased to allow the Notice to appeal the judgment involving the estate of Maxwel Rwiggi (deceased).

iv. Costs

2. The main ground for this application is that the Aggrey Nyaga Rwiggi, or the Applicant herein was aggrieved by the Judgment of this court and intends to pursue an appeal against the same.

3. In his Supporting Affidavit sworn on 19th December 2018, the Applicant states that he is aggrieved by the judgment delivered by this court on 13th December, 2018 and intends to appeal against it.

4. In his written submissions done through counsel, the Applicant contends that he has constructed a school on parcel No. Karingani/Muiru/1148 and fears that he would suffer prejudice if the Estate is distributed as per the Judgment of this court. He contends that he purchased the parcel from the deceased and that he was aggrieved when this court failed to take that fact into consideration in its Judgment.

5. The Applicant has further contended that his chances of appeal are high and has further contended that the parties had majorly agreed on the mode of distribution but that this court failed to take into consideration the point of convergence.

6. On the other hand, Caroline Keeru Rwiggi, the administratrix/Respondent has opposed this application through a Replying Affidavit sworn on 11th January 2019. She has faulted the Applicant for rushing to court with a certificate of urgency contending that in her view, there is nothing urgent.

7. The Respondent has also faulted the Applicant, stating that the affidavit in support of the application in her view reveal nothing to support a prayer for stay of execution. She points out that the Applicant has not deposed what loss or damage he would suffer if stay is not granted.
8. She avers that Applicant stands to suffer no prejudice as the deceased had informally subdivided his estate prior to his demise.
9. The Respondent has further deposed that the Applicant is only interested of stay in order to continue exclusively enjoying rent proceeds from Plot M/9 Chuka Township. She has insisted that the applicant and Loyston Mugendi should first account for the rent proceeds from Plot No. M/9 Chuka Township from 2018 to 2019 before seeking for orders of stay.
10. The Respondent has further averred that the Applicant in total disregard of the court order deposited the rent collected from M/9 in Sidian Bank instead of KCB and has pointed out that there is an application pending to commit the applicant to civil jail for disobeying its orders.
11. The Respondent has further pointed out that the Applicant is time barred from appealing and that his remedy lies in the appellate court in respect to the Notice of Appeal and that because there is no appeal filed this application lacks in merit.
12. This court has considered this application, the affidavit in support and also considered the Supplementary Affidavit sworn on 18th January 2018. I have also considered the opposition made by the Respondent through her Replying Affidavit and Supplementary Replying Affidavit sworn on 21st January 2019.
13. It is true as per the record that this court pronounced itself on the question of distribution of the estate of the late Maxwel Rwigu Mucera (deceased) who died on 26th October 2010. This court did so based on the evidence tendered and upon hearing all the parties in this cause. This court wishes to make it clear that, contrary to what the Applicant states in this application, the parties in this cause particularly the administrator and the administratrix never agreed or had any convergence on how the estate was to be distributed as exemplified by the Affidavit of protest filed by the Applicant himself. However because that is neither here or there, in view of the decision of this court dated 13th December, 2018, that is now water under the bridge. The issue raised by the application before me is whether the Applicant should be granted a stay of execution pending the hearing and determination of an intended appeal.
14. The Applicant has invoked the inherent powers of this court under **Rule 73 of Probate & Administration Rules**. Under that rule this court is granted a discretion to grant such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. The Applicant has not indicated that the Respondent has or is about to do any act that can amount to an abuse of court process. Turning to the issue of ends of justice, the question posed is whether the Applicant has satisfied the requirements to show that ends of justice will be served by a grant of stay of execution. The **Law of Succession Act** unlike the **Civil Procedure Act** does not specifically provide for the conditions for stay of execution. I say so because save for some cited rules, Rules of Civil Procedure Rules applicable in civil cases do not apply in succession matters by a dint of **Rule 63 of Probate & Administration Rules**. **Order 42 Civil Procedure Rules** which deals with stay of executions is not strictly one of those rules applicable in succession matters.
15. However, in order to meet the ends of justice this court finds that the same basic principles apply for a grant of stay of execution which are;
- i. An applicant must demonstrate that substantial loss or prejudice will be occasioned unless stay of execution is granted.
 - ii. The Applicant must show that the intended appeal or appeal itself will otherwise be rendered nugatory and that the Application for execution sought is in good faith and not merely to delay the fruits of Judgment to the other party or parties or cause them prejudice.
16. To begin with the first condition of proof of substantial loss, the Applicant in his application and affidavit in support initially did not disclose the nature of loss he would suffer if stay was not granted and was perhaps prompted to state and illustrate the same by the response filed by the Respondent. I have noted from his Supplementary Affidavit sworn on 18th January 2019 that he has averred that he has put up a residential house in L.R. Karingani/Muiru/1148 and is in the process of putting up a school but he has not explained whether the size of the residential house or the school he intends to put up occupies the entire parcel measuring about 6 acres. Going by the Judgment of this court, each beneficiary in that parcel was to get approximately 0.67 acres each. The Applicant has not placed any evidence before me to show that his residential house occupies more than his entitlement (0.67 acres) such that the same would need to be demolished to give way to other beneficiaries.
17. In regard to claim that he is putting up a school, again no document has been availed to prove the existence of the school or approvals by relevant bodies showing that he has permission to put up a school. Further he could not have sought to put up a school or purport to put a school on an estate of a deceased person before confirmation of the grant as that would obviously be contrary to the provisions of **Sections 45 and 55(1) of Law of Succession Act**.
18. This court further finds that the claim by the Applicant that some beneficiaries stands to suffer irreparable loss unless stay is granted is not supported by any evidence or facts present before me. The Applicant has failed to disclose who those beneficiaries are given that as per the record, he is the only one who was aggrieved by the Judgment of this court. There is no other beneficiary who has come out to say he/she wants to appeal against the Judgment of this court. The Applicant has therefore for the above reasons failed to disclose to the satisfaction of this court what substantial loss he would suffer if stay is not granted.
19. This court also notes from the record that the Applicant is perhaps economical with the truth in so far as rent proceeds from M/9 Chuka Township is concerned. The Respondent has exhibited the statement of joint account at KCB A/C No. 1204076375. This in my view is a sign of good faith and the Applicant should have exhibited the same act of good faith by disclosing the statement of the account held at

Sidian Bank and give account of the proceeds he collected between 2018 and 2019. As an administrator, the Applicant and the Respondent have a legal obligation under **Section 83 of Law of Succession Act** to account for all the monies that may have come into their possession by virtue of position. The Applicant is therefore answerable if he has collected and remain unaccounted for. It is true that this court made an order as to where all the rent proceeds were to be kept and since there is a pending application in regard to that directive. I will leave this issue at that until I hear both sides.

20. As regards the second condition, that is whether the applicant has disclosed that he has come to court in good faith and not merely to cause delay to the prejudice of the others, this court is not satisfied that the Applicant has satisfied that condition either. In the first place, he has been faulted by the Respondent for coming to court with unclean hands as he is said to be enjoying illicitly the proceeds from M9 Chuka Township to the exclusion of others and picking Tea exclusively in Karingani/Ndagani/6921. Although the Applicant has denied that he is collecting the rent, he has not shown or presented bank statements showing how and if the rent proceeds have been deposited in the bank account as ordered by this court.

21. Secondly he has not contested the Respondents allegations that he stands to gain unfairly over utilization of the estate to the exclusion of the other beneficiaries if stay was to be granted. This court finds that the other beneficiaries are entitled to full fruits of litigation and I do not find that ends of justice will be served if stay is granted. The Applicant has not also demonstrated or even alleged that his intended appeal will be rendered futile unless stay of execution is granted.

In the end I find that the summons dated 19th December 2018 lacks in merit and the same is disallowed with costs to the Respondent.

Dated, signed and delivered at Chuka this 27th day of June, 2019.

R.K. LIMO

JUDGE

27/6/2019

Ruling dated, signed and delivered in presence of Mugo for Respondent and Kijaru holding brief for Muthomi for Applicant.

R.K LIMO

JUDGE

27/6/2019