



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**SUCCESSION CAUSE NO. 77 OF 2002**

**IN THE MATTER OF THE ESTATE OF JOHANA NYAGA (DECEASED)**

**GICUKU NYAGA.....APPLICANT**

**VERSUS**

**PHYLLIS GRACE KARIMI.....1<sup>ST</sup> PROTESTOR/RESPONDENT**

**NICASIO NJERU NJAGI.....2<sup>ND</sup> PROTESTOR/RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 3<sup>rd</sup> July 2018 that seeks stay of execution of the judgement delivered by this court on the 19/06/2018 pending the hearing and determination of the intended appeal.
2. On the 19/06/2018 this court delivered a judgement that granted the protestors' herein a share in the deceased's estate after establishing that the two protestors were beneficial owners as they had purchased various parcels of land from the family of the deceased. Being dissatisfied with decision of this court, the applicant lodged this appeal.
3. It is the applicant's case that her intended appeal is meritable and will be rendered nugatory if the current appeal is not allowed as the respondents are intent with proceeding with execution. The applicant further states that she is willing to comply with any reasonable condition that the court may order pending the determination of her appeal. The applicant further asserts that the respondents will suffer no prejudice if the instant application for stay is allowed.
4. The 1<sup>st</sup> protestor opposes the application on grounds amongst which that the applicant is seeking to deny her the fruits of the judgement duly obtained from this court, that the beneficiaries of the deceased will not suffer any prejudice if the grant is executed as granted by court since the applicants have his money since 2004.
5. The 1<sup>st</sup> respondent further states that the applicant have offered no security for grant of stay of execution especially considering that the parcels of land in dispute are valued at over Kshs. 60,000,000/= and that further the applicant's intended appeal has no chances of success.
6. The 2<sup>nd</sup> respondent also opposes the application for stay on the grounds that it is a mere delay tactic meant at denying him the fruits of his judgement especially since the applicant has failed to show that her intended appeal has overwhelming chances of success. The 2<sup>nd</sup> respondent further submits that the applicant has not met the conditions for grant of orders of stay of execution.
7. The parties disposed of the application by way of written submissions.

**B. Applicant's Submissions**

8. It is the applicant's submission that she has met the conditions for grant of orders of stay. She submits that she stands to suffer substantial loss if the execution by the respondent proceeds and further that her appeal will be rendered nugatory.
9. The applicant relies on the case of **Muga v Kunga [1988] eKLR** where the court of appeal held that in cases of land parties should be allowed to come to the court and have all the issues determined by the court of last resort. The applicant further submits that her appeal has

high chances of success.

10. Whilst relying on the case **Re-estate of the late Wambui Njeru (Deceased) (2018) eKLR**, the applicant submits that since the dispute at hand concerns land, monetary security cannot apply. Further it is the applicant's submission that the respondents have not demonstrated that they'll suffer any prejudice.

### **C. 1<sup>st</sup> Respondent's Submissions**

11. The 1<sup>st</sup> respondent submits that the applicant and other beneficiaries of the deceased will not be prejudiced in any way as she is also entitled as a beneficiary of the deceased's estate as she is a creditor and purchaser for value of part of the deceased's estate.

12. It is the 1<sup>st</sup> respondent's submission that the subject matter of the suit which are parcels of land will still be in existence and within reach even after execution and as such the applicant has failed to prove what substantial loss she is likely to incur. The 1<sup>st</sup> respondent relies on the case of **Masisi Mwita v Damaris Wanjiku Njeru H.C.C.A No. 107 of 2015** where the court held substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

13. The 1<sup>st</sup> respondent further submits that the stay should be denied as the applicant has not provided security as was held in the case of **Equity Bank Ltd v Taiga Adams Company Ltd (2015) eKLR** and also in the case of **Machira T/A Machira & Co. Advocates v East African Standard [2002] KLR 63** where the court upheld the sanctity of providing security for grant of orders of stay.

14. The 1<sup>st</sup> respondent further submitted that the applicant had failed to provide a draft memorandum of appeal to demonstrate before court that there are arguable grounds of appeal.

### **D. 2<sup>nd</sup> Respondent's Submissions**

15. The 2<sup>nd</sup> respondent on his part submits that the application is a mere attempt by the applicant to delay the finalization of the dispute herein and further that the applicant's appeal has no chances of success which is inferred from the fact that no memorandum of appeal has been annexed to the application.

### **E. Analysis & Determination**

16. The issue for determination is whether the applicant has satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.

17. The conditions to be met by an applicant are set out as follows:

**i. THAT the Application has been made without unreasonable delay.**

**ii. THAT substantial loss may result to the Applicants unless the order sought for is made.**

**iii. THAT the Applicants provide security as may be ordered by court for the due performance of the decree or order.**

18. Order 42 Rule 6(4) of the Civil Procedure Rules provides;

**"Order 42 Rule 6(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."**

19. It is clear from the record that the application herein has been made timeously specifically after 14 days after the delivery of the ruling and indeed within the existence of a temporary stay of 21 days that was granted by Court.

20. Regarding substantial loss, I note that the subject land was bequeathed to the respondents. There is therefore a real danger that should the appeal go in favour of the applicant there might be no land for the applicant to go to. The respondents have not demonstrated that they are persons of means who would be in a position to compensate the applicant. In any event, the subject matter is succession. Courts, and for good reason, have adopted a policy of maintenance of the status quo where land is the subject matter.

21. In the case of **Mugah Vs. Kunga (supra)** the Court of Appeal stated;

**"The practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court, the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined." (Emphasis added)**

22. I am persuaded that in the circumstances and facts of this case, substantial loss is likely to be visited on the applicant should a stay of execution is not granted.

23. The final condition to be met by the applicant is the rendering of security. A successful litigant is entitled to the fruits of his judgment and if he is kept away from these, there must be a guarantee of due performance of the decree or order. In monetary decrees, the issue of security is always straightforward and invariably involves order for deposit of the decretal sum of a substantial amount thereof.

24. This is a succession matter and it is settled that there is no need for monetary security for it when a dispute involves land. This was the finding of the court in the case in the case of **Re-estate of the late Wambui Njeru (Deceased) (supra)**.

25. I have considered all the issues in this application and find that the applicant has satisfied the court as to the conditions set out under **Order 42 Rule 6 of the Civil Procedure Rules**.

26. I find this application merited and allow it as prayed.

27. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Fatuma for Andande for 2<sup>nd</sup> Protestor/Respondent**

**Ms. Muriuki for Kathungu for Applicant**

**Mr. Okwaro for 1<sup>st</sup> Protestor**

**All 3 parties**