



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 2 OF 2019

PETER MWANIKI NJERU.....1ST APPLICANT/APPELLANT

MWANIKI KOREA.....2ND APPLICANT/APPELLANT

VERSUS

VIETA WAKERE KIENGE.....RESPONDENT

RULING

A. Introduction

1. This is a ruling to the application dated 31st January 2019 in which the appellants seek for orders of stay of execution of the ruling delivered on the 6th December 2018 in Siakago SPM Succession Cause No. 186 of 2017 pending the hearing and determination of the appeal.
2. It is the appellants' case that unless stay of execution is granted the respondent is likely to evict the appellants from land they had validly and lawfully bought from the deceased which will in turn renders their pending appeal nugatory. The land is a portion of 0.40 ha. Out of LR. Nthawa/Riandu/2887.
3. The appellants' state that the instant application has been filed without delay and that the orders sought will not prejudice the respondent and that on the contrary it's brought in the interest of justice and meant to avert hardships to the appellants.
4. In rejoinder, the respondent states that the application for stay of execution is frivolous, vexatious, lacks merit and does not meet the threshold for grant of the orders sought as it seeks to stay an order for dismissal which is incapable of being set aside.
5. The respondent further states that the appellants will suffer no harm if the stay orders are not granted as they are neither beneficiaries nor dependants of the estate of the deceased Issack Kienge whilst conversely the application is a protracted attempt to deny the beneficiaries of the deceased's estate enjoyment of their shares.
6. It is also the respondent's case that if the court is inclined to grant orders of stay then it should proceed to order the appellants to provide security.
7. The parties filed submissions to dispose of the application

B. Appellant's Submissions

8. It is the appellant's case that they stand to suffer substantial loss if the dismissal of their summons for revocation of grant is not stayed considering they have invested in the suit lands and have made substantial developments including construction of their homes, rental houses, rental houses, tobacco barns and other developments. Further it is argued by the 1st appellant that he has caused the subdivision of land parcel number Nthawa/ Riandu/2887 to resultant portions Nthawa/Riandu/4354 and 4355 which he has allocated to himself and his daughters.
9. It is submitted that the instant application was brought without undue delay the judgement appealed from having been delivered on the 6th December 2018 and the instant application being filed on the 31st January, barely one month later. It is also submitted that the appellants are willing to provide security for the due performance of the decree. Finally, it is submitted that the appeal will be rendered nugatory if the instant application is not allowed.

C. Respondent's Submissions

10. It is the respondent's case that the appellants seek to stay execution of an order of dismissal which is a negative order that cannot be stayed. Reliance is placed on the cases of **Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR** and that of **Western College of Arts and Applied Sciences v Oranga & Others [1976 – 80]1 KLR** which held inter alia stay of execution does not apply to negative orders which are incapable of execution.

11. It is further submitted that the instant application is vexatious because it has been brought regardless of its merits and is intended to harass and cause unnecessary burden to the respondent.

12. It is also submitted the appellants have not demonstrated to the court that they will suffer any loss or damage if the stay orders are not granted, and furthermore that they have not proved that the order issued is to be executed and if executed, will make the appeal nugatory.

13. It is also submitted that contrary to the finding in the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR** the appellants have not offered any security.

14. The respondent also rely on the case of **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** where the court held that as a pre-requisite to getting orders of stay of execution, an applicant has to prove that there exists an arguable appeal with higher chances of success.

D. Analysis & Determination

15. The only issue before me is whether or not, in the circumstances, the applicant has made a case for stay of execution of the order of the Magistrates Court pending the hearing of the appeal. The applicable provision of law is **Order 42 rule 6** of the **Civil Procedure Rules 2010**.

16. It provides: -

“(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.”

17. From the above provision, it is clear that the court must be satisfied that there is **“sufficient cause”** to grant a stay. The two conditions which must be considered are: whether the court is satisfied that the applicant will suffer substantial loss if the order is not made; and secondly, that the applicant is willing to give such security for the due performance of the decree or order in issue, as may ultimately be binding on him or her.

18. The authorities on stay of execution pending appeal are clear that for an order of stay of execution to issue, there must be positive requirements therein which would or could be affected or tampered by the stay. In **Western College of Arts (supra)** the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, to stay, it is so ordered”

19. In the application before me, as in **Western College**, there is nothing which the Magistrates Court has ordered to be done or to refrain from being done. The trial court in this case held inter alia **“that as a probate court it was concerned with the distribution of the estate of the deceased and not called upon to ascertain whether or not one was a purchaser and as such the trial court proceeded to dismiss the application for nullification of the grant.”**

20. In **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] e KLR** the Court of Appeal (Kantai J.A) held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been

complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose’ (emphasis supplied).

21. Further, in the more recent case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, the Court of Appeal expounded on stay of execution stating:

“16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of **Raymond M. Omboga v. Austine Pyan Maranga** (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

22. The foregoing analysis leads me to a conclusion that the order made by the SPM Siakago in Succession Cause No. 186 of 2017 is a negative order not capable of being stayed.

23. I find this application lacking merit and is hereby dismissed with costs.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthama for Okwaro for Respondent

Respondent present