



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS APPLICATION NO.11 OF 2017

KINYUNJURI MUGUTA.....APPLICANT

VERSUS

WOTUKU MUGUTA.....RESPONDENT

RULING

The applicant KINYUNJURI MUGUTA filed a notice of motion under **Order 42 rule 6 Civil procedure Rules 2010 of section 1A, 2A & 3A Civil procedure Act, the Constitution of Kenya** and all other enabling provisions of the law and the inherent jurisdiction of the court. It seeks an order that the court be pleased to grant an order of stay of execution of the judgement and the consequential orders of Senior Principal Magistrate's court at Baricho delivered on 31.5.2017 pending the hearing of the application and appeal herein. That the court to grant the applicant leave to lodge its appeal out of time and the same be admitted for hearing once the record is ready.

- a) That the Honourable court delivered judgement in the matter herein on 31st May, 2017 in favour of the respondent herein thus contrary to the law and facts availing before the Honourable court.**
- b) That the Respondent herein is extracting a decree anytime now there being no stay thus execution is foreseeable soon, with no stay orders hence just apprehension of harm by the Applicant/Intended Appellant.**
- c) That the intended Appeal raises serious questions of both law and fact which the honourable lower court fell into error.**
- d) That the subject matter of dispute is landed hence stands the risks of being sold in execution to the detriment of the applicant herein.**
- e) That if the orders sought herein are not granted and the decree executed irreparable harm shall have occasioned.**
- f) That such extreme and highly prejudicial consequences before the lodgement, hearing and determination of the intended appeal would subvert the ends of justice and render Appeal nugatory.**
- g) That the applicant undertakes to lodge the intended Appeal and record whereof expeditiously within such time as this Honourable court may order upon requisite leave being granted.**
- h) That the applicant has moved diligently and expeditiously in bringing this application.**
- i) That the Applicant is willing to abide by any conditions set by this Honourable Court for the grant of the orders sought herein.**
- j) That it is therefore in the interest of justice and fairness that the prayers sought in the Application filed herewith be granted.**

The application is supported by the affidavit of the applicant WOTUKU MUGUTA. He contends that he has filed a notice of appeal annexure WM2 and that the appeal has high chances of success. That if execution is not stayed he will suffer irreparably. He further submits that if the decree is executed the respondent would not be able to repay the amount in the event that the appeal is successful. That he is able and willing to provide security that the court may deem necessary. That the application be allowed in the interests of justice.

The respondent Kinyunjuri Muguta opposed the application and filed a replying affidavit. He deposes that the application is incompetent as the law of Succession does not provide for application by way of motions. That there is no appeal upon which this court can order a stay. That the applicant is not likely to suffer irreparable damages as the subject matter is land. That the applicant wants to enjoy the status quo as he has been occupying the largest portion of the estate to the detriment of other beneficiaries and that said the court ordered the estate to be

distributed equally among the beneficiaries in accordance with the law of Succession Act, the appeal is wanting in merits. That he is entitled to the fruits of the judgement.

The application was disposed off by way of written submissions. The applicant submits that he has filed an appeal against the judgement of the Senior Principal Magistrate court at Baricho in succession cause No.318/2016 as the same was offensive to the law and known precedents and facts were entirely misapprehended by the court warranting the noble intervention of the superior court. That the subject is land which risks being sold in execution to the detriment of the applicant and render the appeal nugatory or an academic exercise would safeguard the proprietorship rights and safety to all parties. That is in the interest of fairness that the application be allowed.

On the law the applicant submits that the court's jurisdiction is under rule 5 (2) (b) of the court of Appeal Rules and cited the case of **Rehance Bank Limited (In liquidation) Vs. Norlake Investments Ltd – Civil Appeal NO. Nairobi 93/2002 UR and R.Vs. Kenya Anti-corruption commission & 2 others (200(KLR 31** where it was stated that party has to show an arguable appeal that is not frivolous and that of stay is not granted the appeal of the intended appeal will be rendered nugatory. This however is not the law with regard to appeals from the subordinate courts to the High Court. The submission on Court of Appeal Rules is misconceived.

The respondent in his submission relies on his affidavit and submits that distribution was in accordance with the Law of Succession Act. That the applicant is not likely to suffer irreparable damages or loss.

I have considered the application. The issue that arises is stay of execution. Stay of execution in the High Court is provided under Order 52 rule 6 of the Civil procedure Rules. It provides;

1. Stay of execution.

Order 42 rule 6 C.P.C

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.

The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

a) Substantial loss may result to the applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

I will now consider whether these conditions have been met.

a) Substantial loss occurring

The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

The Court of Appeal has dealt with the issue in the case of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR.**

The Court of Appeal held the following view on the issue of substantial loss;

The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.

In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR.**

The Court held the following view on the issue of substantial loss;

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so

because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the present application, the appellant has stated that the subject matter is land hence stands the risks of being sold in execution to the detriment of the Applicant. He has not stated what action the respondent has taken towards executing and/or selling the land. He only states that the respondent is about to extract a decree anytime from now. That the respondent would not repay him the appeal finally succeeds. This is a succession and execution would mean each party gets its share. The applicant is not likely to suffer substantial loss in the circumstances.

b) Requisite security

The appellant has stated that he is willing to provide any security that the Court may deem reasonable and necessary. It is the duty of the court to determine the security if the applicant is successful.

c) Was there undue delay?

Judgment was delivered on 31/05/2017 and the appellant filed the application and Notice of Appeal on 19/07/2017 a period of about one and a half month later therefore there was no delay from the appellant.

Execution has not been effected and the respondent is yet to extract the decree for purposes of execution. In addition, the applicant has not indicated the substantial loss he will incur if the respondent proceeds with the execution. Therefore where the applicant has not proved any loss, the prayer should not be granted. Substantial loss is key in determining whether to grant an application for stay of execution pending appeal.

2. Filing an appeal out of time

Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

In the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR

The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.

a) Length of delay and reasons thereof

Judgment was delivered on 31/05/2017 and the applicant filed the application and Notice of Appeal on 19/07/2017. The delay in filing the application was for less than a month which cannot be said to be inordinate. The court will exercise discretion and allow the applicant to file the appeal out of time.

b) Chances of the appeal succeeding

From the little information provided we can discern that the case was a succession matter whereby the court ordered that the deceased's estate be shared equally among the beneficiaries.

The applicant claims that the trial magistrate erred in finding that there was no valid oral will and in finding that the distribution of the estate done by the deceased during his lifetime should be disrupted.

I do not have a copy of the judgment to be able to interrogate whether the appeal has a chance of success and whether or not the trial court considered the oral will done by the deceased. It is unfortunate that the appellant has not availed the judgement of the lower to enable this court to determine whether the appeal has high chances of success. However, the applicant has a constitutional right to appeal. Extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The appellant has already filed a notice of appeal and a draft memorandum of appeal. My view is that he should be given an opportunity to pursue the appeal by giving him an extension of time within which to file the appeal.

In conclusion:

- 1. The application for stay of execution is without merit and is declined.**
- 2. The prayer for extension of time to file the appeal is allowed.**
- 3. The appeal be filed within 30 days from today.**
- 4. Costs be in the cause.**

Dated and delivered at Kerugoya this 19th day of April, 2018

L. W. GITARI

JUDGE

19/4/18.

Ruling read out in open court.

L. W. GITARI

JUDGE