



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 73 OF 2017**

**CAROLINE KAARI KARIUKI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JOSEPH ISHMAEL KARIUKI NDWIGA....2<sup>ND</sup> APPELLANT/APPLICANT**

**V E R S U S**

**SAMUEL WARUI GICHU.....RESPONDENT**

**R U L I N G**

1. This is the application dated 14/12/2017 seeking for orders that: -

*a) There be a stay of execution of the judgement of Hon. M.N. Gicheru pending the determination of the appeal.*

*b) There be a stay of any further proceedings in Embu Succession Cause No. 493 of 2017 until this appeal is heard and determined.*

2. The grounds supporting the application are that the applicant was dissatisfied with the judgment of Hon. M.N. Gicheru in Succession Cause No. 493 of 2017 and had now lodged an appeal.

3. Firstly, that some important matters were determined without the applicant being given a chance to be heard. She states that her claim of the applicant that she was a wife of the deceased was dismissed without being heard. Unless further proceedings are stopped and the execution of the grant is halted, the applicant stands to suffer.

4. The applicant states that the court did not have the benefit of her submissions since her counsel was locked out despite requesting for more time. The applicant says she is based in Meru and that it took time for her to go to her advocate's office to give her input in preparation of the submissions.

5. The judgment was delivered on 20/11/2017 when the case was to come for mention and on the date the applicant's counsel intended to seek for extension of time to file her submissions would have led to a different finding if they were admitted by the court.

6. The respondent opposed the application on grounds that it has no merit. The respondent depones that the matter was mentioned on 25/09/2017 when the court directed the parties to file and exchange written submissions by 6/11/2017.

7. The date for judgment was fixed on 20/11/2017. The 1<sup>st</sup> appellant /applicant was in court on that day and asked that the file be placed aside for her counsel on record to come to court.

8. That the applicant had been given time to file the witness statements and their submissions but failed to do so despite a letter written to the applicant's counsel to the effect that being the protester, she was supposed to file her submissions first. Owing to the failure of the applicant to file her submissions, the court proceeded to deliver the judgment on the scheduled date of 20/11/2017.

9. The respondent depones that all the issues in the case including whether the applicant was the wife of the deceased were decided. It is the protesters who failed to prove their case leading the dismissal of the protest.

10. The applicant's submissions are that due the weight of the issues in the case, she needed to consult her advocate so that the appropriate statement would be done. The statement was filed on 10/11/2017 together with the last documents. The delay to file the submissions was occasioned by the misunderstanding between the advocates as to who between the two was to file the submissions first.

11. The respondent in his submissions argued that Order 42 Rule 6 of the Civil Procedure Rules was wrongly invoked in that there was no order to be executed. Stay can only be granted where there is an order of the court to be executed.

12. The respondent relies on cases of **JOHN MBUA MUTHONI & ANOTHER VS RUTH MUTHONI KARIUKI [2017] eKLR** where Ngugi Joel, J. held that an order for stay could not issue where the orders of the court were negative, in that there was no executable order.
13. The same principle had been adopted earlier by Odunga, J. in the case of **RV THE COMMISSIONER FOR INVESTIGATIONS & ENFORCEMENT EX PARTE WANANCHI GROUP OF KENYA LTD [2014] eKLR** where it was held that stay could not issue where there was no positive order issued by the court.
14. It was further submitted that the conditions under Order 42 Rule 6 have not been satisfied in this application.
15. The respondent submitted that the delay of 25 days has not been explained.
16. It has also not been demonstrated that the applicant will suffer any substantial loss if the orders are not granted. The case of **MAC & MORE SOLUTION [2015] eKLR** was relied on where it was held that an order for stay could not issue where the applicant fails to establish substantial loss.
17. Finally, the respondent argued he should not be denied of the fruits of his judgment by delay in this appeal considering that the orders of stay are granted.
18. This application is brought under **Order 42 Rule 6** of the Civil Procedure Rules which provides:-
- Rule 6(2) No order of stay of execution shall be made under subrule (1) unless: -*
- (2) No order for stay of execution shall be made under subrule (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.*
19. In addition to the authorities relied by the respondent, I wish to rely on the holding in the case of **STEPHEN WANJOHI VS CENTRAL GLASS INDUSTRIES LTD NAIROBI, HCCC NO. 6726 OF 1991** where it was held that for a court to grant orders for stay pending appeal, sufficient cause be shown and the delay must not be unreasonable; substantial loss ought to be demonstrated and security for the due performance of the decree be provided.
20. It is trite law that for any application for stay pending appeal brought under Order 42 Rule 6(2), the conditions set out in the rules must be satisfied. The applicant has not attempted to explain why she delayed filing the application for a period of 25 days after the judgment was delivered.
21. The date of delivery was on 20/11/2017 and this application was filed on 15/12/2017. In my view, the delay was not unreasonable but the applicant was obligated to explain it.
22. On substantial loss, the applicant has not demonstrated in her affidavit what loss she is likely to suffer in the event that the orders are not granted. The applicant tended to argue her appeal in the supporting affidavit rather than stating the loss she is likely to suffer as required by the law.
23. It is a requirement that the applicant gives security for judgment in favour of the respondent. This condition was not considered in the affidavit irrespective of its applicability in this appeal.
24. The applicant did not find it fit to respond to the challenge on non-compliance with Order 42. This may be interpreted as an act of conceding to the allegation. I find that there is total non-compliance with Order 42 Rule 6(2) in this application.
25. As for the argument that the court gave negative orders in which no stay is required, I am of the considered opinion that it all depends on the nature and circumstances of each case. In a Judicial Review application which results in dismissal, the court should not grant stay for it will serve no purpose.
26. It is different in a Succession application which has been dismissed and where the affected party is claiming inheritance rights. An application for stay of any further proceedings pending hearing and determination of the appeal or intended appeal is purposed to protect the rights of that party who was not satisfied with the ruling or judgment of the lower court case.
27. If the parties in whose favor the ruling or judgment was given proceeded to execute any orders given or move to obtain further orders, the opposite party is likely to suffer loss.
28. A Judicial review application with negative orders differs from the judgment in this case that is being appealed from. In granting orders for stay the appeal court requires to examine whether the appeal is arguable. The applicant filed her evidence which was considered by the court and found to be wanting. The absence of submissions which the court gave time to file may not have led to a different finding.
29. I have perused the judgment of the Hon. Magistrate and I am not convinced that this appeal is arguable. I find no merit in this application

and dismiss it accordingly with costs.

30. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Wachira for Wairimu for Appellants/Applicant**

**Mr. Mugo for Wainaina for Respondent**