REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION NO. 193 OF 2002

IN THE MATTER OF THE ESTATE OF PHILIP NTHENGE MUKONYO (DECEASED)

1. STEPHEN MUSEMBI NGUI (DECEASED.....1ST PETITIONER/RESPONDENT

2. THOMAS MUTINDA NGUI.....2ND PETITIONER/RESPONDENT

3. JOHN NDONYE MUTUNGI.....3RD PETITIONER/RESPONDENT

VERSUS

DAVID MUTISO NTHENGE.....OBJECTOR

RULING

1. The Objector herein had challenged the deceased's will on the grounds that the same was invalid as it did not reflect the deceased's wishes. However by a ruling dated 28th March, 2018, this Court (**Nyamweya, J**) found that the deceased's will was valid, proceeded to dismiss the Objector's objection and petition by way of cross-application and directed that a grant of probate of the written will of the deceased and codicil be granted to the surviving petitioners named as executors in the said will with respect to the properties identified therein.

2. Aggrieved by the said decision, the Objector herein filed a Notice of Appeal dated 11th April, 2018 and by a Motion on Notice dated the same day, he now seeks he following orders:

(1). …..Spent.

(2)……..Spent

(3) That pending the hearing and determination of the Appeal, there be stay of execution of the entire ruling and orders made by the Honourable Lady justice P. Nyamweya on 28th March, 2018.

(4) That the costs of this application be in the cause.

3. According to the Objector/Applicant, in order to expeditiously pursue the appeal, he has through his advocates requested for certified copies of the typed proceedings, ruling and decree. In the meantime it was his case that he would suffer substantial loss and that the appeal would be rendered nugatory in the event that confirmation proceeds and the deceased's properties are distributed by the respondents to the applicant's sisters and upon conveyance thereof to third parties hence the appeal would be rendered an academic exercise.

4. It was contended by the applicant that the appeal is prima facie arguable as the court found that the alleged property allocated to him could not be ascertained and that the deceased was not familiar with the English language and there was no proof any bad blood between him and the applicant.

5. According to the applicant, the subject land being inherited is ancestral land with unique value and attachment which cannot be quantified. On the other hand the Respondents stand to suffer no prejudice if the orders sought are granted as opposed to him who has no inheritance or alternative ancestral land.

6. It was the applicant's case that the application had been made diligently and without unreasonable delay.

7. In support of his case, the applicant filed written submissions in which he relied on **Re the Estate of Zakayo Kipkoech Kirui (Deceased) [2014] eKLR** in which **Musyoka, J** allowed stay based on the provisions of Order 42 rule 6 of the Civil Procedure Rules. The applicant also relied on H*alai and Another vs. Thornton & Turpin (1963) Ltd [1990] KLR as well as* **Hannah Ngina & 2 others vs. Francis Kamau Thairu [2016] eKLR** in which **Ndungu, J** held and found that

> **"In our instant case, the applicant's main contention is that the Estate under reference will be distributed to her detriment as she was aggrieved by the judgment of the court which she seek to appeal against. In my view, the applicant has demonstrated on affidavit that substantial loss may result and she has shown specific details and particulars in that if the Estate was to be distributed she is unlikely to get what she considers her rightful share of the Estate. In the circumstances of this case, if the Estate was to be distributed, restitution may not be practical as the other beneficiaries would be at liberty to deal with their shares in whichever way they deem fit which includes disposing off. I am persuaded that the orders sought are meritable."**

8. In response the Respondents filed a replying affidavit sworn **by John Ndonye Mutungi**, the 3rd Respondent herein. According to him, there was no appeal filed since the delivery of the decision sought to be appealed against. It was deposed that the decision sought to be appealed against cannot be stayed since there is as yet no confirmation of the probate.

9. It was the Respondents' case that the order of stay sought ought not to be granted since the Objector's application had been pending since 2002, a period of 16 years and the applicant had not disclosed his intended grounds of appeal hence the appeal was not arguable.

10. It was contended that the applicant was provided for in the will and if he felt that his provision was reasonable he ought to apply for provision to be added in the Will and Codicil as opposed to seeking that all the properties of the deceased be given to him.

11. The Respondents' case was therefore that the intended appeal is only meant to prolong litigation in court. The Respondents however contended that the applicant ought to be directed to provide security for costs so that if the appeal does not succeed the Respondents would get their costs without any difficulties.

12. It was submitted on behalf of the Respondents that as no Probate has been given to the Petitioners by the Court despite the Executor's request to be supplied with the same and hence there is no Certificate for confirmation of the Probate done and signed by the Judge, there is nothing to stay until the Probate is granted and until there is a Certificate of confirmation of the Grant that has been done there cannot be an order capable of execution. In order to support this point the Respondents referred to HCC Succ Cause No. 20 of 2017 - **In The Matter of The Estate of Muthoni Mbua (Deceased) John Mbua Muthoni - Peter Wangaruro Ndichu –vs- Ruth Muthini Kariuki and Titus Kiema vs. North Eastern Welfare Society [2016]eKLR** where the Court stated:

> **"I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed" I have been unable to see any such threat….. The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn…I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decision in R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances".**

13. In this case it was submitted that **Nyamweya, J** dismissed the Objection and the cross petition that had been filed by Applicant/Objector and granted Probate to the Executors which is not capable to be executed to harm the Applicant.

14. It was further submitted that there is no sufficient prove of substantial loss that has been demonstrated by the Applicant that shall result by denying the Applicant stay of Execution. The Judgment being challenged is relating to implementation of the Will and the Codicil where the Applicant is also a beneficiary since a provision was made in the Will and codicil. If the Appeal succeeds the estate shall still be there for redistribution.

15. The Respondents further submitted that the Applicant has not offered any security for the due performance of the Decree as provided by Order 42 Rule 6(2) of the ***Civil Procedure Rules*** to demonstrate his seriousness or commitments to the intended Appeal and to prosecute the Appeal. Up to this moment, the Appeal has not been made and this Application is made to frustrate the Petitioners in finalising their duties as Executors.

16. It was contended by the Respondents in addition that the Applicant had not shown that he has an arguable appeal and the reasons that are to be relied upon ought to have been shown in the memorandum of Appeal. The Respondents also revealed that the Applicant had filed a citation being HCC SUCC Cause 25/2018 in which he shows by implication that he would like the Judgment of **Nyamweya, J** implemented, hence the Applicant should not be allowed to breath hot and cold at the same time and have a double speak. The Respondents also submitted that the said decision was given on 28th March, 2018 and the period to Appeal has already ended and there is no Application for leave to appeal out of time. Since as at the time of filing the Application for stay 91 days had elapsed.

17. It was further submitted that the Applicant did not seek the leave of the Court to appeal to the Court of Appeal, yet there is no automatic right of appeal and reference was made to **Rhoda Wairimu Kioi & John Kiio Karanja vs. Mary Wangui Karanja & Salome Njeri Karanja C A. Civil App. No NAI 69 of 2004.**

18. It was finally submitted that there is no decree in place that has been drawn and there is no order to be stayed and the Application is not mature and the same has no merits and should be rejected forth.

19. The Respondents therefore prayed that this Application should be dismissed since it has no merits whatsoever.

Determination

20. I have considered the foregoing.

21. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions.

22. Therefore the courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

23. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

24. **Warsame, J** (as he then was) was alive to this issue when in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court… The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant… At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."**

25. In **IL Nwesi Company Limited & 2 Others vs. Wendy Martin Civil Application No. Nai. 291 of 2010 [2011] eKLR** the Court of Appeal held that:

> **"Finally, the court has considered the provisions of sections 3A and 3B of the Appellate Jurisdiction Act which the applicants have also invoked. These are fairly recent amendments in the law requiring that the court, in exercise of its powers or in the interpretation of the provisions of the Act, shall facilitate the just, expeditious, proportionate and affordable resolution of the matters before it. Such is the overriding objective of the Act. There has, however, been considerable learning on the application of those provisions. The jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes *inter alia,* reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in the court's view, calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases. That, however, is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of**

whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles."

26. In this case the Objector claims that unless the stay is granted his appeal will be rendered nugatory in that there is a possibility that the deceased's estate may be distributed and third parties may thereby acquire interest therein. However, there is no evidence that there has been a confirmation of the probate in order to pave way for disposal of the properties of the estate. In other words it is contended that there is no decision that is capable of being executed at this stage. The rules do contemplate that there ought to be a decision in place capable of being executed.

27. Secondly, it is doubtful whether the Objector has an automatic right of appeal. This was the position in **Rhoda Wairimu Kioi & John Kiio Karanja vs. Mary Wangui Karanja & Salome Njeri Karanja C A. Civil App. No NAI 69 of 2004** where the Court of Appeal held as follows:-

"We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes. So, what is our decision in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this Court".

28. Having found that the objector has not shown what is intended to be executed, I find that this application is premature hence misconceived and without determining its merits, the same is hereby struck out with costs.

29. It is so ordered.

Dated at Machakos this 25th day of September, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Masika for the Petitioner

Mr Odawa for the Objector

CA Geoffrey