



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1692 OF 2007**

**IN THE MATTER OF THE ESTATE OF SALIM NG'ANG'A ALIAS SALIM NG'ANG'A GATHURU ALIAS SALIM NG'ANG'A KATHURU (DECEASED)**

SHABANI CHEGE YUSUF.....1<sup>ST</sup> APPLICANT

HASSAN YUSUF KARANJA.....2<sup>ND</sup> APPLICANT

MAIMUNA YUSUF.....3<sup>RD</sup> APPLICANT

ISSA YUSUF.....4<sup>TH</sup> APPLICANT

HALIMA WARUGURU YUSUF.....5<sup>TH</sup> APPLICANT

**VERSUS**

HALIMA ISSA.....1<sup>ST</sup> RESPONDENT

MOHAMED YUSUF GITHIO.....2<sup>ND</sup> RESPONDENT

ADIJAH NDUTA KARANJA.....3<sup>RD</sup> RESPONDENT

ABDALLA RASHID KANYERIA .....4<sup>TH</sup> RESPONDENT

**RULING**

1. By a notice of motion dated 6<sup>th</sup> July 2018 and filed in court on the same day pursuant to Order 42, Rule 1 and 6, Order 22, rule 22 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act, the applicants herein sought orders as follows:

- (a) That service of this application be dispensed with in the first instance.
- (b) That this honourable court do certify this application as urgent and direct that early hearing date be granted for the same.
- (c) That pending interpartes hearing there be stay of execution.
- (d) That there be stay of execution pending hearing and determination of the intended appeal.
- (e) That this honourable court be pleased to extend time within which the applicants can file their memorandum of appeal to the court of appeal from the ruling of this honourable court dated 19<sup>th</sup> April 2018.
- (f) That costs of this application be in the cause.

2. The application is predicated upon grounds set out on the face of it and an affidavit in support deponed on 6<sup>th</sup> July 2018 by Damaris Nyambura counsel for the applicant. The applicants basically averred that upon delivery of this court's ruling on 19<sup>th</sup> April 2018 dismissing their application for revocation of grant, they applied for certified proceedings and ruling which was availed on the 6<sup>th</sup> June 2018 by which time the period for filing the appeal had lapsed

3. They further stated that, they had promptly filed their notice of appeal on 20<sup>th</sup> April 2018 and that the same is arguable with high chances of success. They beseeched the court to grant leave to appeal out of time.

4. In response, the respondents filed a replying affidavit sworn on 16<sup>th</sup> April 2018 by Mohamed Yusuf Githio challenging the application terming it as full of falsehood. They stated that after the ruling was delivered on 19<sup>th</sup> April 2018, the same had typing errors which were to be corrected. That their counsel collected a certified copy of the ruling three days after delivery. The respondents wondered why it took the applicants such a long time to collect the ruling until 6<sup>th</sup> June 2018.

5. The respondents further contended that there was nothing to stay as the grant was executed long time ago and the estate was subdivided the year 2014 after the confirmation of the grant. It is the respondent's further contention that, if the applicants were serious, they should have sought for stay immediately the ruling was delivered. They asserted that the application for stay did not require typed proceedings as it is filed before the same court that heard the case and delivered the ruling.

6. As a rejoinder to the replying affidavit, the applicants counsel filed a further affidavit on 20<sup>th</sup> July 2018 claiming that they received a copy of the ruling on 6<sup>th</sup> June 2018. She averred that she did not have instructions to lodge the appeal as their client was observing the holy month of Ramadhan hence the reason for the delay in filing the application.

7. When the matter came for hearing on 23<sup>rd</sup> July 2018, parties agreed to dispose of the same by way of written submissions. Due to the August Vacation, the applicants filed their submissions on 6<sup>th</sup> September 2018. The respondents also filed theirs on 14<sup>th</sup> September 2018. On 17<sup>th</sup> September 2018 when the matter came for mention to confirm compliance, the court was away on other official duties. The Deputy Registrar marked it for mention on 9<sup>th</sup> October 2018 when the court gave a ruling for 27<sup>th</sup> November 2018.

8. In her submissions, M/s Nyambura for the applicant reiterated her affidavit in support of the application insisting that the delay to file this application was occasioned by the late supply of the impugned ruling and court proceedings which were supplied on 6<sup>th</sup> June 2018. She stated that the application was filed in good time and that its within the discretion of this court to extend time and grant stay. In support of her submissions counsel relied on the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 Others (2014) eKLR** where the Supreme Court laid down the principles for extension of time for filing an appeal stating that:

**(1) Extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the discretion of the court.**

**(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**

**(3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis.**

**(4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**

**(5) Whether there will be any prejudice suffered by the respondent if the extension is granted.**

**(6) Whether the application has been brought without undue delay and**

**(7) Whether in certain cases, like election petition, public interest should be a consideration for extending time.**

9. Learned counsel further relied on the case of **Edith Gichugu Koine vs Stephen Njagi Thoithi (2014) eKLR** where the court of appeal held that a delay of 2 months and 8 days in filing an appeal was not inordinate delay and that the respondent could not suffer any prejudice.

10. In response L.N. Muchira counsel for the respondent relied on his submissions filed on 14<sup>th</sup> September 2018. Mr. Muchira submitted that the applicants' application is tainted with falsehood as the court delivered its ruling on 19<sup>th</sup> April 2018 but due to typing errors, it was corrected and the same availed within three days. Counsel stated that the respondents collected the copy of the ruling on 25<sup>th</sup> April 2018. That the delay in collecting the ruling and proceedings until 6<sup>th</sup> June 2018 was due to the applicant's failure. That the claim that the applicants being Muslims were then observing the month of Ramadhan as the cause for the delay in filing the application for stay is not a justifiable ground.

11. Mr. Muchira further asserted that the applicants have not met the criterion for grant of stay orders as enshrined under Order 42 (6) (1) of the Civil Procedure Rules. Counsel submitted that the applicants have not proved that they are likely to suffer substantial loss if the orders are not granted; that the application is filed without unreasonable delay and that they have deposited security. To support this position, counsel relied on the case of **Carter and Sons Ltd vs Deposit Protection Fund Board and 2 others Civil Appeal No. 291 of 1997.**

12. I have considered the application herein, affidavit in support, replying affidavit and submissions by both counsels. The application is seeking stay of execution against the ruling and orders of this court issued on 19<sup>th</sup> April 2018 dismissing the applicant's application for revocation of certificate of confirmation of grant issued on 30<sup>th</sup> January 2013 pending the hearing and determination of the intended appeal. Secondly, that this court extends time within which the applicants can file their memorandum of appeal from the impugned ruling.

13. The applicants' main ground is that the delay in filing the application for stay was partly occasioned firstly, by the delay in supplying the ruling and court proceedings and secondly, lack of instructions from his client who were by then observing their holy month of Ramadhan. The respondents confirmed having collected their certified copy of the ruling on 25<sup>th</sup> April 2018. It is therefore not correct for the applicant

to allege that there was delay in correcting and release of the ruling. M/s Nyambura tacitly confirmed that she had no instructions to file the application as her clients were observing the month of Ramadhan.

14. I do agree with Mr. Muchira that the applicants did not need court proceedings to apply for stay of execution before the same court. In fact, they should have even verbally applied for leave to appeal and temporary stay of execution on the same day the ruling was delivered pending filing of the intended appeal. The applicant should not shift blame to the court. Secondly, this court cannot issue orders of stay pending hearing and determination of appeal yet to be filed.

15. Be that as it may, the applicants did file their application on 6<sup>th</sup> July 2018. The issue for determination is whether the criterior set out for grant of stay orders under Order 42 (6) (1) of the Civil Procedure Rules have been made. It is incumbent upon the applicant to demonstrate that they will suffer substantive loss if the said orders are not granted; that the application has been filed within reasonable time and that necessary security for due performance of the decree has been furnished.

16. As stated, the impugned ruling was delivered on 19<sup>th</sup> April 2018 and the applicant filed notice of intended appeal promptly on 20<sup>th</sup> April 2018. The application herein was filed on 6<sup>th</sup> July 2018. The question is whether the application was filed without undue delay. The application was filed 2 months 18 days later. In the case of Edith Gichugu Koine vs Stephen Njagi thoithi (Supra), the court held that a delay of 2 months and 8 days was not unreasonable. It is my finding that the application was filed within reasonable time.

17. Will the applicants suffer substantive loss if the orders are not granted? The subject property was shared out during confirmation of the grant on 30<sup>th</sup> January 2013. The application for revocation having been dismissed, the confirmed grant will definitely be executed. Litigants are entitled to legal redress and have a right to exhaust their legal rights on appeal. They will definitely suffer substantial loss if the estate is further sub-divided in execution of the grant or transferred to 3<sup>rd</sup> parties. There will be no harm in staying the execution of the grant pending the filing of the intended appeal. As regards furnishing the security, this is not a monetary claim hence the same does not apply.

18. In view of the above finding, I am satisfied that in the interest of justice and in exercise of the wide discretion bestowed upon this court on such matters, I find the application herein merited. Accordingly, the application is allowed with orders as follows:

**(a) That the applicants herein be and are hereby granted leave to appeal against this court's ruling dated 19<sup>th</sup> April 2018.**

**(b) That stay of execution for 30 days is hereby granted against the orders issued on 19<sup>th</sup> April 2018 pending filing of the intended appeal**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF DECEMBER, 2018.**

**J.N. ONYIEGO**

**(JUDGE)**