



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 536 OF 2013**

**IN THE MATTER OF THE ESTATE OF ATANASIO KARANU Alias ATANASIO NJUBA**

**STEPHEN MUTHAMI WACHIRA....PETITIONER/APPLICANT**

**V E R S U S**

**JEREMIAH MURIMI WILSON.....1<sup>ST</sup> RESPONDENT**

**CHARLES NJUBA KARANU.....2<sup>ND</sup> RESPONDENT**

**JOHN NJUBA COSMAR.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application pending before the Court is dated 25/04/2018 seeking the following stay of execution of the orders given on 19/04/2018 and status quo regarding the suit land **Mwerua/Baricho/102** be maintained pending hearing and determination of the intended appeal.

2. The application was based on the grounds that the court delivered its judgment on 19/4/2018 dismissing the application for revocation of grant. Being dissatisfied, he proceeded to file notice of appeal and applied for proceedings. That he has an arguable appeal and the respondents have been threatening that they will distribute the land and alienate third parties therefore his appeal will be rendered nugatory.

3. In response, the respondents stated that it is not true they have been threatening the applicant nor are they in the process of alienating the land to third parties. That the applicant has not demonstrated any substantial loss he will suffer if the orders sought are not granted. The fact that the process of execution has been put in motion does not amount to substantial loss. That they are men of ability while the applicant is a man of straw and if the appeal fails, they will not be able to recover costs so expended in the matter.

**4. The issue which arises is stay of Execution pending appeal**

The principles of grating stay of execution in High Court are provided for under **Order 42, rule 6 of the Civil Procedure Rules.**

**Order 42, rule 6**

*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.*

5. The appellants need 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.**

6. In **Socfinac Company Limited V Nelphat Kimotho Muturi**[2013]eKLR G V Odunga, Judge held that in the absence of evidence that the appellant stands to suffer substantial loss coupled with the fact that the respondent has a judgment in his favour there would be a much larger risk of injustice if the court found in favour of the appellant. He stated as follows;

**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 42 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 order and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions.**

The order for stay of execution though discretionary can only be granted where a party meets the conditions set out under **Order 42 rule (6) C.P.R.**

7. The applicants need to satisfy the court on the following conditions before they can be granted the stay orders:

**a) Substantial loss occurring**

The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to the fruits of his judgment. 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.

This condition was addressed by the Court of Appeal 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.**

8. In **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** The Court held;

**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."***

9. The judgment of the court was that there was no proof that Susan was the wife of the deceased. That Susan is deceased and she did not have any children with the deceased. Luka Wachira had his own father and never lived on the suit land. The applicant went to live with the grandmother Susan after the demise of their father and has no right to inherit.

10. The applicant has stated that the respondents have been threatening that they will distribute the land and alienate him. This has been denied. The applicant has not tendered any evidence other than a mere allegation of a threat. The respondents have submitted that they would be able to compensate him for any loss. There is no prove that he is likely to suffer substantial loss. He has not proved that if stay is not ordered the appeal will be rendered nugatory.

**b) Requisite security**

The applicant has not given option of security. He has not deponed that he is willing to provide security.

**c) Was there undue delay?**

11. The applicant being aggrieved with the order of the trial court delivered on 19/04/2018 proceeded to file notice of appeal and application

for stay of execution on 25/04/2018. The applicants filed application timeously and without delay.

**12. In Conclusion.**

The applicant has not demonstrated that he is likely to suffer substantial loss. This has been stated to be the major consideration in granting an application for stay. This cannot be considered on whims but on sufficient cause as an order of stay denies a party the fruits of his success. An assumed threat which is denied with a rider that they would be able to compensate him is not sufficient to establish substantial loss. The appellant is said to be a man of straw. He has not countered this with a proposal to provide security. Though it is the court which orders the kind of security to be offered, the party must nevertheless state that he is ready to provide security. The applicant has not met this condition. The applicant has not show sufficient cause to warrant the court to order a stay of execution. The application is without merits. I dismiss it with costs.

**Dated at Kerugoya this 18<sup>th</sup> day of December 2018.**

**L. W. GITARI**

**JUDGE**