



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**FAMILY DIVISION**

**SUCCESSION CASUE NO. 569 OF 2014**

**IN THE MATTER OF ESTATE OF MBALANYA OMWAKWE (DECEASED)**

**ALICE OWANO MULUSA.....APPLICANT/RESPONDENT**

**VERSUS**

**MUSA MBALANYA.....1<sup>ST</sup> RESPONDENT**

**TOM MBALANYA.....2<sup>ND</sup> RESPONDENT**

**BENSON MBALANYA.....3<sup>RD</sup> RESPONDENT**

**AND**

**ROSILIA OKILA MBALANYA.....APPLICANT/APPELLANT**

**RULING**

**Introduction**

1. There are two applications coming up for determination in this matter. As both applications seek either full or partial stay of execution of the orders made by this honourable court on 25.10.2016. I shall set out each application serially beginning with the one first in time.

2. The first application is the summons dated 03.11.2016 brought under Rules 49 and 73 of the Probate and Administration Rules and all other enabling provisions of the law. The applicant, Rosilia Okila Mbalanya, seeks for an order staying part of the ruling delivered on 25.10.2016 pending hearing and determination of an appeal lodged against the said ruling, specifically the execution of the order that there be opened a joint account in the names of Rebecca Litunya, Benson Mbalanya, Alice Owano and Rosilia Mbalanya, this particular order was issued in terms of prayer 2(b) and 2(c) of the application dated 03.01.2016.

3. The applicant, Rosilia Okila Mbalanya contends that the applicant has lodged a notice of appeal against the said part of the ruling of 25.10.2016. That the applicant stands to suffer substantially, unjustifiably and irrepealably if a joint account is opened, thus forcing her to remit her only source of livelihood from her late husband's estate. that this court, in its ruling of 25.10.2016 failed to appreciate that the applicant

is the widow to the deceased's son who is also deceased and that she is only collecting proceeds from her late husband's estate pending commencement of succession of the same. That if the order sought is not granted, then the applicant's rights as a widow are on the verge of infringement; that the applicant has a good case on appeal and that if the order sought is not granted the appeal shall be rendered nugatory.

4. The applicant also swore an affidavit in support of the application. In the affidavit she reiterated the grounds on the face of the application and urged this court to grant the orders sought.

5. The application was opposed vide the grounds of opposition dated 28.11.2016, to the effect that the application is resjudicata, since similar issues were raised and determined by the ruling of 25.10.2016. That the said application can only be determined through a full trial. That the orders of 25.10.2016 were mainly preservatory. That the appeal is not warranted. That the applicant is engaged in forum shopping; that if there was any error on the face of the record, the applicant should seek redress through a review application; that the instant application is intended to waste the precious time of this Honourable court and to prolong and cause unnecessary delays in this matter. Dr. Alice Owano Mulusa is the one opposing the application.

6. The second application is dated 17.01.2017 expressed to be brought under order 42 Rule 6 of the Probate and Administration Rules. The application is filed on behalf of the three Respondents. Musa Mbalanya, Tom Mbalanya and Benson Mbalanya. The applicant's main prayer is for stay of execution of the orders made on 25.10.2016 pending the hearing and determination of an appeal lodged against the said ruling. The affidavit in support was sworn by Tom Mbalanya on 17.01.2017 in which he reiterates the grounds in support of the application to the effect that there is an appeal process in motion. The applicants shall suffer substantial loss and hardship, the development and improvement of the estate was made in good faith and pursuant to the wishes of the deceased, the applicants took out loans to make developments on the said land. The developments were made with the knowledge of the respondents that if the income is withheld, the applicants shall default in payment of the loans which will cause great financial constraints to them and finally that if the stay order is not granted the appeal shall be rendered nugatory.

7. The application was opposed through grounds of opposition dated 01.02.2017 and a replying affidavit sworn by Dr. Alice Owano Mulusa on 13.02.2017. In the main, Alice Owano avers that the application dated 17.01.2017 is an afterthought, since it was filed more than three months after the delivery of the impugned ruling; that the application has not been made timeously and is only meant to delay the course of justice. That some of these issues raised in the application can only be canvassed properly through a full trial; that the orders made on 25.10.2016 are valid and mainly aimed at preserving the estate; that the application herein is aimed at causing unnecessary delay of the court process. The respondent prays that the application be dismissed with costs to the respondents.

8. Though M/S Makhandia & Makhandia Advocates through Mr. Otenyo Advocates have filed written submissions on the application dated 03.05.2016 there is no such application on the file. The said firm appears for Rosilia Okila Mbalanya, the appellant and applicant in the application dated 03.11.2016. M/S Makhandia & Makhandia Advocates came on record on 18.11.2016 after filing their notice of change of advocates for the appellant/applicant, Rosilia Okila Mbalanya.

### **Submissions**

9. Parties filed and exchanged written submissions together with relevant authorities and need not say anything more about the same at this stage.

### **The Law**

10. The law governing applications for stay of execution is now well settled. Order 42 Rule 6 of the Civil Procedure Rules under which the two applications are brought provides as follows:-

“(6)(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a

decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

11. The above provisions mean that for applications seeking stay, the applicant must demonstrate to the court that;-

a. Substantial loss may fall upon the applicant unless the order sought is stayed;

b. The application has been made timeously;

c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be bending on him.

12. From the decided cases, all the above three conditions, must be fulfilled before an applicant gets relief. It was however held in the case of **M/S Port Reitz Maternity – vs – James Karanga Kobia, Civil Appeal No. 63 of 1997, which case was cited by Musyoka J. in Succession Cause No. 1559 of 1995- In the matter of the estate of the late Zakayo Kipkoeach Kirui [2014] eKLR** – that considering an application for stay of execution is under a duty to balance the interests of the applicant with those of the respondent, especially in view of the fact that an appeal does not operate as a stay of execution of a judgment.

### **Analysis and Determination**

13. The issue for determination here is whether the applicants, by their respective applications, have satisfied the conditions for the grant of the orders sought. Starting with the application dated 03.11.2016, the same was filed some ten (10) days after the ruling of 25.10.2016 was delivered. In terms of time, I am satisfied that the application filed without undue delay, and for that reason, and if nothing else mattered, the application would succeed. But has the applicant demonstrated that she would suffer substantial loss if the stay order is not granted?

14. The applicant avers that she is the widow of the deceased. She also avers that she is the one who is in acceptance and possession of the property which brings in income and that until this dispute arose, she is the one who has been receiving the income for the benefit of herself and her children and therefore that if the order which is the subject of the pending appeal is not stayed, she will become a destitute. From both the application and the submissions, it does not appear to me that the applicant is trying to derail the course of justice in this matter. If the order for stay is not granted as prayed, the applicant will become destitute as the other parties might not be ready and willing to operate the joint account to her advantage. As noted by Musyoka J , Re the estate of Zakayo Kipkoech Kirui (above) a court considering an application for stay of execution, must do so judicially and not capriciously, for the purpose of ensuring that the ends of justice are met.

15. In the circumstances of this case, I am satisfied that the ends of justice would be served better if the stay order is granted pending the hearing and determination of the appeal.

16. Now concerning the application dated 17.1.2017, the applicant's arguments are that if the application is not allowed, they will default in loan repayments, and eventually that will be to their peril. It is noted however that the application was filed roughly some two and a half months after the ruling of 25.10.2016. Was the application an afterthought as alleged by the respondent? Is it a delaying tactic for the rest of the case? In my humble view and considering the circumstances of this case, and further considering the fact that all parties in this matter agree that there is a will which is only awaiting translation from Kinyore dialect into English, I am satisfied that the applicants are also entitled to the stay order. There is evidence of a loan facility dated 07.03.2015 to Benson Amukoa Mbalanya and Joyce Onda Mbalaya of Kshs.3,500,000/= (three million five hundred thousand Kenya shillings only).

17. In the result both applications dated 03.11.2016 and 17.01.2017 be and are hereby allowed to the effect that that part of the order dated 25.10.2016 requiring the opening of a joint account in the names of Rebecca Litunya, Benson Mbalanya, Alice Owano and Rosalia Mbalanya be and is hereby stayed pending hearing and determination of the appeal.

18. As parties in this matter are all family, each of them shall bear their own costs.

Orders accordingly,

Ruling delivered, dated and signed in open court at Kakamega this 23<sup>rd</sup> day of May 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Miss ilunda (present).....for Alice Owano Mulusa

.....for Musa Mbalanya

.....Mr. Akwala.....for Tom Mbalanya

.....for Benson Mbalanya

.....for Rosilia Okila Mbalanya

.....Polycap.....Court Assistant