



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2292 OF 2011

IN THE MATTER OF THE ESTATE OF GEOFFREY KAHURA NJOROGE (DECEASED)

MARY WAMAITHA GITHUA.....ADMINISTRATORS/APPLICANTS

HANNAH GATHONI GITHU.....ADMINISTRATORS/APPLICANTS

VERSUS

GRACE NJOKI NDUNGU.....OBJECTORS/RESPONDENTS

GLADWELL WACERA.....OBJECTORS/RESPONDENTS

GEOFFREY MUIGAI OBJECTORS/RESPONDENTS

**HENRY NDUNGU.....
OBJECTORS/RESPONDENTS**

R U L I N G

1. There are two applications before this court for determination and I have considered them together since the issues raised in both of them are intertwined. The first in time is the summons dated 13th April 2015 and brought under **Section 47, rule 59 & 73** of the **Probate and Administration Rules of the law of Succession Act Cap 160** of Kenya. In it the Applicant Mary Wamaitha Gitau (hereinafter the Petitioner) prays for:
 - i. The production of the Original title deed and the log book by the Respondent so that the Petitioner may be able to conclude the administration of the deceased's Estate by applying for confirmation of Limuru/Rironi/[particulars withheld], Share Certificates of four plots in [particulars withheld] and motor vehicle reg. No. [particulars withheld] which is already in the Respondent's name.
 - ii. Removal of the caution on Limuru/Rironi/[particulars withheld] that the Respondent placed on 23rd September 2011, and in default orders to issue sui motto.
2. The application is based on grounds that the Petitioner is the widow of the deceased and that on 16th February 2015 the court dismissed the Objector's/Respondent summons for revocation, but the Objector continues to be in possession of a log book and certificates of various parcels of land belonging to the deceased. The Petitioner states that it is in her knowledge that the Objector has already effected some transfers of the deceased's property and may proceed to dispose of other assets and the Petitioner is therefore likely to suffer loss if the orders sought are not granted.

3. The Petitioner swore an affidavit on 13th April 2015 and deposed that the Objector has actual custody of all the title documents to:

1. Limuru/Rironi/[particulars withheld]
2. Share certificates of four plots in [particulars withheld]
3. Motor vehicle reg. No.[particulars withheld]

That the Objector reply to the Petitioner request to relinquish the documents is that they are misplaced. Further that the Objector has, without basis, placed a caution on the parcel of land that is Limuru/Rironi/[particulars withheld].

4. The Objector/Respondent opposed the application in her Replying affidavit sworn on 30th April 2015, and deposed that the original Title Deed to Limuru/Rironi/[particulars withheld] was duly put in her custody by the deceased in his life time in her capacity as his wife. That the Petitioner has not availed proof of the four Embakasi plots they purport to have been owned by the deceased. That the motor vehicle registration No.[particulars withheld] does not form part of the estate of the deceased, as it was duly transferred to her by the deceased during his life time as a gift for his love to her.
5. The Objector avers that the purported plots in Embakasi alleged to form part of the deceased's estate were conspicuously left out by the Petitioner from her original list of deceased's assets. Also that she is optimistic that the Appeal filed against the judgment and order hereof raises weighty and triable issues and has a high probability of success as it touches on the right to inheritance and presumption of marriage. That if the Petitioner proceeds to complete the administration of the deceased's estate hereof, the Objector stands to suffer irreparable loss and their Appeal may be rendered nugatory.
6. The second application in time is the summons dated 30th April 2015 brought under **Rule 49, 59 Order 42 Rule 6** of the **Probate and Administration Rules** and **order 51 Rule 1** of the **Civil Procedure Rules, 2010**. In it the Applicant Grace Njoki (hereinafter the Objector) seeks orders that further proceedings in this cause be stayed pending the hearing and determination of this application. Further that, further proceedings be stayed herein pending the hearing and determination of Civil App No. 91 of 2015 which is pending before the Court of Appeal.
7. She filed a supporting affidavit sworn on reiterating the grounds of the application.
8. In her Replying affidavit dated 8th July 2015, Mary Wamaita Githu the Petitioner deposed that the court in its judgment delivered on 16th February 2015, found that the Objectors are not beneficiaries of the Estate. That they will not suffer substantial loss if the execution is not stayed.
9. The Petitioner further averred that the application for stay was not made immediately and came almost three months after the delivery of judgment and there was therefore unreasonable delay. She argued that waiting for the outcome of the appeal would greatly prejudice her as the Objector wants to dispose of some properties to frustrate the distribution of the said assets to the lawful beneficiaries. She urged that the right of appeal must be balanced against an equally weighty right, of the Petitioner to enjoy the fruits of the judgment delivered in their favour. That there must be just cause for depriving the Petitioner herein of that right.
10. The Objector in her further affidavit denied being guilty of laches and explained the steps she followed before filing the application. She explained that she had obtained the proceedings and ruling to enable her lodge an appeal. That within 90 days she had moved with speed to file a Notice of Appeal, obtain the typed proceedings and Ruling, prepare and file the Record of Appeal and file the instant application.
11. The Objector argues that for the same reason, that the hearing and disposal of the pending appeal may take some considerable time to conclude due to backlog in the Appellate Court, and it is

imperative that the Estate of the deceased be preserved pending the hearing and determination of the said Appeal. She urged that she has no intention whatsoever, to dispose of anything forming part of the deceased's Estate and if she had ever intended to do so, there was nothing that would have prevented her from doing so since the deceased's demise on 16th January 2010.

12. The back drop to these two applications is that Geoffrey Kahura Njoroge whose Estate is in issue died on 16th January 2010 aged 55 years. The widow Mary Wamaitha Githu the Applicant in the first application and her sister Hannah Gathoni Gitau successfully petitioned Limuru Senior Principal Magistrate's court for letters of Administration intestate, indicating that the deceased was survived by the following:

1. Mary Wamaitha Githu - widow
2. Josto Njoroge Kahura - son
3. James Githu Kahura - son
4. David Ndungu Kahura - son
5. Isaac Muniu Kahura - son
6. Anthony Kinyanjui Kahura - son

The grant of letters of Administration intestate was issued on 23rd December 2010 in succession Cause No.59 of 2010 in the Limuru Senior Principal Magistrate Court and confirmed vide certificate of confirmation of Grant dated 21st July 2010.

13. In a summons dated 30th April 2015 Grace Njoki moved the court seeking to have the grant issued in the subordinate court revoked. The court duly considered the grounds of the application, the replying affidavit and in a judgment dated and delivered on 16th February 2015, the court revoked the grant but dismissed the application for the inclusion of Grace Njoki a widow and a co-administratrix in the Estate. The Objector being dissatisfied with the decision of the court, has since lodged an appeal in the Court of Appeal.

14. On the second application and whether or not the court should grant a stay of its judgment of 16th February 2015 pending Appeal, the Court shall not issue any stay orders unless the two grounds set out in **sub-rules (a) and (b) of Order 42 Rule 6(2)** are satisfied. They provide that:

“No order for stay of execution shall be made under sub rule (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:”

Sub rule (b) provides for security. From the above quotation the applicable provisions of the law are couched in mandatory terms, on when the court may grant stay orders.

15. On the question of delay, the court finds that this application, though made with some delay, in the circumstances the said delay from the time the lower court orders were issued cannot be said to be unreasonable. On the second limb of substantial loss, demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. See – the decisions of Mwera J, as he then was in **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. See - the decision of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was).

16. I have considered the two applications together as stated earlier and find that the Objector does have a right to go on appeal although her application for stay of execution cannot be said to have been brought with due dispatch. I am also aware that the Court of Appeal may be of a different mind on the issues under consideration. It is my considered view therefore, that the interests of justice will be best served by staying the application dated 13th April 2015 by the Petitioner in the

interim, and allowing the application dated 30th April 2015 by the Objector also for a limited time without orders as to security.

17. For the foregoing reasons the proceedings before this court are stayed for 90 days to allow the Objector to file an application for the stay of the said proceedings in the Court of Appeal. Failure to do so within the prescribed time the Petitioner will be at liberty to move this court to issue the orders she has sought in the application dated 13th April 2015.

There are no orders as to costs.

SIGNED DATED and DELIVERED in open court this **26th day of January 2016.**

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L. A. ACHODE

JUDGE