



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 604 OF 2006

IN THE MATTER OF THE ESTATE OF NJOROGE NGANGA – (DECEASED)

HANNAH NGINA

JOSEPHINE WANGUI THAIRU

Alias JOSEPHINE WANGUI MWANGI.....OBJECTORS

VERSUS

FRANCIS KAMAU THAIRU.....PETITIONERS

RULING

Esther Wanjiru Thairu moved this court vide notice of motion dated 23rd June, 2015 for orders.

1. Spent
2. Spent
3. That pending hearing and determination of the intended appeal, there be stay of execution of the judgment of Honourable Lady Justice H. Omondi given herein on 28th January, 2015.
4. That the costs of this application do abide the result of the said intended appeal.

The application is supported by her affidavit sworn on 19th June, 2015 and on the following grounds:

- a. That on 28th January, 2015, judgment herein was entered by Honourable Lady Justice H. Omondi.
- b. That the Applicant, Esther Wanjiru Thairu was aggrieved by the said judgment and consequently filed a Notice of Appeal.
- c. That the Objectors/Respondents are now in the process of enforcing terms of the said judgment and the same shall be to the detriment of the Applicant.

Despite evidence of proper service, no reply was filed by the Respondent. I note that service was on two (2) occasions received under protest. On the first occasion, the reason given was that counsel was to be away on the date appointed for hearing and on the 2nd occasion, a hearing notice was received under protest, strangely premised on the fact that there had not been service of the application yet the application had been acknowledged as received before.

In brief submissions, Ms. Njeri Njagua for the applicant told the court that the applicant is desirous of filing an appeal against the judgment of Justice H. Omondi delivered on 28th January, 2015. A notice

of appeal has been filed. A request for proceedings has been made. The request is annexed and marked “*EWTI B*”. It is urged that if the judgment is not stayed, the estate will be distributed. The applicant who is a beneficiary was aggrieved by the judgment.

The granting of a stay of orders of court is a discretionary power. The applicable principles were well enunciated by this court in the case of **Machira t/a Machira & Company Advocates V. East African Standard**, (NO.2) H.C.C.C. No.612 of 1996. It was held:

- “1. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not in the interests of one party.”**
- 2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment and or of any decision of the court giving him success at any stage.**
 - 3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.**
 - 4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.**
 - 5. In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.**
 - 6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.**
 - 7. The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.**
 - 8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.”**

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. With the result that there shall be a stay of execution of the judgment of the Hon. Lady Justice H. Omondi pending the hearing and determination the the intended appeal.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 18th day of February, 2016.

A. K. NDUNG'U

JUDGE