



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.239 OF 2010

IN THE MATTER OF THE ESTATE OF BARNABAS TEYA RUOTI – DECEASED

PAULINE NYANCHERA TEYA.....1ST PETITIONER/APPLICANT

JAMES OBINO TEYA.....PETITIONER/APPLICANT

VERSUS

MILKA KERUBO NYOKWOYO..... OBJECTOR/APPLICANT

RULING

1. This ruling relates to the Notice of Motion Application dated 21st October 2015 brought under **Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act** in which the Objector/applicant seeks orders that:

a) Spent.

b) That this Honourable Court be pleased to Order stay of execution of Certificate of Confirmation issued by this Court till the hearing and determination of the intended Appeal to the Court of Appeal.

c) That this Honourable Court be pleased to preserve the estate of the deceased as it was before 9th March, 2015 by placing on the registers prohibitory orders on the deceased's following properties known as:-

(i) NYARIBARI MASABA/BOGUCHE/132

(ii) BASSI/BOITANGARE/522

(iii) KISII NYANSIONGO SETTLEMENT SCHEME/298

(iv) PLOT NO. 4A AT GESUSU MARKET

(v) PLOT NO. 3 AT KEROKA TOWN

(vi) SHARES AT E.A. BREWERIES – 4080

(vii) SHARES AT KIAMOKAMA TEA FACTORY 1129

And/or granting any other Order to the effect that the deceased's estate should not be distributed until the intended Appeal to the Court of Appeal is heard and determined.

d) This Honourable Court be pleased to grant such further Orders as it may deem fit to grant in the circumstances of this matter.

e) Costs of this Application be provided for.

2. The application is supported by the affidavit of the applicant **MILKAH KERUBO NYOKWOYO** in which she depones that she has filed a Notice of Appeal to the Court of Appeal against this court's judgment of 9th March, 2015 that ordered the distribution of the deceased's estate.

3. The applicant depones that she has a formidable appeal against the said judgment which appeal will be rendered nugatory if the respondents are allowed to distribute the estate as they are planning to do unless the stay orders are granted.

4. The application is opposed by the respondent through the 2nd respondent's replying affidavit sworn on 30th November 2015 in which he depones that the application has been filed almost 9 months after the judgment the applicant intends to appeal from was made and that the delay in filing both the instant appeal and the Notice of Appeal has not been explained by the applicant.

5. The 2nd respondent depones that the applicant did not seek or obtain leave to file the Notice of Appeal out of time.

6. The 2nd respondent further states that the applicant has not demonstrated that she has an arguable appeal with high chances of success as the memorandum of appeal has not been annexed to the application for the court's perusal.

7. The 2nd respondent adds that the applicant has not shown what loss or prejudice she will suffer if the share of the estate of the deceased that was allocated to her by the court is transferred to her name.

8. The 2nd respondent further states that the applicant is guilty of laches, her application lacks merit and is motivated by malice and her desire to protract the succession case to the disadvantage of all other beneficiaries who are eager to bring the case to an end.

9. When the application came up before me for hearing on 9th February, 2016, parties agreed to canvass their arguments by way of written submissions.

Applicants submissions

10. The applicant submitted, through his lawyers M/s Momanyi Aunga & Co. Advocates that his notice of appeal marked annexure "MKNOO1" was endorsed by the Deputy Registrar on 20th March 2015 about 11 days after the judgment intended to be appealed from was delivered and therefore the Notice of appeal was filed within the prescribed time limit.

11. It is the applicant's submission that the respondents have gone ahead to implement the judgment and Certificate of confirmation of grant at the lands registry despite their being aware of the applicant's notice of appeal and this according to the applicant, amounted to an act of bad faith on the part of the respondents.

12. The applicant contends that the action by the respondents of moving to distribute the estate while this application is pending was intended to frustrate the applicant and should not be tolerated by the court.

13. The applicant ends her submissions by praying that the court invokes its discretionary powers to prohibit the new land parcel numbers created from the distribution of the estate of the deceased so as to

preserve the said estate pending the outcome of the appeal. The applicant adds that she has been unable to file the intended appeal due to the applications filed by the petitioners/respondents. The applicant has attached certain copies of the registers in respect to some of the parcels of land to her submissions.

Respondents submissions

14. Through their advocates M/s Momanyi Gichuki & Co. Advocates, the respondents submitted that the instant application ought to be dismissed because of various reasons including reasons that it had been overtaken by events, the intended appeal had not been filed over 1 year after the judgment was entered and that the applicant had not demonstrated that the intended appeal had high chances of success.

15. The respondents contend that the applicant is guilty of laches as the application has been filed almost 9 months after the impugned judgment was delivered yet the applicant was all along fully aware of the said judgment as she was present in court at the time it was read.

16. It was the respondents' submissions that the period of 1 year after the judgment was such a long time that it was not possible to undo or stay the implementation of a lawful court order as within that period, a lot of water had passed under the bridge and therefore, the court cannot be seen to come to the rescue of an indolent litigant.

Analysis and determination

17. Upon considering the instant application, the replying affidavit and the parties respective submissions, the question that stands out and that begs this court's determination is whether the applicant is entitled to the orders sought in the application dated 21st October 2015.

18. The application is expressed to have been filed under order 42 rule 6 of the Civil Procedure Rules which stipulates 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the

delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

19. The above provision order and rule clearly outlines conditions a party seeking orders of stay of execution pending appeal must fulfill. In the instant case the applicant has demonstrated that he has filed a notice of appeal to the Court of Appeal even though the validity of the said notice has been challenged by the respondents who claim that it was lodged out of time without leave of the court.

20. In this application however, even though the issue of the validity of the notice of appeal is not one of the issues requiring the court's determination, this court will endeavour to address it because the notice of appeal is central to the application as without it, there would be no appeal so as to warrant the issuance of orders of stay of execution.

21. The judgment, the subject of the intended appeal was delivered on 9th March 2015 and the applicant claims that the notice of appeal was lodged at the High Court at Mombasa on 20th March 2015. The Notice of Appeal does not have the stamp of the Mombasa Court, where it was allegedly lodged, to show when exactly it was lodged. There is also no proof that the said Notice of Appeal was served upon the respondents within the stipulated 7 days period.

22. **Rule 77 of the Court of Appeal Rules** stipulates as follows:

“77 (1) An intended appellant shall before or within 7 days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”

23. The above rule is couched in mandatory terms, yet the applicant in this case has not stated when if at all he served the respondents with the Notice of Appeal.

24. The notice of appeal attached to the 2nd respondents replying affidavit as annexure **“JOTI”** is not very clear on the date it was actually lodged even though it dated 19th March, 2015. Be that as it may, assuming it was lodged on 20th March 2015 as alleged, then that was 11 days after the date of the delivery of the judgment in question. **Rule 75 of the Court of Appeal Rules** states that a Notice of Appeal be lodged within 14 days of the date of the decision against which it is desired to appeal.

25. In this case, if the appellant lodged the Notice of Appeal on 20th March 2015, then she ought to have filed the appeal within 60 days of the lodging of the appeal that is on or before 20th May 2015. The intended appeal has however not been filed to date. The applicant claims that he has not been supplied with the proceedings relating to the judgment of 9th March 2015 so as to enable him prepare the memorandum of appeal and record of appeal.

26. It is instructive to note that the applicant has deponed that he made the request for the said proceedings vide her letter to court attached to her supporting affidavit as annexure **“MKNOO2”**. While it is not clear if and when the said letter was received by the court, the said letter is dated 2nd July, 2015. The applicant does not disclose if she served the respondents with the letter requesting for the proceedings.

27. The applicant ought to have applied for the proceedings immediately or within reasonable time after the delivery of the judgment so as to beat the 60 days deadline for the filing of the appeal so that in the event of a delay by the court in the typing of the proceedings, then the Deputy Registrar would issue a certificate of delay that would then enable the applicant to file her appeal outside the limitation period.

28. **Rule 82 of the Court of Appeal Rules** provides in part as follows:

“82 (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry within 60 days of the date when the notice of appeal was lodged---- provided that when an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within 30 days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant such copy.

(2) An appellant shall not be entitled to rely on the provision to sub rule (1) unless the application for such copy was in writing and a copy was served upon the respondent.”
Emphasis added.

29. The above provisions of Rules 75, 77 and 82 of the Court of Appeal Rules show that time was of essence in applying for court’s proceedings, the lodging of the notice of appeal and the service of the same on all the affected parties and the filing the appeal itself. Contrary to the provisions of the said rules, the applicant operated as if time was not of essence by applying for the proceedings on 2nd July, 2015, long after the 30 days period, after judgment, allowed by the rules had lapsed. The Applicant has not demonstrated that he served the notice of appeal on the respondents or that he applied for the proceedings on time. The applicant can be said to have broken every rule in the book as regards the procedure to be adhered to in pursuing a case before the Court of Appeal with the end result that can be said that there is no valid appeal on record on which the present application can be anchored. That time is of greater essence in the proceedings before the court of appeal, is further fortified by the provision of Rule 84 of the Court of Appeal Rules that states that anyone affected by an appeal may at any time before or after the institution of appeal, apply to strike out the notice or the appeal, as the case may be on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

30. One could however, argue that the delay in filing the appeal is a procedural technicality curable under Article 159 of the Constitution. In **Hon Lemanken Aramat vs Harun Mutembei Lempaka & 2 others Supreme Court Petition No. 5 of 2014** while considering whether an election petition filed out of time could be sustained expressed itself thus:

“The Court’s authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the Constitution links certain vital conditions to the power of the court to adjudicate a matter. This is particularly true in the context of Kenya’s special electoral dispute resolution mechanism.....

Those who filed election petitions outside the 28 day requirement of the constitution cannot, in our perception, avoid the consequences of their dilatoriness; for it is the prescribed time frame that opens the jurisdiction of the courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by parties in their pleadings. To this question, the general discretion provided for in Article 159 would not apply, as this is not an ordinary issue of procedural compliance.”

31. In my view, whether or not an appeal is filed out of time goes to the jurisdiction of the court as the court can only entertain appeals filed within the requisite time or out of time with the leave of the court, a different holding would upset the established principles of institution of appeals to the Court of Appeal.

32. In the instant case, the applicant has neither filed the appeal on time nor applied for leave to file the same out of time. Clearly therefore, this court finds that, for all intents and purposes, there is no appeal on which the current application for stay of execution pending appeal can be sustained. The applicant sat on her laurels for almost 4 months before making her request for the proceedings and did not serve the notice of appeal or proceedings request letter to the respondents within the required time or at all.

33. I therefore find that the applicant’s intended appeal is a mere mirage or smokescreen that cannot be

actualized due to the unexplained and unreasonable lapse of time and failure to comply with the laid down rules. As matters stand now, the applicant cannot be said to have lodged a valid Notice of Appeal upon which this application for stay of execution can be anchored and on this ground alone, the instant application fails.

34. In **Gerald M'limbine vs Joseph Kangangi [2009] eKLR** Anyara Emukule J. interpreted the proviso to Section 79G of the Civil Procedure Act thus, and I concur with that holding

“My understanding of the proviso of Section 79G is that all applicants seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the courts’ permission to admit non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process which under section 79B says:

79B. Summary rejection of appeal

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”

35. On the other hand, assuming that there was a valid Notice of Appeal and Appeal on record, would the instant application succeed? I am afraid that the answer to the above question is negative for the following reasons:

36. Firstly, the application was not filed within reasonable time as envisaged by Order 42 Rule 6 of the Civil Procedure Rules. The instant application was filed on 21st October, 2015 over 7 months after the impugned judgment was delivered and the applicant has not furnished the court with any reasonable explanation for the delay.

37. Secondly, the applicant has not demonstrated that she will suffer any substantial loss that cannot be compensated in damages if the stay of execution orders sought are not granted. The impugned judgment relates to the distribution of the estate of the deceased in which the applicant, among other beneficiaries was granted a share thereof. It is my humble view that in the event the applicant’s intended appeal, if any, succeeds, the estate will still be available for redistribution as the applicant has not demonstrated that any beneficiary is intent on wasting or disposing off the said estate.

38. Thirdly, the applicant has not offered any security for the due performance of the decree as provided for under **Order 42 Rule 6 (2) (b)** of the Civil Procedure Rules to demonstrate her seriousness or commitment to the intended appeal.

39. Lastly, an order for stay of execution would only be available to the applicant if she proved that the estate of the deceased is still in the same state as it was on 9th March 2015 when the judgment was delivered. As matters stand now, the certificate of confirmation of grant was issued way back on 9th March 2015. It is possible that the beneficiaries named in the certificate of grant have taken steps to secure their respective titles to the suit estate in which case, a stay of execution order issued now would be a mere academic exercise in futility because there would really be no need to stay an event that has already occurred.

40. The applicant has in her submissions, alluded to the fact that the suit land parcels have already been sub-divided. This to me, is a clear demonstration that the court’s judgment of 9th March 2015 has already been executed or acted upon in which case, it would be pointless to order for a stay of execution.

41. In sum therefore, it is my finding that the application dated 21st October 2015 lacks merit and the

same is hereby dismissed. Taking into account that this case relates to the estate of a deceased person in which the parties hereto are relatives, I order that each party shall bear his/her own costs of the application.

Dated, signed and delivered in open court this 15th day of August, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Momanyi Aunga for the Applicant
- N/A for the Petitioner
- Omwoyo: court clerk