



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCC CAUSE NO. 290 OF 2010

IN THE MATTER OF THE ESTATE OF AMINA JUMA KASSAM (DSD)

GULZAR ABDUL WAIS ..... PETITIONER/RESPONDENT

VRS

VASMIN RASHID GANATRA.....1<sup>ST</sup> OBJECTOR/APPLICANT

TARIO ABDUL RASHID.....2<sup>ND</sup> OBJECTOR/APPLICANT

R U L I N G

1. The Objectors/Applicants through a chamber summons dated 11<sup>th</sup> July 2014 brought pursuant to section 3A, 63 of Civil Procedure Act, Order 51, 42 Rule 6 of the Civil Procedure Rules and Rule 63 and 73 of Civil Probate and Administration Rules have sought an order of temporary stay of execution of the ruling delivered on 8<sup>th</sup> July 2014 in the instant matter pending hearing of the intended appeal and status quo be maintained over a house on land parcel No. Ntima/Igoki/5685.
2. The said application is premised on the grounds on the face of the

application *interalia*; that if an order of temporary stay is not granted the Objectors shall be rendered homeless/destitute since they live in the estate of the deceased as dependants; that if temporary stay is not granted the Objectors intended appeal shall be rendered nugatory; that there is no vacuum created by the ruling delivered on 8<sup>th</sup> July 2014 as the Petitioner and the 1<sup>st</sup> Objector were appointed as the administrators of the estate of the deceased; and that in the interest of justice to all parties orders of temporary stay be issued.

3. The Applicants case as per supportive affidavits is that; on 8<sup>th</sup> July 2014, this Honourable court made a ruling that prior to her death; the late AminajumaKassam had left a valid *Will* bequeathing her daughters her estate herein. That amongst the property mentioned in the aforesaid *Will* is the upper house in land parcel No. Ntima/Igoki/5685 where the Applicants live and as a result of this court's ruling the Applicants aver that they stand eviction from that home rendering them destitute.
4. The applicants aver that they have sought to appeal against the court's ruling as per attached draft memorandum of Appeal marked "URG3". That they have paid charges paid to be provided with certified typed proceedings as per receipt marked "URG4" and have put in Notice of Intended Appeal marked as "URG5".
5. The Applicants contend that unless an order of stay of

execution/proceedings *or status quo* is maintained in this cause, they shall suffer irreparable damage since they are dependants in the estate of the deceased herein and that the Intended Appeal shall be rendered nugatory urging that their appeal has high chances of success.

6. The Petitioner/Respondent is opposed to this application through a replying affidavit dated 15<sup>th</sup> February 2014.
7. It is the Petitioner's/Respondent's contention that the Applicants application is incompetent on the following grounds *inter alia*; that the Notice of Appeal attached do not comply with Rule 74(6) of the Court of Appeal Rules which is a mandatory requirement; that the Notice of Appeal does not bear a court stamp of the High Court of Kenya as required by the Court of Appeal Rules; that the letter requesting for proceedings attached does not comply with provisions of Rule 82(1) and (2) of Court of Appeal Rules; which provides that the application for a copy of proceedings must be in writing and a copy of it be served upon the Respondent; that the Applicants have not met out the threshold of order 42 Rule 6 of the Civil Procedure Rules in that the Applicants have not satisfied the court that substantial loss may result if the application is not granted; that Applicants have not offered security for the due performance of such a decree; and that the Applicants have not provided proof that there is an intended execution or execution

has commenced.

8. The Respondent further contend that the Applicants have not demonstrated evidence before trial Court, on purchase of the residential home or any proof of support of a stay or any documentary proof or support of their claim that they purchased the property or constructed the residence or the first floor of the deceased's matrimonial home or at all or that they have arguable appeal; urging the application has no merits and should be dismissed.
9. The Applicants counsel and the Respondent's counsel filed their rival submissions on 9<sup>th</sup> December 2014 and 20<sup>th</sup> December 2014 respectively attaching authorities in support of their different opposing positions.
10. I have very carefully considered the pleadings, submissions, and rival authorities by the parties. The issue for consideration is whether the applicants have met the conditions for granting orders of stay of execution in this matter.
11. The Applicants submitted that they have indeed complied with the provisions of Rule 74(6), of the Court of Appeal Rules; that the Notice of Appeal is duly stamped by the High Court at Meru; that they have also complied with the provisions of Rule 82(1) and (2) of the Court of Appeal Rules; that certified proceedings in the

instant case have been issued for them to prepare the Record of Appeal; that they have met the conditions set out under order 42 Rule 6 of Civil Procedure Rules to warrant the issuance of the orders sought.

12. Order 42 Rule 6(2) (a) (b) of the Civil Procedure Rules, provides as follows;

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.

13. In the case of *Equity Bank Limited -Vs- West Link MBO Limited [2013] Eklr*, the Court of Appeal held;

*“that an appeal does not operate as a bar to execution of judgment. A party seeking stay of execution pending appeal must therefore demonstrate that they are not using the appeal to delay justice. They must not show that they have an arguable appeal but also that they have come to court without undue delay”.*

14. In the case of *Jethina -Vs- Shah T/A Supreme Styles 1989* the Court of Appeal held as follows;

*“The purpose of an application for stay is to preserve the subject matter in dispute so that the rights of an appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.*

15. The Respondents referred this court to the case of *Global Tour & Travel Limited: Nairobi Hc Winding Up Cause No.43 Of 2000* where the Court stated that;

a) *“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of Judicial time and whether the application has been brought expeditiously”.*

16. The Applicants in the instant case have contended that if the orders sought are not granted, they will stand destitute if the Respondents herein goes ahead to seek letters of probate with *Will* annexed as the court in its judgment annulled the joint letters of administration issued to the Petitioner and the Applicants. The order that the Applicants seek to appeal against reads in part as follows;

*“I direct that the Petitioner consults the Objectors and her sister Reshid in terms of Section 82(d) of Law of Succession Act over the property L.R. NO.NTIMA/IGOKI/5685 and offer to the Objectors the option to purchase the property or the residence where they live upon consideration subject to the advice of a qualified valuer”.*

17. In the circumstances of this cause and in right of the Applicants contention and in the above citation from the judgment of the learned Judge, I am of the view that if the order of stay is not granted as sought or *status quo* maintained as sought, the court's

judgment will be executed and the subject property or the estate will be distributed amongst the respective beneficiaries or be disposed of before the Applicant's intended appeal is filed and determined. Nothing will stop the Respondents from disposing of the property and start evicting the Applicants whose rights of appeal will be affected. This will in my view cause a substantial loss to the Applicants who will by the very nature of this matter be rendered destitute and their appeal rendered nugatory.

18. The judgment which the applicants seeks to appeal against was delivered on 8<sup>th</sup> July 2014. The instant application was filed in this court on 11<sup>th</sup> July 2014 and signed by the Deputy Registrar on the same day. This was a period of about 3 days from the date of Judgment which is in my view quite expeditious, timely and I find that there was no inordinate delay.

19. Having carefully evaluated the contents of the Applicant's affidavit and that of the Respondents, I am satisfied from the same that the Applicants have met the threshold of order 42 Rule 6 of the Civil Procedure Rules in that they have demonstrated that they would suffer substantial loss if the order sought is not granted and I also find the application has been made without unreasonable delay.

20. The respondent in their submission raised the issue that the Notice of Appeal does not comply with Rule 74(6) and rule 82(1) and (2)

of the Court of Appeal Rules. The said Rules provides as follows;

Rule 74(6)

*“A notice of appeal shall be substantially in the form D in the First Schedule and shall be signed by or on behalf of the appellant”.*

Rule 82 (1)

*“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged;-*

- a) a memorandum of appeal in quadruplicate;*
- b) the record of appeal, in quadruplicate;*
- c) the prescribed fee; and*
- d) security for the costs of the appeal;*

*provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty 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 of such copy”.*

*a) Rule 82 (2)*

*“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent”.*

21. I have first to point out that Rule 74(6) of the Court of Appeal Rules relied upon by the Respondent deals with procedural issues and in my view do not have a lot of weight in view of the provisions of Article 159(2) (d) of the Constitution of Kenya 2010.

22. The above notwithstanding, if this court was to go ahead and consider whether the applicants have complied with the Court of Appeal Rules (*Supra*) or the submissions by the Respondent that

the Applicants have no documentary proof to support any of their claims, since no document showed that they had purchased the property and/or carried out construction of the residence or the first floor of the deceased matrimonial home, that in my view would amount to considering the appeal on its merit or otherwise which is the preserve of the Court of Appeal. I have no doubt in my mind what is now before this court is an application for stay of execution or maintaining *status quo* pending intended appeal and no more.

23. In support of the above proposition I am guided by the case of *Butt -Vs- Rent Restriction Tribunal [1982] Klr417* cited with approval in *Nakuru High Court Civil Appeal No 182 Of 2005 Ngotho Commercial Agency Limited -Vs- George Wanjuki Gethi*. where the court noted as follows;

*“Although each of parties herein argued on merits or otherwise of the appeal at this stage of proceedings that is not the concern of this court. This court is only concerned with whether the appellant has satisfied the conditions set out in orders XLI Rule 4 (2) of the Civil Procedure Rules (now order 42 Rule 6 of Civil Procedure Rules)”.*

24. In view of the foregoing, I am satisfied for the reasons stated herein above that the Applicants have met the requirements of order 42 Rule 6 of the Civil Procedure Rules as substantial loss will occur unless a stay of execution is made. The application was filed without unreasonable delay; consequently I find the application to be meritorious.

25. The upshot is that the Applicant application succeeds. I proceed to make the following orders;
- a) An order of temporary stay of execution from judgment delivered on 8<sup>th</sup> July 2014 in this matter be and is HEREBY granted pending hearing and determination of the intended appeal which intended appeal ought to be filed within 60 days from the date of this ruling.
  - b) An order do issue for *status quo* to be maintained over house on land parcel No. Ntima/Igoki/5685 pending filing of the intended appeal and determination of the intended appeal which appeal ought to be filed within 60 days from the date of this ruling; in default of filing the intended appeal within the said period this order shall be deemed as vacated.
  - c) Costs of this application be in the cause.

**DATED AT MERU THIS 21ST DAY OF MAY 2015.**

J.A. MAKAU

J U D G E

*DELIVERED IN OPEN COURT IN PRESENCE OF;*

Mr. Mulinge for the Applicants  
M/s Kilonzo & Co. Advocates for Respondent  
C/clerk - Penina/Mwenda

J.A. MAKAU

J U D G E