



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1559 OF 1995**

**IN THE MATTER OF THE ESTATE OF THE LATE ZAKAYO KIPKOECH KIRUI**

**RULING**

1. There are two applications dated 27<sup>th</sup> May, 2013 and 6<sup>th</sup> June, 2013 for determination. It would be prudent to begin by considering the first one in time, which is a Summons dated 27<sup>th</sup> May, 2013 and taken out under Rule 49, 73 of Probate and Administration Rules, Order 9 Rule 9, Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and all enabling provisions of the laws. The Applicant seeks in the main for a stay of execution of the order made by Kimaru J on 9<sup>th</sup> May 2013.
2. The application is supported by the annexed affidavit of Margaret Isutsa Kirui the Applicant herein dated 27<sup>th</sup> May, 2013 and is based on the grounds specified therein. In that affidavit, the Applicant contends, and in reiterating the grounds as set out in the application, that she is aggrieved by the Ruling delivered on 9<sup>th</sup> May, 2013 and has filed a Notice of Appeal against the same; that she stands to suffer substantial loss and damage if the distribution of the deceased's assets is carried out as ordered; further that the court failed to appreciate that there is a valid Will in which the deceased had expressed his wishes with regard to his properties; it is her contention that the court failed to appreciate that the deceased died testate and any purported distribution of the assets as if the deceased died intestate is contrary to the law and may set a dangerous precedent; that she has a good case on appeal with a high probability of success; that the intended appeal will be rendered nugatory unless the orders sought are granted; that the application has been brought without undue delay; that she is willing to deposit such reasonable security as the Court may require and that it is in the best interests of justice for this Honourable Court to grant the orders sought.
3. The Respondent opposes the application. Through her replying affidavit sworn on 14<sup>th</sup> June, 2013, the Respondent contends that the application is frivolous, vexatious, aimed at delaying compliance of a confirmed grant and amounts to abuse of the process of the court; that what the Applicant has sworn under oath in paragraph (8) of her affidavit is a lie. She further contends that an administrator of the estate who fails to comply with the orders of the court and the provisions of **section 76** of the law of succession will have a grant issued to her revoked even on the court's own motion. And finally that the Applicant is simply trying to cover up the wastage that she caused to the subject estate. It is upon this premise that the Respondent invites the court to dismiss the application with costs.
4. Has the Applicant made out a case for grant of stay pending appeal? The principles for grant of stay pending appeal are well settled. The principles are that the order is discretionary, that the

applicant may suffer substantial loss, that the application is made without unreasonable delay and on provision of such security as the Court may impose.

5. The conditions to be satisfied by an applicant before the High Court can exercise its discretion in granting a stay are as stated under Order 42 of the Civil Procedure Rules 2010. Rule 6 of Order 42 provides thus;

*“(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 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; 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.”*

6. The said conditions were also set out by the Court of Appeal in *Halai and Another vs. Thornton & Turpin* (1963) Ltd [1990] KLR as follows;

*“In Rasiklal Somabhai Patel v Parklands Properties Ltd the Court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules under which the Applicant had to satisfy the Court of two matters application is granted, which prima facie means that if the appeal succeeds, the Respondent would not be in a position to make full restitution. Secondly, the Applicant had to give such security as the Court may order. Those are the requirements under Order XLI Rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior Court and not those to this Court, although in sub-rule (1) of the same Rule reference is made to the Court to which the appeal is preferred.”*

7. This Court will be duly guided by the law. Equally, it is important to assert that when a court is determining an application for stay such as the instant application, the court is invited to balance the interests of the Applicant with those of the Respondent. In the case of *M/S Port Reitz Maternity vs. James Karanga Kabia* Civil Appeal No. 63 of 1997 the Court had this to say-

*“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”*

8. 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 only show that they have an arguable appeal but also that they have come to court without undue delay.

9. The applicant contends that the court in distributing the estate failed to take into consideration the existence of the Will and the Wishes of the deceased and the beneficiaries and that in view of the

said Will the deceased did not die intestate and the purported distribution of the estate as if he died intestate was contrary to the law. There is no doubt that this court made an order with regard to the distribution of the estate of Zakayo Kipkoech Kirui. If the order for stay is not given the order will be executed and the estate will have been distributed among the respective beneficiaries before the appeal is heard and determined. If this were to be the case, nothing will stop the beneficiaries from disposing of their portions to third parties whose rights are well protected under **Section 93** of the Law of Succession Act. This to mind will no doubt cause a substantial loss to the Applicant.

10. In light of the aforementioned, I am satisfied that the Applicant has an arguable appeal. I also note that, the instant application was filed on 27<sup>th</sup> May, 2013, while the said ruling had been delivered on 9<sup>th</sup> May, 2013. In the case of *Tarbo Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR*, Gikonyo J held that, stay of execution pending appeal is granted at the discretion of the court upon demonstration by the applicant that the application has been brought without unreasonable delay. I am satisfied that this application being filed almost 18 days after the delivery of the said ruling, was made without undue delay. Moreover, considering that this court has been called upon to exercise its discretion and grant the prayers sought. It must do so judicially to ensure that the ends of justice are met and that justice is done to both parties. Accordingly, this being a court of justice and law, it would be fair to grant the orders of stay pending appeal.
11. The second application is a Notice of Motion dated 6<sup>th</sup> June, 2013 and is taken out under Rule 73 of the Probate and Administration Rules, and **Section 45(1)** and (2) of the Law of Succession Act, Laws of Kenya. In it the applicant seeks orders that would facilitate access to certain properties for the purpose of the conduct of survey and valuation on the said properties. There is also a prayer for the approval of the draft confirmed for the purpose of the extract of the confirmation order.
12. The application is premised on the grounds that all the beneficiaries are bound by the ruling on distribution; that there are no orders staying execution of the ruling on distribution pursuant to the confirmation of the grant and that the Respondent's past and present actions and inaction necessitates issuance of the orders sought. It is supported by the annexed affidavit of Rosemary Chepkorir Sang sworn on 6<sup>th</sup> June 2013 and reiterates the grounds on the face of the application stated above.
13. In the end I allow the application dated 27<sup>th</sup> May 2013. As the first application, dated 27<sup>th</sup> May 2013, has succeeded and stay pending appeal hereby granted, the second application, the Notice of Motion dated 6<sup>th</sup> June 2013, must fail. The parties should wait for the outcome of the intended appeal. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>ST</sup> DAY OF MARCH, 2014.**

**W. MUSYOKA**

**JUDGE**