



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 2377 OF 2008
IN THE MATTER OF THE ESTATE OF BERNARD NJONJO RUBIA
AND
IN THE MATTER OF AN APPLICATION BY CHARLES WANYOIKE RUBIA, MAURICE RUBIA AND MICHAEL RUBIA

RULING

1. The application before court for determination is a Summons for Stay of Execution dated 5th June 2014 and brought under Sections 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. The applicants seek orders that there be a stay of further proceedings and of execution of the orders of the court issued on 11th April 2014 pending the hearing and determination of an intended appeal to the Court of Appeal.
2. The said application is founded on the affidavit of Charles Wanyoike Rubia sworn on 5th June 2014. The application is premised on the grounds that the court rendered the decision the subject of the intended appeal on 11th April 2014 without notice by the court registry to the applicants or their advocates, that the applicants only got to know of the decision on or about 5th May 2014 after the time for lodging the Notice of Appeal had lapsed, that the applicants are aggrieved by the decision of the court which has the effect of excluding the applicants from the administration and distribution of the estate in which event the estate may go to waste and the applicants may be left without a remedy, that in the ruling the subject of the intended appeal the court gave the dependant the status of a son of the deceased while it was a contested matter whose effect is to alter the mode of distribution of the estate without affording the applicants a hearing on the matter, and that the respondents have since sought distribution of the estate and if the same proceeds as matters stand the appeal would be rendered nugatory.
3. The application is opposed by Elizabeth Wanjiru Njonjo Rubia, the 1st respondent, who has filed a replying affidavit sworn on 9th June 2014. She avers that the ruling on the applicant's application dated 10th July 2013 was delivered on 11th April, 2014 after it had been adjourned several times. The said ruling was previously scheduled to be delivered on 4th April 2014 but the same was not delivered as the judge did not sit on that date. The court clerk advised parties present on that day to appear before the judge on 7th April 2014 to seek directions on their rulings. The respondent's counsel duly appeared before the judge on 7th April 2014 when he directed them to appear again before him on 9th April 2014 at 2.30 pm for a mention for directions. When they appeared on the said 9th April 2014, they were directed that the ruling was not ready and that the same would be delivered on notice. The judge asked them however to check for the ruling on 11th April, 2014 at 10.00 am as he was scheduled to deliver some rulings on

that date. The ruling was subsequently delivered on the 11th April, 2014 at the judge's Chambers in the presence of the 1st respondent's advocate.

4. It is further her averment that the applicants herein had not been keen on pursuing the ruling and yet it touched on their application and that they only woke up when they realized that an adverse ruling had been delivered. She argues further that it is almost six years since these proceedings began, and complains that the same have been dragging at the instance of the applicants herein. She avers that the applicants herein have no interest in the estate and that they have not given any good reason for failing to file appeal. She says that they are merely giving excuses and that they have displayed lack of due diligence. She argues that it would be in the best interests of justice and fairness that the present application be dismissed and that the distribution process be allowed to proceed.

5. The 2nd respondent also opposes the application. He has filed grounds of opposition dated 9th June 2014. He avers, among others, that the ruling delivered by this court on 11th April 2014 was not final and is incapable of being executed against, that the applicant has not sought to extend time within which to file a notice of appeal nor has he requested for proceedings and ruling despite learning of this court's ruling, and that the application is made with utmost delay, and only meant to defeat the distribution of the deceased estate. It is further averred that the applicants' right of appeal is automatic and will be exercised once there is a full judgment capable of being executed against, and that the application is made in limbo and cannot issue in a vacuum.

6. The application was prosecuted by way of oral submissions made on 7th July 2014 by counsel appearing for the various parties in the matter.

7. This court has considered the application, the affidavits for and against and the oral arguments by the respective parties. As has been stated above, the application is for stay of execution pending appeal and for stay of proceedings. The principles that guide the grant of stay of execution pending appeal are well settled. Grant of stay of execution is discretionary. In the case of ***Halai and another vs. Thornton (1963) Ltd (1990) KLR 355*** the court held that it had discretion to grant stay of execution. However, it was emphasized that an applicant had to demonstrate a sufficient cause, that the court must be satisfied that substantial loss would follow from a refusal to grant stay, that the applicant must furnish security, and finally that the application must be made without unreasonable delay.

8. This court has considered the foregoing in the instant case. It is my finding that the applicant has not established to my satisfaction that substantial loss may occur unless the order is granted. Similarly, nothing in the applicants' supporting affidavit shows that the applicants are prepared to deposit security for the due performance of such decree or order. Indeed, it is the considered view of this court that the applicants have not given sufficient cause to enable it to exercise its discretion in granting the order of stay of execution pending appeal.

9. The decision subject to this application and appeal was made on the 11th April 2014, and it is the applicants' case that they got to know about it on 5th May 2014, and made this application on 5th June, 2014 almost two months after the said decision had been made. In the circumstances of this case, I find that the delay of nearly two months was not unreasonable.

10. However, I am persuaded that the applicants have not shown sufficient cause that would make me exercise discretion to grant the orders sought herein. In view of the foregoing, I find that the application is not merited and it is therefore expedient to dismiss it. The same is hereby dismissed. There shall be no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 24th DAY OF October, 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Githara advocate for the applicant.

In the presence of Ms. Kabage advocate for 1st respondent .

In the presence of Ms. Makumi advocate for 2nd respondent .