



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
SUCCESSION CAUSE NO. 59 OF 2011
RE ESTATE OF WILSON WACHENDA ASONI

BEN KUMBUTI WASILWA.....OBJECTOR

VERSUS

SHIKUKU MASON SITERA.....PETITIONER

EVERLYNE NAKHUNGU JUMA.....RESPONDENT

RULING

1. Shikuku Mason Sitera and Everlyne Nakhungu Juma (to whom I will refer as *the applicants*) pray for stay of execution of the ruling and order the High Court (Ngenye-Macharia J.) made on 28th March 2013 pending the hearing and determination an appeal to the Court of Appeal. The High Court revoked the grant of letters of administration intestate confirmed on 9th September 2012. The grant was annulled on the grounds that the applicants concealed material facts from the court.
2. The applicants have lodged a notice of appeal dated 3rd April 2013 in the High Court. They have also filed a memorandum of appeal at the Court of Appeal on 3rd June 2013.
3. The grounds of the motion are set out in the notice of motion dated 8th April 2013. The applicants contend that unless the stay is granted, they will suffer substantial loss. They aver that their appeal would in the circumstances be rendered nugatory. The applicants state that they are ready and willing to deposit such security as may be ordered by the court. Lastly, the applicants aver that this motion has been presented without delay. Those matters are buttressed by a brief deposition of both applicants sworn on 8th April 2013. There is also a supplementary affidavit of the same deponents sworn on 15th October 2014 with leave of the court.
4. The gravamen of the motion is captured well in the supplementary affidavit at paragraphs 4 and 6

“4. That we will suffer substantial loss if grant of stay of execution of the decree of this court is not granted as the Respondent has partitioned the suit land parcel No. Kakamega/Chekalini/238 and has been disposing off or alienating the partitions arising there from to third parties in particular to one Gladys Chilikona Tawayi hence defeat the interest of us the beneficiaries of the estate of the deceased thus stay of execution of decree of this court is very vital. Annexed herein is a certified copy of the land register of the suit land and certified copies of official searches of the petitioned suit land registered in different portions green card Kakamega/Chekalini/2582, Kakamega/Chekalini/2583 and Kakamegak/Chekalini/2584 marked as SMS 2(a), (b) and (c) respectively.”

4. That we as the beneficiaries of the deceased we are entitled to benefit from his estate.”

5. The motion is contested. There is a replying affidavit sworn by Ben Wasilwa (I will refer to him as *the objector*) on 23rd June 2014. The pith of the reply is this: That the applicants have not demonstrated what substantial loss they will suffer if stay is not be granted; that the applicants have not shown sufficient cause to ground the orders sought; that the objector is a man of means; and, that the application has not reached the threshold set in order 42 of the Civil Procedure Rules 2010. Regarding the merits of the case, the objector avers that he is the only person who has possession of the suit land; and, that the applicants have never been in occupation. He prays for dismissal.
6. On 23rd October 2014, the applicants, in person, and the learned counsel for the respondent made their arguments to Court. I have considered the application, depositions, and the rival submissions.
7. The court may grant a stay pending appeal under Order 42 of the Civil Procedure Rules 2010. The present motion is predicated upon Order 42 rule 6 (1) of the Rules which provides-

“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.”

8. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in Wilson v Church (No 2) 12 Ch D [1879] 454 at 459.

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

9. Justice Madan delivered himself thus in the Butt case (Supra) at page 419,

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

10. Again the court will grant a stay if special circumstances of the case dictate so. See Attorney General v Emerson and others 24 QBD [1889] 56 at page 59. In the Butt decision (supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in Madhupaper International Limited v Kerr [1985] KLR 840 at page 846.

11. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania [2010] eKLR (Civil Application No 68 of 2008).
12. Applying those principles and the law to the facts here, I find that the impugned decision was a *negative* order. The court *annulled* a grant made to the applicants. I appreciate that the applicants are aggrieved by the entire decision. The point however is that from the perspective of the estate of the deceased, there is *nothing* to stay or *capable* of being stayed pending the appeal. By their own admission, the applicants concede that the property has already been subdivided and various titles issued. It would be inappropriate to comment on the merits of the appeal. One of the grounds upon which the High Court revoked the grant was *non-disclosure* or *concealment* of material facts. The contested parcel of land *is* not part of the estate it should *not* have been included in the grant. If that be the case, the present motion cannot assist in the preservation of the estate. Those matters are however within the true province of the appellate court.
13. I will now turn to other aspects of this motion. The impugned judgment was delivered on 28th March 2013. The notice of appeal dated 3rd April 2013 in this Court was filed on 8th April 2013. The memorandum of appeal at the Court of Appeal was again lodged on 3rd June 2013. The application for stay was filed on 8th April 2013. I find that the application was brought without delay and in compliance with order 42 Rule 6 of the Civil Procedure Rules 2010. I cannot blame the applicants, as urged by the objector's learned counsel, for the delays in prosecuting the motion.
14. What is critical in a matter of this nature is for the applicants to show they will suffer *substantial loss* or that the appeal will be rendered nugatory. The applicants contend that they will suffer substantial loss because the objector has partitioned the suit land Kakamega/Chekalini/238 and has been disposing off or alienating the land to third parties or to one Gladys Tawayi. The applicants aver that the transfers will prejudice the interests of the beneficiaries of the estate. The trouble is that the High Court found that that property was not an asset of the deceased; and, that it was erroneously included in the grant. Secondly, the objector claims that the applicants have never been in possession; and lastly, by their own admission, the applicants concede that the property has *already* been *subdivided* and various titles issued. That fortifies my earlier views that there is nothing to be stayed at the moment.
15. In a synopsis, I am not satisfied that the applicants have shown they will suffer *substantial loss*. I cannot then say that *sufficient* basis has been laid for grant of stay. I am not saying that the applicants have no *arguable* appeal. Far from it. What I am saying is that the land will still be there. If the appeal is successful, the transfers or other dealings can be nullified and reversed by the court. But in all the circumstances of this case, I am unable to find that the appeal will be rendered *nugatory*.
16. Granted all those reasons, the applicants' notice of motion dated 8th April 2013 is devoid of merit. It is dismissed. Considering that the applicants are acting in person; and, that this is a succession cause; and, that there is a pending appeal; and, in the interests of justice, I will order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 20th day of November 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

The applicants acting in person.

Mr.....for the objector instructed by Gicheru & Company Advocates.

Mr J. Kemboi, Court clerk.