REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A SUCCESSION CAUSE NO 351 OF 2004

IN THE MATTER OF THE ESTATE OF WILLIAM KIPTABUT MWEI

SALLY JEPTOO MWEI………………..APPLICANT

=VERSUS=

ESTHER JEPKOECH MWEI……..…RESPONDENT

RULING

1. The Applicant ***Sally Jeptoo Mwei*** moved this court by way of a Notice of Motion dated 4th June, 2012 seeking orders that:

a. **The application be certified urgent and its service be dispensed with in the first instance.**
b. **The Honourable court be pleased to stay the execution of consent order dated 28th June, 2011 and all other consequential orders thereto pending the hearing of the application interpartes.**
c. **The Honourable court be pleased to stay the execution of consent order dated 28th June, 2011 and all other consequential orders thereto pending the hearing and determination of an appeal lodged against the ruling delivered on 23rd April 2012 by Hon. Justice F. Azangalala.**

2. The application was expressed to be brought under ***Section*** 3 and ***3A*** of the ***Civil Procedure Act, Order 42 Rules 1 and 2*** of the ***Civil Procedure Rules*** and all other enabling provisions of the law. It is premised on the grounds stated on the face of the application. It is supported by an affidavit sworn by the Applicant on 4th June, 2012.

   It is worth noting that ***Prayers (a) and (b)*** of the application were spent by the time the application was heard leaving only prayer (c) as the substantive prayer remaining for determination by this court.

3. Briefly, the background against which this application was filed as can be discerned from the affidavits filed by the parties in this matter is that the Applicant and the Respondent were wives to the deceased and were therefore beneficiaries to the Estate of their late husband one William Kiptabut Mwei.

   According to the Applicant, among the assets comprising the Estate were parcels of land known as parcel number ***64 and 65***; that upon the demise of their husband, she was supposed to inherit parcel No. 65 which she had been exclusively occupying with her family while the Respondent was supposed to inherit parcel No 64. But in a consent order executed on 28th June 2011 by M/s Odede

& Company advocates on behalf of the Respondent and M/s Amasakha & Company Advocates purportedly on her behalf, she allegedly conceded her half share of plot No. 65 to the Respondent.

4. In an application dated 16th November 2011, the Applicant sought orders to set aside the consent order on grounds that it was executed on her behalf by a firm of advocates who did not have her instructions to do so.The application was dismissed by Azangalala J (as he then was) in a ruling delivered on 23rd April, 2012.

The Applicant was aggrieved by that ruling and she filed a notice of appeal on 2nd May, 2012 expressing her intention to appeal to the Court of Appeal against the whole of the decision dismissing her application.

That is what triggered the filing of the instant application seeking a stay of execution of the aforesaid consent orders pending the hearing and determination of the Applicant's intended appeal.

5. The application was orally argued before me on 6th November, 2014. Learned counsel Mr. Aseso appeared for the Applicant while Ms Ruto represented the Respondent.

Mr. Aseso in his submissions urged the court to allow the application on grounds that the Applicant had an arguable appeal and if stay is not granted, the Respondent was likely to execute the contested consent orders which would have the effect of rendering the intended appeal nugatory. That this would also cause irreparable harm to the Applicant who would be rendered homeless. Counsel argued that if the application was allowed, no loss would be occasioned to the Respondent.

6. The application was opposed by the Respondent by way of a replying affidavit sworn on 13th June, 2012 in which she disputed that parcel No 64 formed part of the deceased Estate and that the Applicant was supposed to exclusively inherit plot No. 65.

She maintained that the consent was validly executed by their respective advocates and that the Applicant has filed the instant application in bad faith with the aim of delaying the course of justice.

7. In her submissions, besides re-iterating the Respondents averments in the replying affidavit, Ms Ruto submitted that the application was incompetent as it was premised on ***Order 42*** of the ***Civil Procedure Rules (the Rules)*** which was not among the orders in the ***Rules*** made applicable to succession causes by ***Rule 63(1)*** of the ***Probate and Administration Rules;*** that even if it was applicable, the Applicant had not demonstrated that if the application was dismissed, she would suffer substantial loss.

In response to this submission, Mr Aseso asserted that citing the wrong provisions of the law in an application was a procedural technicality which can be cured by ***Article 159*** of the Constitution which emphasizes on administration of substantive justice.

8. Having carefully considered the application, the affidavits filed by the parties and the rival submissions made by their advocates on record, I find that only two issues arise for determination by this court namely:-

i. **Whether the application is incompetent.**
ii. **Whether stay of execution should be granted pending the Applicant's intended appeal.**

9. Starting with the first issue, as stated earlier, Ms Ruto contended that the application was incompetent for having been brought under ***Order 42*** of the ***Rules*** which is not among the rules

cited ***under Rule 63 (1***) of the ***Probate and Administration Rules.***

This rule states as follows: -

"***Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X,XL, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."***

In my view, though it is true that ***Order 42*** of the ***Rules*** is not among the orders specifically stated by the aforesaid rule, the wording of the rule leaves no doubt that the list of procedural rules applicable to succession matters cited therein was not meant to be exhaustive as the rule was to apply subject to "any order of the court or a registrar in any particular case for reasons to be recorded." The rules were also to apply together with other High Court (Practice procedure) Rules.Besides, ***Section 47*** of the ***Law of Succession Act*** read together with ***Rule 73*** of the ***Probate and Administration Rules*** empowers this court to entertain any application and determine any dispute under the ***Law of Succession Act*** and to make such orders as may be expedient and necessary for the ends of justice to be met and to prevent abuse of the court process.

In addition, under ***Article 159*** of the ***Constitution of Kenya 2010***, courts are enjoined to administer substantive justice which requires them to overlook procedural technicalities which may cloud the way of resolving the core dispute between the parties before it. In view of the foregoing, this being an application made in a succession cause in which the beneficiaries are seeking a determination of their rightful share in the deceased's Estate, i hold the view that the application is properly before the court and it is not incompetent as claimed by the Respondent. I so find.

10. Having resolved the first issue, I now turn to a consideration of whether the Applicant is entitled to the orders of stay of execution as sought in prayer (c).

It is important to note that the application is primarily premised on Order 42 Rules 6 (1) and (2) of the ***Rules*** and not under ***Rule 5 (2) (b)*** of the ***Court of Appeal Rules*** which applies to applications for stay of execution made to the Court of Appeal.

Case law on this point shows that for the Court of Appeal, the only consideration it has to bear in mind in deciding whether or not to grant stay pending appeal is whether an applicant's intended appeal was arguable and whether if the stay sought was not granted, the appeal would be rendered nugatory***. See Kenya Airports Authority versus Mitu – Bell Welfare Society and Another (2014) EKL and Joseph Gitahi Gachau & Another =vs= Pioneer Holdings (A) Ltd and 2 others civil Appeal No 124 of 2008*** among others.

11. As I will demonstrate shortly, slightly different considerations apply to this Court while considering similar applications. ***Order 42 Rule 6(2)*** which spells out the conditions that an applicant must satisfy before the court can exercise its discretion in his or her favour states as follows;

" No order of 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 or the due performance of such decree or order as may ultimately be binding on him has been given by the applicant***. "

Unlike in the Court of Appeal where the main considerations revolves around whether an

applicant has an arguable appeal or whether if orders of stay were denied the intended appeal would be rendered nugatory, the two critical factors which this court must consider in deciding how to exercise its discretion in deciding on applications for stay pending appeal are firstly whether the application was filed within a reasonable time and secondly whether if the orders sought were denied, an applicant is likely to suffer substantial loss .

12. In this case, it is not disputed that the Applicant filed the instant application without unreasonable delay. The ruling the Applicant intends to appeal against was delivered on 23rd April, 2012 and this application was filed on 4th June, 2012 about two months later. It is my finding that the application was filed within a reasonable time.

On the issue of whether or not the Applicant had demonstrated that she will suffer substantial loss if the orders sought were not granted, it is common knowledge that if the orders sought were refused, the consent orders will remain in force and the Respondent will be at liberty to apply for their execution. And if they are executed, the Applicant stands to lose half share of the parcel of land known as plot No. 65 which she claims she was entitled to inherit from her late husband exclusively, the Respondent having inherited plot No 64.

It then follows that if stay is not granted and the contested consent orders are executed, the Applicant stands to suffer substantial loss. In any event, the validity of the consent orders whose execution is sought to be stayed is at the heart of the intended appeal and if the stay orders are not granted and the orders are executed, the intended appeal will be rendered nugatory.

But whether the intended appeal is arguable or has good chances of success or not is not an issue for determination by this court. This is an issue which falls in the exclusive domain of the Court of Appeal which will determine the merits or otherwise of the intended appeal.

13. The upshot of this ruling is that the application dated 4th June, 2012 is merited and it is hereby allowed in terms of prayer (c).

Costs of the application to abide outcome of the intended appeal.

Orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9th DAY OF DECEMBER, 2014

In the presence of :

Mr. Mukabane for the Applicant.

Ms Ruto for the Respondent

Paul Ekitela : Court Clerk