



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**(Coram : F. Azangalala, J.)**

**CIVIL APPEAL NO. 161 OF 2010**

**BETWEEN**

**KIBIRECH A. SITIENEI.....APPELLANT**

**AND**

**GEOFFREY LELGO SAINA.....RESPONDENT**

***(Being an appeal from the decision of the Principal Magistrate Hon. J. M. Njoroge, dated 24<sup>th</sup> August, 2010***

***in Kapsabet Principal Magistrate's Court Succession Cause No. 102 of 2006)***

**RULING**

The applicant, **Kibirech A. Sitienei**, seeks by his Notice of Motion dated 16<sup>th</sup> December, 2010, stay of execution/proceedings in Kapsabet Succession Cause No. 102 of 2006 pending the hearing and determination of this appeal. The application is expressed to be brought under the provisions of section 47 and 50 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules made thereunder.

The main reason for the application is that unless the same is granted this appeal will be rendered nugatory and the applicant stands to suffer irreparable loss. The application is supported by an affidavit sworn by the applicant. He has deponed, *inter alia*, that his counsel challenged the jurisdiction of the Lower Court but was overruled thereby precipitating this appeal and that unless stay is granted the respondent will execute the lower court's judgment which event shall render his appeal nugatory. In the premises the applicant contends that he will suffer irreparable loss and damage.

The application is opposed on the basis of a replying affidavit sworn by the respondent. It is deponed in the said affidavit, *inter alia*, that the lower court indeed had jurisdiction to entertain the cause which was infact filed by the appellant himself. It is also deponed that the applicant's appeal has no chance of success and that this application is without merit and should be dismissed.

When the application came up before me for hearing on 24<sup>th</sup> May, 2011 counsel agreed to file written submissions which were duly in place by 25<sup>th</sup> October, 2011. The submissions reiterated the parties'

stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed by both parties and the submissions of counsel. Having done so, I take the following view of this matter. The guiding principles while considering an application for stay are whether there is sufficient cause to order stay; whether there has been delay; whether the applicant stands to suffer irreparable injury unless stay is granted and whether the respondent stands to suffer prejudice if the order is made.

With regard to delay, I note that the decision appealed from was delivered on 24<sup>th</sup> August, 2011. This application was then lodged on 16<sup>th</sup> December, 2010 subsequent to the appeal filed on 26<sup>th</sup> August, 2010. The delay involved is of nearly three (3) months. I consider that delay long but it is not inordinate. The applicant contends that the Lower Court had no jurisdiction to entertain the matter. Jurisdiction goes to the root of the matter. In the premises, it cannot be said that the appeal is frivolous. In my view, the appeal is arguable and unless stay is ordered the appeal, even if it may eventually succeed, may very well be rendered nugatory. There is therefore sufficient cause for making the order. The dispute in the lower court appears to have been on the distribution of a deceased's person's estate. I do not see how a stay will prejudice the respondent.

With regard to security, there is the subject land in which the applicant has a substantial interest. In my view it is an adequate security for the due performance of any decree which may have to be settled ultimately in the event the appeal is lost.

In the premises, the applicant has demonstrated sufficient cause and is entitled to the order sought. There will therefore be a stay of execution/proceedings of the ruling in Kapsabet Succession CauseNo. 102 of 2006 pending the hearing and determination of this appeal.

Costs shall be in the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> DAY OF DECEMBER, 2011**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

**Mr. Okara for the Applicant.**

**F. AZANGALALA**

**JUDGE**

**6<sup>TH</sup> DECEMBER, 2011.**