



REPUBLIC OF KENYA



In re Estate of Benjamin Bwaber Barngetuny (Deceased) (Succession Cause 2329 of 2011) [2024] KEHC 5470 (KLR) (Family) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2329 OF 2011
MA ODERO, J
MAY 6, 2024
IN THE MATTER OF THE ESTATE OF BENJAMIN BWABER
BARNGETUNY (DECEASED)**

RULING

1. Before this court for determination is the Notice of Motion application dated 4th May, 2022 by which the Applicant LUCY KIBOGY BARNGETUNY seeks the following orders;-
 - “1. Spent
 2. Spent
 3. That this Honourable Court do order a stay of execution of the judgment delivered on 10th March, 2022 by Honourable Justice Ali Aroni delivered on in Succession Case No. 2329 of 2011 – In the matter of Estate of Benjamin Bwaber Bangertuny pending the hearing of the Applicant’s Appeal herein.
 4. That the Honourable court be pleased to issue such further orders as it may deem fit in the interest of justice.
 5. That the costs of this Application be provided for”
2. The application which was premised upon Sections 1A & 1B, 3 and 3A of the *Civil Procedure Act* and order 42 Rule 6 of the *Civil Procedure Rules* and all other enabling provisions of the law was supported by the Affidavit dated 27th April, 2022 sworn by the Applicant.
3. The Respondents Eric Barngetuny, Edna Barngetuny and Peninah Jepkoech Suge opposed the application through the Grounds of opposition dated 9th May, 2023. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 4th July, 2023. Counsel for the 1st and 2nd Respondent informed the court that they would be relying on their Grounds of



opposition and would not file written submissions. The 3rd Respondent filed written submissions dated 22nd May, 2023 one Enoch Charles Kariuki (a beneficiary) filed written submissions dated 13th June, 2023.

Background

4. This succession cause relates to the estate of the late Benjamin Bwaber Barngetuny (hereinafter ‘the Deceased’) who died intestate on 18th August, 2011 at the Nairobi Hospital.
5. Following the demise of the Deceased an issue arose as to who were the genuine windows and children entitled to benefit from the estate of the Deceased.
6. The Applicant Lucy Kibogy claimed that she was a wife of the Deceased having married him under Kalenj’in customary law during a ceremony held at her parents’ home at Kaptagat.
7. The matter was heard by Hon. Lady Justice Ali Aroni (as she then was) who in a judgment delivered on 10th March, 2022 found and held that no marriage ceremony customary or otherwise had taken place between the Applicant and the Deceased.
8. The court therefore dismissed the Applicant’s claim that she was a wife to the Deceased and held that the Applicant was not a beneficiary to the estate. However the court in the same judgment held that the Applicants two (2) daughters.
 - Janet Chemutai Barngetuny, and
 - Barbara Cherono Barngetuny were the biological children of the Deceased and included the two as beneficiaries to the estate.
9. The Applicant being aggrieved by the judgment of 10th March, 2022 purposed to appeal against the same. She filed this application seeking to stay the decision of the court pending the hearing and determination of her intended appeal.
10. As stated earlier the application was opposed.

Analysis And Determination

11. I have carefully considered the application before this court, the Grounds of opposition filed in response thereto as well as the written submissions filed by the parties.
12. The only issue for determination in this matter is whether the Applicant has made out a persuasive case for grant of an order of stay pending appeal.
13. [Order 42 Rule 6](#) which sets out the principles for stay of execution provide as follows;-
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal 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 to appeal is preferred may apply to the appellate court to have such order set aside.

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.
- c.”

14. Therefore in order to merit the orders being sought the applicants must satisfy the court.
- a. That the application for stay was filed without unreasonable delay.
 - b. That they stand to suffer substantial loss unless the stay order is granted.
 - c. That security for the performance of the decree or order has been given by the Applicants.
15. On the question of delay I note that the impugned judgment was delivered on 10th March, 2022. The present application for stay of execution was filed on 4th May, 2022, that is approximately two (2) months after the said judgment had been delivered.
16. It is my view that if the Applicant had been truly aggrieved by the said judgment then she would have filed this application for stay much sooner. Although two (2) months is quite a considerable period of time I do not feel that it amounts to inordinate delay.
17. The Applicant seeks a stay on grounds that she intends to file an appeal against the judgment of 10th March, 2022. That appeal is yet to be filed.
18. Whilst it is not the duty of this court to delve into the merits or otherwise of the intended appeal the court must be satisfied that the Appellant has an ‘arguable’ appeal. No memorandum of Appeal has been annexed to the application. Therefore this court is not privy to the grounds of Appeal which will be relied upon and this makes it difficult to determine whether indeed the Applicants has an ‘arguable’ appeal.
19. In order to merit an order of stay the Applicant must satisfy the court that she is likely to suffer substantial loss if the orders of stay are not granted.
20. The case of *Mukoma v Abuoga* [1988] KLR the Court of Appeal in referring to the exercise by the Superior court of their discretion in granting stay of execution under Order 42 Civil Procedure Rules 52 (b) of the Court of Appeal Rules respectively emphasized the centrality of substantial loss as follows

“..... the issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

21. Therefore the courts should aim at preventing substantial loss to either party and should also guard against rendering the appeal nugatory. In *Kenya Commercial Bank v Benjob Amalgamated Ltd & Another* Nairobi and Application No 50 of 2001 (KLR) the court of Appeal held that –

“.....the onus of satisfying us on the second condition that unless stay is granted the intended appeal would be rendered nugatory is also upon the applicant..... We remind ourselves that each case depends on its own facts.....”



21. This is a Succession Cause. The Applicant's claim that she was a wife to the Deceased and therefore a beneficiary to his estate was dismissed by the High Court. The estate cannot be held in limbo whilst the Applicant pursues an appeal (which is yet to be filed). The court must weigh the interest of the Applicant against the rights and interest of all other beneficiaries to the estate.
22. To merely allege that substantial loss is likely to occur is not sufficient. The Applicant must tabulate the precise nature of loss that she is likely to suffer. At the moment the Applicant does not have possession (or (ownership) of any asset of the estate. Therefore I fail to see what loss she stands to suffer if the order of stay is not granted.
23. In any event if the Applicants Appeal succeeds then the Administrators would be directed to include her as a beneficiary and make provision for her out of the estate.
24. Finally the nature of the orders which the Applicants seeks to stay must be considered. In the judgment of 10th March, 2022 the court dismissed the Applicants prayer seeking a declaration that she was a wife to the Deceased.
25. The order dismissing the Applicants claim was a 'negative order'. A negative order cannot be stayed as there was no order made directing a party to do or to desist from doing any act.
26. In the case of *Raymond M. Omboga v Austine Pyan Maranga* [2010] eKLR the court stated as follows

"The order dismissing the application is in the nature of a negative order and is incapable of execution save perhaps for costs and such orders is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution there can be no stay of execution of such an order....." [own emphasis]
27. Similarly in the case of *George Ole Sangui & 12 Others v Kedong Ranch Limited* [2015] eKLR the court of Appeal stated as follows:-

"The issue whether dismissal of a suit gives rise to an order that is capable of being stayed by an order under Rule 5 (2) (b) was considered by this court in the case of *Western College of Arts and Applied Sciences v Oranga & Others* [1976] KLR 63, where it stated that regard to the prayer for stay in respect of which the court has jurisdiction in a unanimous decision the court stated:

"But what is there to be executed under the Judgement, the subject of the intended Appeal. The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs. The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or to restrain by injunction." [own emphasis]
28. The Applicant in this case sought for orders declaring that she was a wife to the Deceased. The court dismissed this prayer.
29. In her judgment at Paragraph 19 the learned trial judge stated that;-

"Based on all the court makes a finding that by whatever name the relationship between the two is to be described it fails the test of a marriage. Lucy [the Applicant herein] was not a wife".



The court made no positive orders capable of execution.

30. In the George Ole Sangui Case [supra] the court of Appeal went on to state as follows:-

“In the instant case, the High Court dismissed the Suit in which the Applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the Claimant was not entitled to the reliefs or orders sought and dismissed the Suit against the Respondent.

That was not a positive order that required any party to do or to refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the Suit cannot be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the Suit cannot be granted.” [own emphasis]

31. Based therefore on the foregoing I find no merit in this application for stay of execution. The Notice of Motion dated 4th May, 2022 is hereby dismissed in its entirety.

THIS BEING A FAMILY MATTER EACH SIDE WILL BEAR ITS OWN COSTS.

DATED IN NYERI THIS 6TH DAY OF MAY, 2024.

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MAUREEN A. ODERO

JUDGE

