



REPUBLIC OF KENYA



**In re Estate of Dorcas Nyambura Kigera (Deceased) (Succession Cause 540 of 2011) [2023] KEHC 18471 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18471 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 540 OF 2011  
HK CHEMITEI, J  
JUNE 15, 2023**

**IN THE MATTER OF THE ESTATE OF LATE DORCAS NYAMBURA KIGERA (DECEASED)**

**BETWEEN**

**JOHN MUNGAI KIGERA ..... PETITIONER**

**AND**

**FRANCIS WAIRIRI KIGERA ..... OBJECTOR**

**RULING**

1. The applicant filed summons dated July 19, 2022 pursuant to the provisions of Section 7 of the *Appellate Jurisdiction Act*, section 47 and 50 of the *Law of Succession Act* and Rule 49 *Probate and Administration Rules* seeking the following orders: -
  - a. Spent.
  - b. That this honourable Court be pleased to grant leave to the Objector/Applicant to file the intended appeal.
  - c. That this Honourable be pleased to extend time to the Objector/Applicant to file and serve the Notice of appeal out of time.
  - d. Spent.
  - e. That pending the hearing and determination of this summons, this Honourable court be pleased to stay execution of the judgment delivered by Hon. Ngetich J on 20<sup>th</sup> May, 2022 together with all consequential orders arising therefrom.
  - f. That cost of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of the objector/applicant. He deposed that this matter was heard on merit before Hon. Lady Justice Rachael



Ngetich on diverse dates between 23<sup>rd</sup> November, 2020 and 2<sup>nd</sup> December, 2022 and subsequently judgment was delivered on 25<sup>th</sup> May, 2022. That upon perusing, understanding and internalizing the said judgment he informed his advocates on record of his partial dissatisfaction of the judgment and thereafter instructed them to file an appeal. Further, that he had been advised by his advocates on record that there was a statutory limitation on an automatic right of an appeal from this Court to the Court of Appeal.

3. He deposed further that his application was timeously lodged and he had an arguable appeal with high chances of success. That therefore there was need for issuance of the orders of stay for the reasons that; the petitioner/respondent may proceed to enforce the judgment of the court hence reducing the intended appeal to an academic exercise. Also, that substantial loss would be occasioned to him seeing that should distribution be done as decreed by the court, the 3<sup>rd</sup> party to whom the land was sold to would be evicted from the said land at his expense.
4. The petitioner/respondent in response to the objector's/applicant's application filed a replying affidavit dated 30<sup>th</sup> August 2022. He averred that the judgment of the trial court was just and fair and the properties of the deceased were to be distributed among the beneficiaries. That the objector/applicant unlawfully sold land title no Molo South/Langwenda Block 18/93 during the pendency of the Succession Cause to a third party without the consent of the beneficiaries and as such the said agreement was null and void. Further, that the law was clear that the properties of the deceased ought not to be interfered with unless with leave of the court.
5. The petitioner/respondent averred further that there was no urgency in the application and the applicant's attached memorandum of appeal did not raise any significant issues to warrant the grant of the said orders. That the application by the applicant was meant to delay the completion of the distribution of the estate of the deceased to the beneficiaries. Also, that he could not enforce the judgement as they were both appointed as joint administrators and he could not act on his own.
6. When the matter came up for hearing the court directed that the parties to file written submissions which they have complied.

### **Objector/Applicant's Written Submissions**

7. The objector/applicant in his submissions identified several issues for determination.
8. On the first issue, whether the objector/applicant should be granted leave to file the intended appeal he submitted that this court could entertain his application pursuant to section 47 of the Law of Succession Act. He also cited the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR where the court observed in part that an appeal would lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where leave is refused then with the leave by the Court of Appeal.
9. The objector/applicant submitted further that the attached memorandum of appeal raised substantive points of law which ought to be tried before the Court of Appeal. He placed reliance on the case of *Re Estate of Joel Thaara Ruria (Deceased)* [2022] eKLR.
10. On the second issue, whether this court should extend to the objector/applicant to file and serve the notice of appeal out of time he submitted that under section 7 of the *Appellate Jurisdiction Act*, the High Court may extend time for giving notice of intention to appeal from its judgment or for making an application for leave or for a certificate that the case is fit for appeal notwithstanding that the time for giving notice or making such appeal may have already expired. He also placed reliance on the cases of *KAA & Another v Timothy Ndui CA* [2014] eKLR, *Cecilia Kiajia Mbatia & Another v*



*Evangeline Tirindi Josphat & Another* [2018] eKLR and *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR as quoted in *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application no NAI 255 of 1997(UR).

11. On the third issue, whether execution of the Judgment delivered by Hon. Lady Justice Ngetich on 20<sup>th</sup> May 2020 together with all consequential orders arising therefrom should be stayed pending hearing and determination of this summons he submitted that he would suffer substantial loss if the said orders were not stayed as the intended appeal would be rendered nugatory. He draws the court's attention to the cases of *Jason Nhumba Kagu & 2 others v Intra Africa Assurance Co. Limited* [2014] eKLR and *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 OF 1997.
12. Lastly, on costs the objector/applicant prayed for the same and submitted that the award of the same was discretionary. Also, that ordinarily it followed events pursuant to Section 27 of the *Civil Procedure Act*.

### **Petitioner's/Respondent's Written Submissions**

13. The petitioner/respondent in his submissions identified two issues for determination namely; whether the objector/applicant should be granted leave to file an appeal and if time ought to be extended for him to file a notice of appeal out of time and whether the objector/applicant was entitled to an order for stay of execution of the judgment pending appeal.
14. On the first issue, the respondent submitted that there was no automatic right of appeal from the High Court to the Court of Appeal on succession matters. He placed *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR and *John Mwita Murimi & 2 others v Mwakabe Chacha Mwita & Another* [2019] eKLR.
15. On the second issue, the petitioner/respondent placed reliance on the provisions of Order 42 rule 2, and 6 (1) of the *Civil Procedure Rules* and the case of *M/S Portreitz Marternity v James Karanga Kabia* Civil Appeal no 63 of 1997 and *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* Civil Appeal no 291 of 1997.
16. He urged the court to be guided by the said authorities and find that the applicant would not suffer any substantial loss. Further, the petitioner/respondent submitted that no explanation had been given as to why the applicant had waited for 60 days before moving the court for leave and stay of execution. In addition, that the applicant had not offered any security in the event that the appeal failed. For those reasons he urged the court to dismiss the instant application with costs.

### **Analysis and Determination**

17. I have considered the instant application, affidavits by both parties as well as their submissions. In my view, the issues for determination by this court are as follows;
  - a. Whether the court should grant stay of execution of the judgement delivered on 20<sup>th</sup> May, 2022.
  - b. Whether the court should grant the objector/applicant leave to appeal to the Court of Appeal.
18. In addressing the first issue, which is on stay of execution pending appeal, the procedure is provided under Order 42 of the *Civil Procedure Rules*. Though this is not one of the orders referred to under Rule 63 (1) of the *P & A Rules*, the practice in this court has leaned on the reliance of the Order 42



when dealing with stay of execution in succession matters. This is on the basis of Rule 73 *P&A Rules* which provides:

“Nothing in this rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

19. Therefore, since Order 42 Rule 6 of the *Civil Procedure Rules* deals with stay of execution pending appeal, this court has discretion to rely on the said order to enable the parties in appeals arising from succession matters to apply for stay of execution of the orders or judgments. Such orders are made in the interest of justice and to prevent the abuse of the court process.
20. Section 47 of the *Law of Succession Act* gives court’s jurisdiction to entertain any application and determine any dispute under the Act. This section must be given a wider interpretation to include applications like the present one which seeks to preserve the status quo pending appeal.
21. Order 42 Rule 6(2) of the *Civil Procedure Rules* lays down the conditions which a party must establish in order for this court to order stay of execution. The rule provides: -

“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.”
22. In view of the above provision of the law, the applicant herein is supposed to prove that substantial loss may result unless the order is made, that the application has been brought without unreasonable delay and such security as maybe ordered by the court. There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Also, where a party has satisfied the above conditions, the court exercises discretion to order a stay.
23. It is important to note that in the exercise of the discretion, the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held in the case of *Bhutt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of execution maybe stated to be a measure to prevent the subject matter so that the right of appeal can be exercised without any prejudice to the applicant as the appeal would be rendered nugatory if stay is not ordered. An applicant in this kind of application invokes the discretionary powers of the court.
24. In the instant case, the applicant has stated that substantial loss would be occasioned to him seeing that should distribution be done as decreed by the court, a 3<sup>rd</sup> party to whom land which formed part of the estate had been sold would be evicted at his expense. The petitioner/respondent on his part has argued that objection/applicant unlawfully sold land title no Molo South/Langwenda Block 18/93 during the pendency of the Succession Cause to a third party without the consent of the beneficiaries and as such the said agreement was null and void.
25. In the estimation of this court, if the said 3<sup>rd</sup> party to whom the objector/applicant allegedly sold the said parcel of land unlawfully was to be evicted in compliance of the decree of the court at the expense of the objector/applicant, then he would suffer substantial loss as he may be required to



refund the purchase price to the said 3<sup>rd</sup> party upon evicting him and any other collateral damage and consequences.

26. On issue of time, the instant application was filed two months after the judgement had been read. The objector/applicant argued that he was not able to file the appeal on time as the judgement was delivered in a different station and accessing the file and the said judgment took time hence the delay. This court has considered the said argument and the possibility of such delay occurring in the normal court processes. Accordingly, it is my view that despite the fact that there was delay in filing the instant application the same was not an inordinate delay.
27. On the issue of security, there is no evidence that any of the parties will suffer prejudice if the disputed parcel namely Molo south /Langwenda block 18/93 is held in abeyance pending appeal. The third party may continue unless otherwise proved, to utilise the said parcel of land. Meanwhile the rest of the undisputed estate may be distributed as directed by the court. There is therefore no need to require such security.
28. In addressing the second issue, it is a requirement to seek leave to appeal decisions of the High Court exercising original jurisdiction in succession matters, and failure to obtain such leave is fatal, as it would lead to the striking out of the record of appeal. In the instant case, the decision which the objectors/ applicant intend to appeal against arises out of a succession cause. It is therefore a requirement that he seek leave to appeal before filing the intended appeal. This court takes cognizance of the fact that the right of appeal is an integral part of access to justice and the foundations of what we call a fair and impartial judicial process. To deny one the right to appeal is akin to denying them an opportunity to have their issues ventilated and determined by and large ensuring that the ends of justice are met.
29. In the premises, the objector/application dated 19<sup>th</sup> July 2022 is allowed as hereunder;
  - (a) The applicant is hereby granted leave to file his notice of appeal within 14 days from the date herein.
  - (b) The judgement delivered by this court on 25<sup>th</sup> may 2022 be and is hereby allowed to be executed save for land parcel number Molo south Langwenda block 18/93 pending the hearing and determination of the intended appeal.
  - (c) The respondent shall have the costs of this application.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH DAY OF JUNE 2023.**

**H. K. CHEMITEI**  
**JUDGE**

