Nyongesa v Nyongesa (Civil Appeal E098 of 2022)
[2023] KEHC 20722 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20722 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E098 OF 2022

DK KEMEI, J

JULY 21, 2023

BETWEEN

COSMAS MAKOKHA NYONGESA ..... APPELLANT

AND

MAURICE WAFULA NYONGESA ..... RESPONDENT

RULING

1. The Appellant/Applicant herein has filed an application dated 24/4/2023 pursuant to section 47 of the *Law of Succession Act*, Rules 49, 59 and 73 of the *Probate and Administration Rules* and Order 42 Rule 6 of the *Civil Procedure Rules*, seeking principally an order for stay of execution of judgement and decree in Bungoma CMC Succession no 7 of 2016 pending hearing and determination of the appeal already filed.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Applicant wherein he deposed that being aggrieved by the ruling of the lower court dated October 7, 2022, he sought for stay in the trial Court but the same was issued with tough conditions not bearing in mind that the parties herein are brothers.

3. He argued that the trial Court failed to consider that this was not a money decree and that the conditions issued by the trial Court were a hurdle to his quest for justice.

4. According to him, he is ready to abide by any conditions of security this Court may issue but not the punitive orders of security like the one issued in the trial Court. He averred that the trial Court ruled that he deposits ksh 100,000/= in a joint interest earning account in the name of both Advocates and that he subsequently releases ksh 50,000/= to the Respondent within 14 days from 20th April 2023 failing which the matter will proceed.

5. He further argued that he has appealed the decision and should the orders be executed; the appeal will be rendered nugatory. He beseeched this Court to issue an unconditional orders pending determination of the appeal.

6. In response to the application, the Respondent swore a replying affidavit on 8th May 2023, wherein he averred that this issue has been handled on several occasions and that the Applicant has a habit of disregarding Court orders. He averred that the Applicant is guilty of wasting the Court's time and using delaying tactics.

7. The application was canvassed by way of written submissions. Both parties duly complied.

8. In a nutshell, the Applicant submitted that unless he is granted the requisite stay pending appeal, he will suffer irreparable damages and that his appeal will be rendered nugatory.

9. Opposing the application, the Respondent submitted that the Court ruling was fair and that the Applicant is simply using the delaying tactics to deny the widows of the estate of the deceased and other beneficiaries from gaining and enjoying their share of the parcel of land.

10. I have considered the application herein and the rival submissions filed by the respective parties. It is my view that the main issue for determination is whether the application is merited.

11. In *Patrick Kalaya Kulamba & another v Philip Kamosu and Roda Ndanu Philip (Deceased)* [2016] eKLR Meoli J. held:-

> " For the purpose of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty....to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof....
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> So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6(1) of the *Civil Procedure Rules* can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court's original jurisdiction vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2)(b) (as it is now). The foregoing has a bearing on the interpretation of order 42 Rule 6(6) of the *Civil Procedure Rules* and in particular the highlighted phrase therein.
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> Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6(1) however does not preclude the applicant from approaching this court as it has done.
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> I would venture to add that the wording of Order 42 Rule 6(1) of the *Civil Procedure Rules* effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2)(b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6(1).

> It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment in the lower court. To insist in this case that the applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing the duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 159(2)(d) of *the Constitution*."

12. Bearing in mind the above and the existing decision of the lower Court, it is noted that the instant application is brought under section 47 of the *Law of Succession Act* and Rules 49 and 73 of the *Probate and Administration Rules*. Under section 47 of the Act, this Court has jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Further, pursuant to Rule 49 of the *Probate and Administration Rules*, a person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules ought to file a summons supported if necessary by affidavit. Rule 73 on the other hand preserves the inherent jurisdiction of this Court while dealing with matters succession. The wording of that Rule is *pari materia* with section 3A of the *Civil Procedure Act* on inherent powers of this Court.

13. It is thus my view that notwithstanding Order 42 of the *Civil Procedure Rules* not being one of those Orders imported into succession matter by Rule 63(1) of the *Probate and Administration Rules*, this Court has jurisdiction to grant orders of stay of execution while invoking its inherent powers under Rule 73 and make orders for the ends of justice to be met. The application before me is by way of summons and supported by an affidavit and thus in compliance with Rule 49 and as such the instant application is proper before the Court.

14. Order 42 deals with stay of execution pending appeal. The power to grant orders of stay of execution pending appeal is a discretionary power and which must be exercised judiciously. Further, 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 (See *Bhutt v Rent Restriction Tribunal* (1982) KLR 417.)

15. The conditions which a party must establish in order for this Court to order stay of execution are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules*. Basically, the Applicant must satisfy the court: -

    i. that substantial loss may result to the Applicant unless the order is made;

    ii. that the application has been made without unreasonable delay; and

    iii. that the Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

16. The question therefore is whether the Applicant has satisfied the above conditions.

17. As for the likelihood to suffer substantial loss if the stay is not granted, the Applicant deposed to the effect that should the orders be executed, the appeal will be rendered nugatory and that he stands to suffer substantial loss as the Respondent intends to sell the land in question.

18. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the Court held that: -

> " the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both

jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

19. As a general rule, where there is no positive order capable of being executed, a stay of execution ought not to be issued. In *Titus Kiema v North Eastern Welfare Society* [2016] eKLR the Court stated:

> " I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed" I have been unable to see any such threat..... The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn."

20. The Court of Appeal in *AG v James Hoseah Gitau Mwara* [2014] eKLR (Court of Appeal no 121 of 2013) remarked that in order for a Court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the ruling or decision sought to be impugned.

21. In the instant case, the Applicant intends to appeal against a ruling by Hon. C.A.S Mutai wherein he adopted the mode of distribution by the Respondent without considering that the deceased had gifted his children the suit parcels of land prior to his demise. According to him, the trial Court erred when it held that he did not purchase 2 acres of land from the deceased when the Applicant presented an agreement that showed he purchased 2 acres of land from his deceased father.

22. He averred that the Court was in error when it held that he had forged an agreement but there was no fraud proved on his part by the Respondent. It is my view, the applicant ought to prove that he stands to suffer substantial loss if the orders of stay are not granted. However, there is good reason to relook the mode of distribution considering that all the parties were the children of the deceased. Although it has been alleged that the land was initially gifted by the deceased prior to his demise, there was no sufficient evidence adduced to support this but this Court has to grant the Applicant the opportunity to prove that he did purchase the alleged 2 acres from the deceased and that his agreement is not a fraud. The Applicant seeks that the mode of distribution be set aside in order to have equal distribution of the deceased's estate. It is fair that the applicant be given an opportunity to agitate his appeal and that there is need to preserve the subject of the appeal.

23. The Court of Appeal in *Halai and another v Thornton & Turpin (1963) Ltd* [1990] KLR in considering the conditions for stay of execution pending appeal held that: -

> " The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely: - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.
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> In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman* EA Ltd (2013) as follows: -
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> "In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."

These twin principles go hand in hand and failure to prove one dislodges the other"

24. In the instant case, the Applicant has shown that he will suffer substantial loss if the orders sought are not granted and that the application was brought without unreasonable delay. The Applicant has not offered any security in the event that the appeal fails. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the Court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

25. Even though the Applicant in this matter has not offered any security in the event that the appeal fails, he has deponed that he is ready and willing to abide by any conditions to be imposed by this court. That gesture alone, is a clear indication that the applicant appreciates the import of the conditions under Order 42 Rule 6 (2) of the *Civil Procedure Rules*. Indeed, the applicant has contended that the orders of stay granted by the lower court are punitive yet he and the respondent are brothers and children of the deceased. Even if that is so, the applicant must understand that parties once they decide to sue each other, matters of kinship are not considerations to be taken into account more so when they are not agreeable to amicably resolve the dispute through a consent or mediation. Generally, the principle in an adversarial system is that of every one for himself and God for us. Hence, an order for costs or security is appropriate in order to take the interests of the parties into account. The respondent has vehemently and vociferously opposed the appeal and seeks for its dismissal with costs.

26. It is noted that the lower court ordered that the applicant deposits the sum of ksh 100, 000/ into a joint interest account in the names of the parties or advocates. I find the said amount to be reasonable in the circumstances as the parties have a stake in the matter and further to take care of the successful party who has a judgement in his favour. Even though the applicant wishes to be allowed to prosecute the appeal without putting in a security, iam not persuaded that an order for security will prejudice him in any way. Consequently, I order the applicant to deposit the aforesaid sum in a joint interest account in the names of the respondent's advocate and himself within thirty days from today failing which the order for stay will lapse.

27. In the result, the applicant's application dated 24/4/2023 is allowed in the following terms:

    a. An order of stay of execution of the judgement and decree in Bungoma CMC Succession Cause no 7 of 2016 is hereby granted pending the determination of the appeal herein upon the applicant depositing the sum of ksh 100, 000/ into a joint interest account of the Respondent's advocates and himself within thirty (30) days from the date of this ruling failing which the stay shall lapse.

    b. The costs of the application shall abide in the appeal

    It is so ordered.

Dated and delivered at Bungoma this 21st day of July 2023.

D. Kemei

Judge

IN THE PRESENCE OF:

Wamalwa R for Appellant/Applicant

Maurice W Nyongesa for Respondent

Kizito Court Assistant