



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 4 OF 2018

(FORMERLY CMCC SUCC NO. 278 OF 2017)

IN THE ESTATE OF THE LATE KABURACHI PETER (DECEASED)

BETH GICUKU PETER.....APPLICANT

VERSUS

CECILY WANJIRU KARIUKI.....1ST RESPONDENT

PETER NJAGI NJERU.....2ND RESPONDENT

RULING

A. Introduction

1. The applicant herein moved this court vide summons dated 16/01/2020 which application sought for orders of stay of execution of the orders given on 18/12/2019 pending the hearing and determination of the appeal to the Court of Appeal.
2. The summons are supported by the affidavit sworn by the applicant wherein she deposed that being aggrieved by the ruling of 18/12/2019, she filed a Notice of Appeal and as such, pursuant to Rule 2 of the Court of Appeal Rules, she has appealed and should the orders be executed, the appeal will be rendered nugatory. Further that the instant application has been filed without any unreasonable delay and that she is willing to provide reasonable security for costs as this court may direct.
3. What appears from the submissions by both parties is that there was a replying affidavit dated 20/01/2020 by the respondent herein. However, none of such affidavit is in the court record.
4. The parties took directions for disposal of the matter by way of written submissions. In compliance thereto, each party filed its submissions in support of its position in the pleadings herein.
5. The applicant submitted that she has a right to appeal under Article (2)(q) of the Constitution and that she has demonstrated that she has met the grounds for issuance of orders of stay of execution in that, the application was filed without unreasonable delay, that if the orders sought are not granted the appeal shall be rendered nugatory and that she stands to suffer substantial loss as she is unlikely to get her rightful share and that if the estate is distributed, restitution may not be practical. As to provision of security, it was submitted that the instant application is not premised on Order 42 of the Civil Procedure Rules and that stay of execution order is discretionary and the court has powers to allow the application based on what it deems just and fit.
6. Further that Rule 73 donates inherent powers to this court to make orders as may be necessary for the ends of justice and to prevent abuse of the process of court. That the applicant is a widow and cannot afford to deposit security for due performance of the order. Reliance was made to the Court of Appeal decision in **George Gathuru Karanja –vs- George Gathuru Thuo & 2 Others (2019) eKLR** to the effect that jurisdiction to order stay of execution in succession matters is discretionary and is intended for the preservation of the subject matter of the appeal where an appeal has been filed or is intended.
7. The respondents submitted that parties are bound by their pleadings and further the applicant herein ought to comply with the provisions of Order 42 Rule 6 of the Civil Procedure Rules in respect of security for due performance of the decree and which Rules, it was submitted, applies to succession matters as they are civil in nature. Reliance was made on **Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 others (2012 eKLR)**.

B. Issues for determination

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

C. Applicable law and determination of the issues

9. The instant application seeks stay of execution of the orders of 18/12/2019 and which is provided under *Order 42 of the Civil Procedure Rules 2010 but which is not provided for under the Law of Succession Act and/or Probate and Administration Rules 1980*. As a rule, in proceedings under the Law of Succession Act, provisions of the Civil Procedure Act and Civil Procedure Rule do not apply as the Law of Succession Act is *sui generis* with its own unique and special procedures which regulate proceedings in probate courts. The only provisions of the Civil Procedure Rules which apply are provided under Rule 63 of the Probate and Administration Rules. (See **Josephine Wambui Wanyoike -vs- Margaret Wanjiru Kamau & Another [2013] eKLR**). Under Rule 63 the said Orders are Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X and which Orders in the amended Civil Procedure Rules 2010 are Orders dealing with *service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time*.

10. As such, it is clear that stay of execution is not one of the reliefs which can be granted by a probate court.

11. However, I note 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*.

12. 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 thus the instant application is *proper before the court*.

13. 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.**)

14. 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.

15. The Court of Appeal in **Halai and Another -vs- Thornton & Turpin (1963) Ltd [1990] KLR** reiterated these conditions as follows: -

“In Rasiklal Somabhai Patel v Parklands Properties Ltd the Court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules under which the Applicant had to satisfy the Court of two matters application is granted, which prima facie means that if the appeal succeeds, the Respondent would not be in a position to make full restitution. Secondly, the Applicant had to give such security as the Court may order. Those are the requirements under Order XLI Rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior Court and not those to this Court, although in sub-rule (1) of the same Rule reference is made to the Court to which the appeal is preferred. It is, however, worth noting that as to the court to which the appeal is preferred it is at liberty to consider the application made to it and make such order thereon as may, to it, seem just.....”

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 she stands to suffer substantial loss as she is unlikely to get her rightful share and that if the estate is distributed, restitution may not be practical.

18. In **James Wangalwa & Another -vs- 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 –vs- 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 –vs- 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 Muchemi, J. wherein she revoked a grant of letters of administration made to the applicant herein. Generally, once a grant is revoked, any subsequent transaction on land forming the estate of the deceased becomes null and void. The land reverts back to the deceased. The 1st respondent herein (being the applicants in the application for revocation of the grant) cannot distribute the land without filing a succession cause for the estate of her son whom she alleged to have died without having been survived by wife or children.

22. The court did not order her to distribute the said land and neither did it order the land to be registered in her name. As such, there is no order which is capable of being executed so as for the same to be stayed by this court. It is my view that the applicant did not prove that she stands to suffer substantial loss if the orders of stay are not granted. In my view, the applicant's remedy is not in staying the execution but in lodging a caveat with the Court's registry.

23. The Court of Appeal in **Halai and Another –vs- Thornton & Turpin (supra)**, 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.

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...Vs...Straman EA Ltd (2013) as follows: -

“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 having failed to prove that she will suffer substantial loss if the orders sought are not granted, then even if the application was brought without unreasonable delay and further even if the applicant is willing to provide security, nonetheless, failure to prove the first condition dislodges the others. The application as such ought to fail and it is hereby dismissed.

25. Issue of costs is discretionary power available to court and as a general rule costs follow events. However, the instant application is pitting what appear to be a daughter in-law and a grandchild on one side and the mother-in-law/ grandchild. It is my view that as such, this court do exercises its discretion and makes no orders as to costs.

26. It is so ordered.

Delivered, dated and signed at Embu this 10th day of February 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent