



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

SUCCESSION CAUSE NO. 37 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE DOMINICUS ODHIAMBO (DECEASED)

JENIPHER ACHIENG ODHIAMBO.....1ST OBJECTOR/APPLICANT

ALEX OMONDI ODHIAMBO.....2ND OBJECTOR/APPLICANT

VERSUS

FREDRICK ODHIAMBO ODHIAMBO.....1ST RESPONDENT

CHRISCENSIA ATIENO ODHIAMBO.....2ND RESPONDENT

RULING

Introduction

1. This ruling determines the application dated 30th September 2020 in which the applicants Jenipher Achieng Odhiambo and Alex Omondi Odhiambo seek the following orders:

a) Spent

b) That the applicant herein be granted leave to Appeal against the Judgement of this court delivered on 28th July 2020.

c) Spent

d) That this court be pleased to grant an order of stay of execution of the judgement of Hon. Justice Aburili delivered on 28th July 2020 pending the hearing and determination of the Applicants intended appeal.

e) That this Honourable court be pleased to grant temporary order of injunction be issued restraining the objectors from interfering, trespassing onto, or in any way dealing with the deceased's properties until the application is heard and determined.

f) That this Honourable court be pleased to grant temporary order of injunction be issued restraining the objectors from interfering, trespassing onto, or in any way dealing with the deceased's properties until the intended appeal is heard and determined.

g) That cost of this application be provided for.

2. Opposing the application, the 2nd respondent swore an affidavit dated 4th November 2020 upon which the 2nd applicant filed a further affidavit dated 14th December 2020. The parties herein agreed to canvass the application by way of written submissions.

Applicants' Case

3. The applicants' case as it emerges from the supporting affidavit dated 2nd October 2020 and the further affidavit dated 14th December 2020 deposed by the 1st and 2nd applicants respectively is that the applicants were desirous of appealing against the judgement delivered on 28th July 2020 and to this end had already filed a Notice of Appeal dated 31st July 2020, which appeal had overwhelming chances of success.

4. The applicants further stated that unless they were granted leave to appeal as well as stay of execution of the court's judgement, they

would incur serious loss as they stood to lose their property to trespassers and strangers who were threatening to sell and transfer the suit property which was their home. It was their case that their application had been brought without undue delay and further that the respondents would not be prejudiced if the application was allowed.

5. It is the applicants' case that they do not intend to delay the instant case or frustrate the respondents but to seek justice as the respondents are not dependants of the deceased. The applicants claim that the 2nd respondent was not a wife of the deceased as she was married to one Daniel Amollo and that the 1st applicant was the deceased's only wife.

6. The applicants also stated that they had disclosed all the properties of the deceased in their petition for grant of letters of administration and that subsequently they had sold two parcels of land from the deceased's estate to settle the family's debt as agreed by the family.

Respondents' Case

7. In opposition, the 2nd respondent deposed that the fact that the applicants had lodged their Notice of Appeal two days after the court's judgement demonstrated that they were fully aware of the contents and outcomes and as such the instant application was intended to delay the matter and frustrate the respondents from taking out proper proceedings to benefit from the deceased's estate.

8. The respondents further contended that in the absence of the decree, they were restrained from doing anything in as far as the deceased's estate was concerned. The respondents further refuted the claim that they intended to sell the suit property as the applicants were in possession of most documents relating to the deceased's estate.

9. It is the respondents' contention that the fact that the instant application was filed four months since the delivery of judgement and no reason had been given for the delay amounted to an inordinate delay. The respondents further stated that the instant application was pre-judicial to them as the applicants had previously attempted to sell some of the deceased's estate without being granted a Certificate of Confirmation of grant and further that the applicants were currently enjoying benefits from the deceased's estate in the form of rental income to the exclusion of the Respondents.

10. The application was canvassed by way of written submissions.

Applicants' Submissions

11. It was submitted that at all material times the 1st applicant had been the administrator of the deceased's estate vide the grant of letters of administration dated 8/9/2016 and as such the deceased's estate was at risk and was likely to be misused.

12. The applicants further submitted that unless the orders for stay of execution are issued, execution will proceed and the substratum of the appeal will be destroyed thereby rendering the intended appeal null. The applicants further submit that they are living in fear of being rendered homeless as the respondents threaten to acquire all the parcels on which they live. The applicants further submitted that the application was brought timely.

13. On the temporary injunctions sought, the applicants submitted that they had a prima facie case based on the definition of a prima facie case brought out in the case of **Mrao v First American Bank of Kenya & 2 Others (2003) eKLR** as they had been the administrators over the deceased's estate and they wanted to safeguard the deceased's properties.

14. They further submitted that they were at risk of losing unless the injunction sought were granted as the respondents would proceed to execute the orders to the applicants' detriment. They further submitted that on a balance of convenience they stood to suffer more harm in comparison to the respondents unless the injunctions sought were granted.

15. It was further submitted that the court had powers to enlarge time under Order 50 Rule 6 of the Civil Procedure Rules to allow the applicants' leave to file their appeal. Reliance was also placed on the case of **Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat (2013) eKLR**

Respondents' Submissions

16. It was submitted that the applicants had not demonstrated the substantial loss they were likely to suffer if the order of stay was not granted as the court in refusing to confirm the grant of letters of administration did not in any way grant a favourable order to the respondents but implored the parties herein to commence fresh succession proceedings.

17. It was submitted that the assertion that the deceased's estate would be misused was imaginary as the applicants were in possession of the deceased's estate. The applicants further submitted that the assertion that the applicants would be rendered homeless was unfounded. Further, it was submitted that the inordinate delay of four months since the judgement was rendered to the filing of the instant application had not been explained by the applicants.

18. The respondents submitted that the applicants had not met the threshold for grant of temporary injunction.

19. On whether leave to appeal ought to have been granted, the respondent submitted that no leave was required as provided by Article 48 of the Constitution and the Court of Appeal decision in the case of **KSM CA No. 22 of 2015 – Joyce Nyamweya v Jemima Nyamweya**

Analysis & Determination

20. I have considered the instant application, reply by both parties as well as their submissions. The issues for determination are, in my humble view:

- a) *Whether the court should grant stay of execution of its judgement delivered on 28th July 2020,*
- b) *Whether the court should grant the temporary injunction sought and*
- c) *Whether the court should grant the applicants leave to appeal to the Court of Appeal.*

21. For 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.”

22. 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 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.

23. Furthermore, Section 50(1) of the Law of Succession Act provides: -

“An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the high Court thereon shall be final.”

24. Section 47 of the Law of Succession Act gives court 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. 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 subrule (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.”

25. The applicant 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.

26. There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. 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 by the Court of Appeal 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.

27. In this case, the applicants have stated that they are likely to suffer substantial loss as they have been living on the land and the respondents are likely to evict them, sell the land and transfer it to another person. This has not been denied. However, In this instance, this court ordered the parties herein to file fresh petition for grant of letters of administration for the deceased’s estate with the full list of assets, liabilities, dependants and beneficiaries. If the judgment of this court is executed, the applicants would not be evicted and will therefore not suffer any loss, let alone substantial loss. The respondents were not granted any orders to possess the deceased’s estate or evict the applicants. In my humble view, there is no loss to be incurred by the applicants if stay of execution would be denied, noting that the respondents were not granted any orders to possess the deceased’s estate or evict the applicants.

28. The instant application was filed four months after the judgement had been read. I do note that the Notice of Appeal was filed 2 days after the judgement was read. Further, I take notice that by the time the judgement was read, the Covid 19 pandemic had greatly affected the country to the point that freedom of movement was heavily restricted Accordingly it is the view of this court that despite the fact that there was an inordinate delay, the same is understandable in light of the Covid19 restrictions.

29. On the issue of security, it is noted that it is the court which can order security for due performance of decree upon application by either party or on its own motion. In this case, the respondents have not urged the court to order the applicant to provide security. However, the court has discretion to order the applicant to provide security. However, as the requirements for grant of stay of execution ought to be taken cumulatively as connoted by the inclusion of the conjunction **“and”** in Order 42 Rule 6, the applicants have not met the threshold for grant of stay of execution. That prayer for stay of execution of judgment of this court declining to confirm grant is hereby rejected and dismissed.

30. Turning to the second issue of grant of temporary injunction, the procedure for the grant of temporary injunctions is provided under Order 40 of the Civil Procedure Rules –Rule 1(a) & (b) which provides: -

“1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

31. The principles for the Grant of temporary injunctions were laid out in the celebrated case of **Giella v Cassman Brown.(1973)EA 358** where it was held that a party wishing to get an order of injunction must –

“Establish a prima facie case with a probability of success.

That he will suffer irreparable loss if the injunction is not granted and the loss cannot be compensated by an award of damages.

That if the court is in doubt, it will decide the application on a balance of convenience.”

32. These principles were reiterated in the case of **East African Industries Ltd v Trufoods Limited 1972 E. A 420**. The Court of Appeal in the case of **Mrwao –v- First American Bank of Kenya Limited & 2 Others (2003) KLR 125** and recently in **In re Estate of the Late Moses Cyprian Kimanjui Nguru(DCD) [2019]eKLR**.

“A prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

33. A prima facie is one which is not frivolous and one which is easily discernible from the pleadings even before the party is heard as it will show a right exists which may be infringed if an injunction is not issued. It is the applicant who must establish in prima facie case.

34. The applicants’ claim is that the respondents will evict them from the suit property and dispose of the same therefore rendering their appeal nugatory.

35. As earlier stated herein, the judgement the applicants intend to challenge before the Court of Appeal does not grant possession of the property in the estate of the deceased to the respondents to the exclusion to the applicants. In fact, the said judgement directs the parties to institute fresh succession proceedings over the deceased’s estate as the process of petitioning for grant was flawed with the petitioner not signing the petition and as was found by this court, the objectors are legally entitled to be included as beneficiaries of the estate of the deceased.

36. The respondents deposed that they do not intend to evict the applicants and further that they are not in a position to transfer the suit property as the relevant documents are in possession of the applicants. The respondents further submitted that they are not in a position to execute the aforementioned judgement as they have not extracted the decree.

37. It is noteworthy that the applicants are the ones in possession of the property of the estate of the deceased and even enjoy benefits in terms of rental income from the deceased’s estate, to the exclusion of the respondents.

38. The applicants have not attached any evidence of the pending execution, disturbance or threatened eviction or disposal of the properties of the deceased by the respondents. There is also no evidence of any irreparable loss to be suffered by the applicants if the judgment of this court is executed through filing of fresh succession proceedings. They have not stated which loss cannot be quantified and cannot be compensated by an award of damages. In the view of this court, the balance of convenience does not tilt in favour of the applicant. Accordingly, it is my finding that the applicants have not established grounds to warrant the grant of injunction. The prayer for an injunction is accordingly declined and dismissed.

39. Finally, on whether an appeal lies as a matter of right from judgment of this court to the Court of Appeal in succession proceedings as submitted by the respondent’s counsel, citing Article 48 of the Constitution on the right to access justice, Section 50 of the Law of Succession Act provides:

(i) " An Appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

(ii) An Appeal shall lie to High Court in respect of any order or decree made by a Kadhi’s Court in respect of the estate of a

deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal. "

40. The question of whether an appeal lies as a matter of right in succession matters against decisions of the High Court exercising its original jurisdiction has been met with two different schools of thought emerging. This is because the cited law above appears silent on the question of an appeal from the High Court to the Court of Appeal particularly in regard to decisions made in exercise of its original jurisdiction. The law is clear that where the High Court makes a decision in exercise of its appellate jurisdiction, the decision is final. In the case of **Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others [2013] eKLR** the Court of Appeal stated as follows regarding appeals from the High Court to the Court of Appeal in Succession matters:

"It is trite law that where any proceedings are governed by a Special Act of Parliament, like in this case, the Law of Succession Act, the provisions of such an Act must be strictly construed and applied..... therefore what is in the Law of Succession Act is what was intended to be therein in the manner and extend it is there. What is not therein expressly is what was intended not to be there by the legislature. I find that the applicant in this case was not required to seek leave to appeal from the High Court."

41. The above decision appears to resonate with the contention by the respondents who submitted that under Article 48 of the Constitution, access to justice is guaranteed to the Court of Appeal from the High Court as a right. The applicants in my opinion wrongly quoted the case of **KSM CA No. 22 of 2015 – Joyce Nyamweya (supra)** asserting that it supported the view that an appeal lies as right from the High Court to the Court of Appeal. However, a proper reading of the aforementioned case reveals that the Honourable Justices did not address the issue of the right to appeal to the Court of Appeal from the High Court but moved to determine the issue of striking out a Notice of Appeal under Rule 84 of the Court of Appeal Rules.

42. The 2nd school of thought has it that the right to appeal from the High Court to Court of Appeal only lie with leave from this court. In the case of **Mary Wangui Karanja & Another -vs- Rhoda Wairimu Karanja & Another [2014] eKLR**, Hon. Justice Musyoka held as follows:-

"I am persuaded, and it is my reading of Section 50 of Law of Succession Act that no right of appeal arises from original decisions of the High Court as a probate court to the Court of Appeal. A right of appeal is statutory and since the Law of Succession Act has not provided for such a right the same does not exist. I find not at all upon which I can grant leave in the manner sought by the respondent."

43. The above decision finds traction in the Court of Appeal decision in the case of **Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR** where the Court of Appeal after a long and winding judgment finally made the following observations:-

" We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

44. Consequently, I am persuaded and bound by the decision of the aforementioned Court of Appeal decision that there is need for seeking leave to file an appeal to the Court of Appeal from the High Court in succession proceedings where this court is exercising original jurisdiction.

45. The only question is whether the leave sought to appeal to the Court of Appeal is merited. The judgment of this court and which is sought to be impugned is two pronged. First is that the respondents are legally entitled to benefit from the estate of the deceased and secondly that the petition was in the first instance, fatally defective as it was never signed by the petitioner Jennifer Achieng Odhiambo. This court is more than interested in getting to know what the Court of Appeal will say concerning the controversies surrounding the relationships between the applicants and respondents especially where the respondents refused to have DNA tests conducted to establish the paternity of children who claim to be the deceased's children, and whether a petition which is unsigned should be allowed to stand and a grant issued to such a petitioner to administer the estate of a deceased person.

46. For that reason, I hereby exercise discretion and grant leave to the applicants to file a Notice of Appeal to the Court of Appeal and serve within Seven Days from the date hereof upon which the Court of Appeal Rules shall apply as far as filing of a Memorandum of Appeal and record of appeal are concerned. Costs of this application shall be in the cause.

47. In addition, I'm alive to provisions of Section 73 of the Probate and Administration Rules which provides that:

"73 Nothing in these 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."

48. Accordingly, I order that none of the parties to these proceedings shall intermeddle with the deceased's estate in any way pending the filing, hearing and determination of the applicants' intended appeal. This is because even the applicants are duty bound to ensure protection and preservation of the estate of the deceased where there are other persons claiming entitlement to the said estate.

49. In the end, the application by the applicant dated 30/9/2020 is only allowed in terms of prayer No (b) granting them leave to file an appeal to the Court of Appeal and serve the respondents within seven Days of today. All the other prayers are dismissed with an order that each party bear their own costs.

Orders accordingly.

Dated, signed and Delivered at Siaya this 2nd Day of March, 2021 virtually in open court in the presence of Mr. J.A.Mwamu counsel for the applicants.

R.E. ABURILI

JUDGE