



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 217 OF 1998

IN THE MATTER OF THE ESTATE OF DAUDI KIPSEREM SEREM (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR STAY OF EXECUTION OF JUDGMENT

BETWEEN

SALLY SEREM.....APPLICANT

AND

CLARA J. KEMBOI.....RESPONDENT

RULING

[1] Before the Court for determination is the Summons dated **22 December 2020**. It was filed by **Sally Serem**, the applicant herein, pursuant to **Articles 48, 165(3)(a)** of the **Constitution** and **Section 47** of the **Law of Succession Act**, as well as **Rules 49 and 73** of the **Probate and Administration Rules**, for orders that:

[a] Spent

[b] Spent

[c] There be stay of Judgment and Decree delivered on **30 November 2020** pending the hearing and determination of the intended appeal; and,

[d] That costs of the application be costs in the cause.

[2] The application was premised on the ground that the applicant is dissatisfied with the Judgment of the Court dated **30 November 2020**; and that she has appealed the said decision. It was further the contention of the applicant that the respondent stormed the estate properties on **21 December 2020** with the intention of having them surveyed pursuant to the Judgment of the Court; and therefore that, unless stay of execution is granted, she will proceed in that course and render the appeal nugatory. The applicant further indicated that she is willing to provide such security as the Court shall order for the due performance of the decree; and added that the respondent shall not in any way suffer prejudice since she is in possession and occupation of one of the estate assets, namely, **Mosine Farm**.

[3] The applicant relied on her Supporting Affidavit sworn on **22 December 2020** and the documents annexed thereto, which include a copy of the Certificate of Confirmation of a Grant, issued to **Rosaline Serem**, dated **18 March 2004**, copies of the impugned Judgment and Decree; and a copy of the Notice of Appeal issued under **Rule 75** of the **Court of Appeal Rules**. The applicant also exhibited a copy of her Memorandum of Appeal as **Annexure SS-7** to her Supporting Affidavit with a view of demonstrating that the intended appeal is arguable. She also relied on affidavits filed by her brother, **Richard Keter Kemboi**, and her sisters-in-law, **Miriam Jeptoo Kemboi** and **Miriam Jeruto Kemboi** to demonstrate substantial loss.

[4] The respondent is opposed to the application dated **22 December 2020**. In her Replying Affidavit sworn on **28 January 2021**, she confirmed that she extracted the Decree herein with a view of execution and thereafter proceeded to the subject properties to claim her portion of the deceased's estate in line with the Judgment pronounced herein on **30 November 2020**. While confirming that she is presently in occupation of **Mosine Farm**, measuring 6 acres, she pointed out that this is all she was allowed to utilize since the demise of her husband

and father-in-law; and that the applicant has no justifiable cause for further delaying the enjoyment of the fruits of her judgment.

[5] In response to the respondent's assertions, the applicant filed a Supplementary Affidavit on **8 February 2021**, reiterating her stance that respondent is keen on executing the Judgment dated **30 November 2020**. She added that she has since filed a Party and Party Bill of costs dated **24 December 2020** for taxation; notwithstanding that a substantive appeal has already been filed. She further averred that her mother, **Rosaline Serem**, who was the original petitioner, has since died; hence the need to distribute the estate afresh in line with the provisions of **Section 38** of the **Law of Succession Act**. Thus, she urged the Court to find that the appeal raises several arguable points; and therefore that the interests of justice would best be served by granting stay of execution pending the hearing and determination of the appeal.

[6] The application was canvassed by way of written submissions, pursuant to the directions given herein on **8 February 2021**. **Ms. Chesoo** for the applicant made reference to **Re Estate of Nasotokini Ole Sane (Deceased)** [2020] eKLR for the proposition that, in an application of this nature, an applicant needs to prove the following three elements:

- [a] That the application was filed without unreasonable delay;
- [b] That the applicant stands to suffer substantial loss;
- [c] That such security as the Court may order for the due performance of the decree has been furnished.

[7] In respect of the first prerequisite, **Ms. Chesoo** urged the Court to find that the application was lodged "**in supersonic speed**" and brought before the Court without undue delay. She pointed out that it was filed within 16 days of the date of delivery of the impugned Judgment; taking into account the provisions of **Sections 57 and 58** of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya**. She further urged the Court to note that the applicant promptly filed a Notice of Appeal on **4 December 2020** for purposes of **Rule 77 and 78** of the **Court of Appeal Rules**.

[8] In terms of substantial loss, **Ms. Chesoo** submitted that the intended execution, if levied, shall irreparably affect or negate the very core of the appeal and would necessitate further orders of not only cancellation of titles, but also eviction, should the applicant succeed on appeal. The case of **R W W vs. E K W** [2019] eKLR was cited by counsel to underscore the purpose of stay of execution pending appeal, namely; to preserve the subject matter in dispute so that the rights of the appellant are safeguarded and the appeal not rendered nugatory. Counsel further urged the Court not to lose sight of the emotive nature of land disputes and the need for the parties to be given the opportunity to fully ventilate their grievances, in line with the decision of the Court of Appeal in **Mugar vs. Kunga** [1988] KLR.

[9] As for the third prerequisite, namely security for the due performance of such decree as may ultimately be binding on the applicant, counsel made reference to paragraph 13 of the Supplementary Affidavit wherein the applicant confirmed that she is agreeable to surrendering occupation and possession of **Nandi Hills/Kosoiywo Block 1/772, Nandi Hills/Kosoiywo Block 1/773** and **Nandi Hills/Kosoiywo Block 1/773** each measuring 2.7 acres; and **Mosine Farm**, measuring 6 acres, to the respondent. She accordingly prayed that the application be allowed; and that the orders sought be granted as prayed in the Summons dated **22 December 2020**.

[10] On her part, **Ms. Cheron** for the respondent relied on her written submissions dated **4 March 2021**. She proposed the following two issues for determination:

- [a] Whether the applicant has satisfied all the requirements for stay of judgment and decree; and,
- [b] Who should bear the costs of the application.

[11] Counsel alluded to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** by submitting that the three conditions for stay are the establishment of substantial loss, sufficient cause and the furnishing of security. She further submitted that, in granting stay, the overriding objective of the court is to ensure that the execution of one party's right should not defeat or derogate the right of the other. She relied on the expressions of **Hon. Warsame, J.** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited**, Nairobi HCCC No. 795 of 1997 that:

"...It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined rights of a party with definitive conclusion. For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss..."

[12] Counsel urged the Court to note that, all that has been presented in proof of substantial loss is the assertion that the applicant's sisters in law are also widows like the applicant; and therefore that execution of the impugned judgment would occasion them untold suffering. She however pointed out that the applicant was a dependant of the deceased as at the time of his demise, which source of livelihood was completely severed upon the demise of the deceased; unlike the case of the applicant's sisters-in-law who have all along been living off the estate. Counsel further pointed out that the death of the deceased's widow invariably means that what would have gone to her as an individual would be shared out amongst her children; and therefore that there would be no need to interfere with the Judgment of the Court as to the mode of distribution.

[13] As regards security, counsel faulted the proposal by the applicant that the properties, **Nandi Hills/Kosoiywo Block 1/772, 773** and **774** be utilized as security; pointing out that one of the properties, **Nandi/Kosoiywo Block 1/774** no longer forms part of the estate, the same having been sold by the applicant's late mother and a school has been put up thereon, known as **Mosine Primary School**. Thus, counsel took the view that, in the event the Court is inclined to grant stay of execution of the Judgment and Decree, it should be on condition that she be

granted access, possession of the following assets:

[a] Nandi Hills/Kosoiywo Block 1/772 measuring 1.1 Ha.

[b] Nandi Hills/Kosoiywo Block 1/773 measuring 1.1 Ha.

[c] 7.5 acres of the 50-acre EATEC Farm.

[d] 10 acres out of the 50-acre Kirondio Farm, LR No. 4072.

[14] I have given careful consideration to the application in the light of the proceedings held herein as well as the written submissions filed by learned counsel. Whereas counsel made reference to the provisions **Order 42 Rule 6** of the **Civil Procedure Rules**, and the conditions stipulated therein for stay pending appeal, **Rule 63** of the **Probate and Administration Rules** is explicit that:

“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), ... shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased person shall be those existing and in force immediately prior to the coming into operation of these Rules.”

[15] I therefore subscribe to the view that, since **Order 42 Rule 6** of the **Civil Procedure Rules** was consciously omitted in **Rule 63** aforesaid and was consequently not imported for purposes of the **Law of Succession Act**, it is inapplicable to the instant application. In this viewpoint, I find succor in the decision of the Court of Appeal in **Josephine Wambui vs. Margaret Wanjiru Kamau & Another** [2013] eKLR, wherein it stated thus:

“We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1).”

[16] Thus, and as rightly stated on the face of the application, the instant application is to be looked at from the prism of **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**. In particular, **Section 47** of the **Law of Succession Act** stipulates that:

““The High Court shall have 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...”

[17] **Rule 73** of the **Probate and Administration Rules** on the other hand provides that:

“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.”

[18] Thus, the only issue for my determination herein is whether a sound and justifiable basis has been shown for the issuance of stay of execution of the Judgment dated **30 November 2020**; and whether the orders are necessary for *the ends of justice in this matter to be met; bearing in mind that the disputants are both beneficiaries of the deceased with equal standing before the Court. I note that the applicant has already filed an appeal; having lodged her Notice of Appeal on 4 December 2020. She has further annexed to her Supporting Affidavit a copy of the Memorandum of Appeal, indicating her dissatisfaction with the decision of the Court dated 30 November 2020. She basically seeks redistribution of the estate; on which she is entitled to the decision of the Court of Appeal. Thus, the position taken in Banco Arabe vs. Bank of Uganda* [1999] 1 EA 22, which I hereby adopt, is that:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

[19] Moreover, in *Mugar vs. Kunga* (supra), the Court of Appeal adopted the posturing that:

“...parties should be allowed to come to court to have the issue involved in their dispute determined by a court of last resort. For the parties to come to this court the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined...”

[20] In the premises, granted that the respondent is agreeable to certain aspects of the applicant's proposals as to security, it is my finding that this is a case in which the parties ought to be given an opportunity to ventilate their grievances on appeal to their satisfaction. As was correctly pointed out by counsel for the respondent, one of the properties being offered by the applicant as security, namely **Nandi**

Hills/Kosoywo Block 1/774, had long been sold by the deceased's widow for Kshs. 2,000,000/=; hence the order, in the impugned Judgment, that the respondent be paid its value as at the date of sale. On the other hand, the respondent seeks that she be allowed access and use of the properties that have been given to her per the Judgment dated 30 November 2020 pending appeal. It is manifest that the sticky issue is the question whether the respondent should be given portions of the Kirondio Farm and the EATEC Farm. Since any use and occupation of those two pieces would invariably involve survey and demarcation, it would be in the interest of justice that those aspects of the Judgment dated 30 November 2020 await the determination of the appeal.

[21] Accordingly, having weighed the competing interests of the parties, I am satisfied that there is sufficient cause for granting stay of execution pending the hearing and determination of the appeal. Hence, the application dated 22 December 2020 is hereby allowed and orders granted as hereunder:

[a] That stay of execution be and is hereby granted pending the hearing and determination of the applicant's appeal to the Court of Appeal from the Judgment and Decree of this Court dated 30 November 2020, on condition that the respondent be forthwith allowed free access to, occupation and use of the following properties:

[i] Nandi Hills/Kosoywo Block 1/772 measuring 1.1 Ha.

[ii] Nandi Hills/Kosoywo Block 1/773 measuring 1.1 Ha.

[b] That the costs of the application shall be costs in the cause.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MAY 2021

OLGA SEWE

JUDGE