



**REPUBLIC OF KENYA**

**IN THE HGH COURT OF KENYA**

**AT NYAHURURU**

**SUCCESSION APPEAL NO. 2 OF 2020**

**IN THE MATTER OF THE ESTATE OF SOLOMON MUNGURA MATHIA (DECEASED)**

**TERESIA WAMBUI KESI**

**GLADYS MUTHONI MUNGURA.....APPLICANTS**

**VERSUS**

**JOSEPHINE NDIKO MUNGURA.....RESPONDENT**

**RULING**

**FACTS**

1. The application is coming up for determination is Notice of Motion dated 2<sup>nd</sup> July 2020 whereby the Applicants sought for the following orders: -

*i. That the application herein be certified as urgent*

*ii. That pending the hearing and determination of this application interpartes there be a stay of execution of the judgement delivered on the 18/6/2020 in Nyahururu CMCC Cause No. 32 of 2018 in the Matter of the Estate of the Late Solomon Mungura Mathia*

*iii. That pending the hearing an determination of the Appeal filed herein, there be a stay of execution of the judgement delivered on the 18/6/2020 in Nyahururu CM Succession Cause No. 32 of 2018 In the Matter of the Estate of the Late Solomon Mungura Mathia*

*iv. That the costs of this application be provided for*

**APPLICANTS' CASE**

2. In a nutshell, the Appellants/Applicants herein are the administrators of the estate of their deceased father Solomon Mungura Mathia as per the grant issued to them on 24/5/2018. Though the succession was filed as if the deceased died intestate, they later discovered that the deceased had left behind a Will through their brother G. Nduru Mukuha who was present and acted as the secretary during the when the said Will was written and who had retained a copy. The Applicants proposed for the deceased's estate to be distributed as per the written Will and all the beneficiaries were in agreement save for Josephine Ndiko Mungura, the Respondent herein who filed for objection proceedings.

3. The Respondent produced a letter of consent dated 21/7/2015 which purportedly sought to issue her a larger portion of the deceased estate over her other siblings including the area holding the family house and the graveyard. The court in its judgement delivered on 18/6/2020 dismissed both the written Will and the letter of consent but went ahead to order for a current surveyor's report to be prepared based on the letter of consent dated 21/7/2015 that had already been dismissed for consideration and possible distribution of the estate as per consent.

4. Consequently, being aggrieved by the said judgement, the Applicants filed a memorandum of appeal on the 24/6/2020. According to the Applicants, the substance of their appeal which they averred has high chances of success is that the deceased died testate as per the written Will dated 24/12/2014 and which Will was dismissed by the court in the judgment delivered on 18/6/2020 and proceeding to execute the said judgment will further aggravate that matter.

5. The Applicants averred that the delay in filing the Memorandum of Appeal and the present application for stay was occasioned by the fact that the 2<sup>nd</sup> Applicant was in the U.S.A while movement in Kenya was restricted due to Covid-19 pandemic and that the 1<sup>st</sup> Applicant resides in Kilifi County and is 70years old making it hard for her to travel to Nyahururu therefore making consultation strained between them and their advocate.

6. In any case, the delay is not inordinate. The Applicants asserted that unless the stay of execution is issued, the judgement dated 18/6/2020 may be executed rendering their appeal nugatory as it seeks to have the said judgement set aside in its entirety. Furthermore, the Respondent does not stand to be prejudiced if the stay orders are granted as all other beneficiaries are in support of the appeal and intended stay and in any case the Respondent is in possession of the family home and controls the land wherein their parents are buried and will continue to enjoy the use and control thereof pending the hearing and determination of the appeal.

### **RESPONDENT'S CASE**

7. In response, the Respondent vide her replying affidavit dated 12/7/2020 asserted that the stay application is premature, bad in law and abuse of the court process and should therefore be dismissed. She stated that it is only the Applicants that have legal authority to do anything in respect to the deceased's estate and therefore the application seeking for stay of execution is inept and superfluous and that there is no decree issued in CM Succ. 32/18 that is capable of execution.

8. Additionally, the grant of letters of administration dated 24/5/2018 issued to the Applicants has not been confirmed meaning that the issue of which beneficiary gets what portion of the estate property has not yet been fully decided. The Respondent stated that the Applicants have not demonstrated that they are likely to suffer any substantial loss unless that stay orders are issued and that the Applicants have not deposited in court any form of suitable security as required under **Order 42 Rule (1) (b) Civil Procedure Rules**. Lastly, she contended and that the appeal filed has no reasonable chances of succeeding because the same is premature and was brought even before the trial court makes its final determination on the issues before it.

### **ANALYSIS OF THE ISSUES**

9. First and foremost, grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**, the relevant part of which states as follows:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless—***

***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***

***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.***

***(3) ...***

***(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***

***(5) ...***

***(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”***

10. The principles guiding the grant of a stay of execution pending appeal are provided for under **Order 42 Rule (2) Civil Procedure Rules** as encapsulated above. Against this backdrop, it was rightly stated in the case of **Antoine Ndiaye vs African Virtual University (2015) eKLR**, that an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the certain conditions namely:-

***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 such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.***

11. It is vital that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. Accordingly, the

Court substantially tips the scales of the likely ramifications of granting the stay or not doing so and ultimately tips towards a resolution which is not likely to lead to an undesirable outcome. The same was reiterated in *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR* where it was stated that:

***“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”***

12. I concur with the position endorsed by the Court in *Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR*, citing the decision of Sir John Donaldson M. R. in *Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198* are apt:

***“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”***

13. The Court in *RWW vs. EKW [2019] eKLR*, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

***“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”***

14. Weighing all the relevant matters and considering the parties interests, I find that for purposes of preserving the appeal and avoiding it been rendered nugatory it is in the interest of justice that the Applicants order of stay be issued as the may suffer substantial loss if the same is disallowed. In any case, the Respondent does not stand to be prejudiced if the stay orders are granted as all other beneficiaries are in support of the appeal and intended stay and in any case the Respondent is in possession of the family home and controls the land wherein their parents are buried and will continue to enjoy the use and control thereof pending the hearing and determination of the appeal.

15. While in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR*, it was stated that:

***“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”***

16. Consequently, The Applicants through the written submissions dated 13/1/2021 asserted that they are ready and willing to abide by the orders issued by this court in relation to security with is a sign of utmost good faith that the application of stay is not meant to deny the Respondent the fruits of the judgement

17. Moreover, I find that the Applicants delay in filing for this application and the appeal is not inordinate and that the reasons given herein for the delay are satisfactory to the Court. In *Nicholas Kiptoo Arap Korir Salat vs IEBC & Others [2014] eKLR* the Supreme Court of Kenya stated that:

***“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***

***(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

***(3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;***

***(4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;***

***(5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;***

***(6) Whether the application has been brought without undue delay; and***

***(7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

## **CONCLUSION**

18. In view of the foregoing, the application dated 2<sup>nd</sup> July 2020 be and is hereby allowed as prayed pending the hearing of this Appeal. Each party should bear its own costs.

Dated, Signed and Delivered at NYAHURURU this 13<sup>th</sup> day of May, 2021.

.....

**CHARLES KARIUKI**

**JUDGE**