



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION APPEAL NO. E004 OF 2020

IN THE MATTER OF THE ESTATE OF THE LATE JAMES NGANGA MWANGI (DECEASED).

EUNICE WANGOI MWANGI.....APPELLANT

VERSES

NAOMI WANGUI NGANGA.....RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 2nd February 2021 pursuant to the provisions of **Order 42 Rule 6 (1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Rule 73 of the Probate and Administration Rules** and sought for orders: -

a. That pending the hearing of the application inter-parties, this Honourable court be pleased to stay proceedings in Molo CMC Succession Cause No. 63 of 2018.

b. That pending the hearing of the application inter-parties, this Honourable court be pleased to stay proceedings in Molo CMC Succession Cause No. 63 of 2018.

c. That the costs of this application be provided for.

2. The application is premised on the supporting affidavit of **Eunice Wangoi Mwangi** and the grounds inter alia that the trial Court delivered its ruling on 26th November 2020 allowing the respondent to file additional witness statements after she had already testified and cross-examined extensively on her replying affidavit when the Appellant had already testified and closed her case in violation of the doctrine of full disclosure and the legitimate expectation by the appellant before trial.

3. The applicant thus preferred the appeal against the said ruling. The applicant is apprehensive that unless the orders sought are granted the Respondent's intended witnesses may proceed to testify to the detriment of the applicant.

4. That applicant stated that the appeal has a high chance of success and it will be rendered nugatory if the proceedings are not stayed, hence it is only fair and just that there be stay of proceedings in Molo CMC Succession Cause No. 63 of 2018 pending the inter-parties hearing and determination of the Appeal.

5. The respondent filed a replying affidavit in person and stated that the applicant's application is frivolous and vexatious, an abuse of the court process and an abuse of the respondent's right to a fair and expeditious trial as the applicant has not demonstrated that they have an arguable appeal.

6. The respondent averred that she filed witness statements and served counsel for the Applicant's herein within 14 days as directed by the court and the witness statements were received with no objection. The date for further hearing of 4th February 2021 was taken in court by both parties hence the applicant's contention that it was fixed ex-parte is not true.

7. The respondent averred that a day prior to the hearing, counsel for the Applicant called her and stated that they would not be able to proceed with the hearing for unforeseen reason and so they sought for an adjournment. The matter was deferred to the 4th April 2021. The applicants thereafter on 23rd February 2021 served the respondent with the instant application which seeks to stay the ongoing succession matter in Molo Magistrates Court so that the appeal herein can be first heard and determined. The appeal is against the ruling of the court allowing the respondent to file witness statements before her witnesses can adduce their evidence before court.

8. The respondent averred that the applicant will not be prejudiced in any way as she will be accorded an opportunity to cross-examine the

witnesses. The applicant has not demonstrated that she will suffer any loss should the application herein not be granted. The respondent averred that the applicant has her own property but has forcibly taken over the property of the respondent to the respondent's loss and detriment despite the fact that the confirmed grant has not been revoked or nullified by the court.

9. The respondent averred that the instant application will only have the effect of denying her much sought justice while she continues to languish in abject poverty and desolation since the applicant is intermeddling in the estate property by tilling and utilizing after having thrown her out. The respondent averred that granting the instant application will mean that the applicant will continue with her intermeddling to the detriment of the respondent and the illegal gain of the Applicant.

10. The respondent averred that this court should dismiss the instant application with costs being alive to the provisions of **Articles 159 (2) of the Constitution** and allow the lower court matter to proceed for the expeditious disposal of the succession suit.

11. The applicant filed a supplementary Affidavit and averred that the fact that a party has the right to cross-examine cannot overcome the prejudice that she would suffer by allowing the respondent to introduce additional evidence after close of the applicant's case and after the respondent had testified and cross-examined and yet she had not given the applicant prior information during the pre-trial to incorporate whatever might have been anticipated during the hearing of the evidence. The applicant added that the new witnesses are intended to fill in the gap raised during trial, which is against her right to be accorded full disclosure.

12. The applicant averred that the allegation that she forcibly took over the respondent's property are not true as the respondent had sometime in 2020 leased out a portion of property to a third party who is currently cultivating. The applicant averred that the deceased used to cultivate the said property prior to his death as the source of their livelihood and had even entrusted the applicant with the title deed to the said property. It was not until the respondent tried to dispose of the deceased's said property by sending prospective buyers to view the said property that the applicant became aware of the Grant of letters of Administration issued to her and subsequently filed summons for revocation of the same which matter is still pending before court.

13. The applicant averred that it is only fair that her application seeking stay of proceedings in lower court pending hearing and determination of the instant application as well the hearing and determination of the appeal be allowed.

Issues for determination

14. The only issue for determination is whether the applicant has met the threshold for grant of stay of proceedings.

15. Stay of proceeding should not be confused with stay of execution pending appeal. The test for stay of proceeding is high and stringent since it seriously interferes with the right of a litigant to conduct his/her litigation. It impinges on right of access to justice, right to be heard without delay, right to fair trial.

16. Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** persuasively stated thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

17. **Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332**, illuminates the threshold for stay of proceedings as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

18. It is trite law that in considering whether there is sufficient reason required by **Order 42 Rule 6 of the Civil Procedure Rules** to grant stay of execution or stay of proceedings pending appeal, the court will consider whether an arguable case is established, and whether the appeal, if successful, shall be rendered nugatory.

19. Having had a look at the memorandum of appeal, it is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court. I am not satisfied that the Applicant has demonstrated that she has an arguable appeal to warrant issuance of the orders being sought. The applicant has raised concrete allegations in her application for revocation of a grant and it is only fair and just that the respondent be allowed to bring forth further evidence and or witnesses to support her case.

20. The applicant has also not shown any prejudice that will be suffered by her since the court will allow her to cross examine the supplementary witnesses brought forth by the respondent. In allowing such cross examination the court will obviously be guided by the rules of evidence so as to ensure that the applicant does not steal a march against the respondent. In other words, care should be taken so that new evidence to be introduced will not prejudice the respondent.

21. For now, and for the reasons adduced above this court does not find merits in the application and the same is hereby disallowed with no order on costs.

Dated signed and delivered via video link at Nakuru this 17th day of June 2021.

H. K. CHEMITEI.

JUDGE