



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION APPEAL NO. 3 OF 2021

IN THE MATTER OF THE ESTATE OF JOHN MUTERO alias MUTERO S/O KARIUKI (DECEASED)

GERALD MUTERU MUTERO.....APPLICANT/APELLANT

VERSUS

ROSALINE WANGUI MUTERU.....1ST RESPONDENT

DUNCAN NDEGWA MUTERU.....2ND RESPONDENT

RULING

Brief facts

1. The applicant has brought this application dated 4th March 2021, under **Rule 63 and 73 of the Probate and Administration Rules and Order 42 Rule 6 of the Civil Procedure Rules** seeking for orders for stay of execution of the judgement delivered on 22/01/2021 and stay of any consequent proceedings in the trial court in Othaya Senior Resident Magistrate's Court Succession Cause No. 2 of 2019 pending the hearing and determination of the application and the main suit.
2. In opposition of the said application, the respondents have filed a replying affidavit dated 19th March 2021.
3. Furthermore, the applicant filed a Further Supporting Affidavit dated 4th May 2021.

The Applicant's Case

4. It is the applicant's case that he was dissatisfied with the judgement and thus lodged this appeal. The applicant states that he requested for typed and certified proceedings on 19/2/2021 to enable him prepare his record of appeal.
5. The applicant states that respondents have filed an application dated 19/02/2021 which is coming up for hearing on 12/03/2021 seeking orders to facilitate transfer and issuance of title deeds in accordance with the judgment delivered on 22/1/2021 which amounts to execution of the judgement.
6. The applicant contends that his appeal has high chances of success as it raises meritorious and weighty issues for determination by the court and thus it is in the interest of justice that stay of execution of the judgment delivered on 22/1/2021 and any consequent proceedings in the trial court in Othaya Senior Resident Magistrate's Court Succession Cause No. 2 of 2019 be granted pending the hearing and determination of the appeal herein. Additionally, the applicant contends that he stands to suffer substantial loss if stay is not granted because he runs the risk of losing his entire inheritance and that he has made the application herein without unreasonable delay.
7. The applicant further adds that if the application herein is not allowed, it will render the appeal nugatory.

The Respondents' Case

8. It is the respondents' case that the application herein is fatally and incurably defective, misconceived, scandalous, frivolous, vexatious, and otherwise an abuse of the court process.
9. The respondents depose that the applicant has not annexed a certified copy of the confirmed grant in which he is seeking for orders of stay

of its execution. Notably, from the certificate of confirmation of grant, the applicant is not a beneficiary and hence he has not demonstrated what substantial loss may accrue to him. Further, from the Summons for Confirmation of Grant, the applicant has renounced his right to participate in the distribution of the estate of the deceased, as such he does not run any risk of losing his inheritance.

10. The respondents further state that the applicant was categorical in his evidence that he was not claiming any property that is comprised in the estate.

11. The respondents contend that from the applicant's Memorandum of Appeal, the applicant does not have an arguable appeal with high probability of success as it is not clear on whose behalf he is agitating and expressing his dissatisfaction. Further, the applicant has not demonstrated what substantial loss he stands to suffer or how his appeal will be rendered nugatory and that he has made the application without unreasonable delay.

12. The respondents contend further that the trial court did not grant any positive order in our favour which is capable of execution and as such, a stay of execution is not available in the circumstances. A stay can only be issued where there is an executable order which is not the case herein. The respondents contend that they are the ones who will be prejudiced in the event stay orders are granted as we shall not benefit from the estate of the deceased.

13. The respondents pray that the summons be dismissed with costs.

14. The applicant filed a Further Supporting Affidavit dated 4th May 2021 in which he states that he is an administrator of the estate herein and he represents the interests of the beneficiaries in the estate. As such, his participation in the proceedings is limited to instructions received from the beneficiaries of the estate who are unable to participate in the matter herein personally. These beneficiaries are dissatisfied with the judgment of the trial court delivered on 22/1/2021 as it deviates from the wishes of the deceased.

15. The applicant further contends that despite having annexed the certificate of confirmation there still remains an imminent threat of execution as the respondents' application dated 19/2/2021 seeks orders that the executive officer executes transmission documents on behalf of the beneficiaries.

16. That the said beneficiaries will suffer great prejudice if the respondents are allowed to interfere with the status quo before the estate before the appeal herein is heard and determined. Further, the appeal raises weighy issues for consideration by this court and it would be detrimental to the estate should the respondents be allowed to change the ownership of the estate properties before the appeal is heard.

17. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

The Applicant's Submissions

18. It is the applicant's case that the issue in contention and the subject of the appeal is the distribution of Land Parcel CHINGA/KAGONGO/597 and 598 (hereinafter referred to as which have been distributed in favour of the respondents. The respondents have filed an application pending before the trial court seeking orders to facilitate transfer and issuance of title deeds of the said parcels to themselves. The applicant reiterates that this appeal has a high chance of success as it raises meritorious and weighty issues for determination by this Court.

19. The applicant contends that substantial and irreversible loss will accrue to the beneficiaries if stay of the judgment and proceedings in the trial court is not granted as there is the risk that the said parcels of land may be transferred to innocent 3rd parties during the pendency of this appeal. The applicant relies on the case of **Butt vs Rent Restriction Tribunal [1979] cited in Charles Kariuki vs Francis Kimaru Rwara (Suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR.**

20. The applicant further relies on the case of **Consolidated Marine vs Nampija & Another, Civil App. No. 93 of 1989 (Nairobi) cited in Charles Kariuki Njuri vs Francis Kimaru Rwara (Suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR** to support his contention that the purpose of stay of execution is to preserve the substratum of the case. As such the court herein is clothed with the necessary discretion to preserve the subject matter in dispute being Land Parcel CHINGA/KAGONGO/597 and 598 in order to safeguard the applicant's right of appeal. The respondents will not suffer any prejudice that cannot be compensated by way of damages. Thus the applicant prays that the application dated 4/3/2021 be allowed.

The Respondents' Submissions

21. The respondents submit that the applicant ought to satisfy the conditions for stay of execution pending appeal as enshrined in Order 42 Rule 6(2) of the Civil Procedure Rules which include:- proving substantial loss, that the application has been brought without unreasonable delay and provision of security as ordered by the court. Upon the applicant proving the aforesaid conditions, the court then exercises its discretion to grant stay. The court ought to exercise its discretion in a manner that would not prevent the appeal from being heard and determined on its merits. In saying so, the respondents rely on the case of **Bhutt vs Rent Restriction Tribunal (1982) KLR 417.**

22. The respondents further submit that the applicant was categorical in his evidence that he was not claiming any property in the estate of the deceased. The Certificate of Confirmation of Grant as well as the Summons for Confirmation of grant do not bequeath any part of the estate to the applicant. Thus the applicant has failed to demonstrate what substantial or irreparable loss he stands to suffer if the orders for stay are not granted or rather what prejudice he is likely to suffer or how the appeal shall be rendered nugatory. In saying so, the respondents rely on the cases of **Adah Nyabook vs Uganda Holding Properties Limited (2012) and Daniel Chebutul Rotich & 2 Others vs Emirates Airlines Civil Case No. 368 of 2001** to support their contention that demonstrating substantial loss is the core of granting an order of stay.

23. The respondents contend that stay is not available in this instance because the trial court did not grant any positive order in favour of the respondents or as against the applicant which is capable of execution. Since then there is nothing to execute, there cannot be anything to stay. In saying so, the respondents rely on the cases of **In the Matter of the Estate of Muthoni Mbua (Deceased) John Mbua Muthoni – Peter Wangaruro Ndichu vs Ruth Muthini Kariuki and Titus Kiema vs North Eastern Welfare Society [2016] eKLR and Titus Kiema vs North Eastern Welfare Society [2016]eKLR. Further the respondents relied on the case of AG vs James Hoseah Gitau Mwara [2014] eKLR** to support their contention that before a court exercises its discretion to grant stay it must ask itself whether there is anything capable of being stayed in the ruling or decision sought to be impugned.

24. The respondents conclude by stating that the applicant has not demonstrated why stay of execution and subsequent proceedings in the trial court ought to be allowed. On the other hand, the respondents have tendered sufficient evidence and demonstrated reasons to show that the application is unmerited and ought to be dismissed with costs.

Issues for determination

25. After careful analysis, we humbly submit that the only issue for determination is whether the applicant has met the requisite for grant of stay of execution pending appeal.

The Law

Whether the Appellant has met the requisite for grant of stay of execution pending appeal.

26. The principles upon which the court may stay the execution of orders appealed from are well settled. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- a) The Court is satisfied that substantial loss may result to the 1st 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.**

27. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:

- 1. Substantial loss may result to him unless the order is made;*
- 2. That the application has been made without unreasonable delay; and*
- 3. 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.*

28. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.**
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.**

Whether Substantial loss has been demonstrated

29. Under this head, an Applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

Earlier on, Hancox JA in his ruling observed that:-

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

30. Before the magistrate’s court, the applicant represented the interests of a number of beneficiaries who testified in support of the applicant’s case. Although the applicant forfeited his right of inheritance in the estate for the reason that the deceased had given him land measuring four acres during his lifetime, the court cannot lose sight of the other beneficiaries who were riding on the back of the applicant. He was the 1st petitioner/co-administrator in the cause with one Rosaline Muteru who later became a protestor following the issue of letters of administration intestate.

31. An administrator is a driver of succession proceedings and may be regarded as the main party at the initial stage until protests and revocation proceedings are filed. This important position, leads me to opine that although the applicant did not get a share in the estate, he represents a number of beneficiaries who may also have been dissatisfied with the judgement and initiated or joined the applicant in filing this appeal. In this regard, I reach a finding that the applicant’s application for stay carries with it the interests of other beneficiaries.

32. If the grant was to be executed as the respondents are already in the process of doing so, it will render this appeal nugatory. In my considered view the execution of the grant will cause the beneficiaries who were dissatisfied with the judgement to suffer substantial loss. I am satisfied that the applicant has demonstrated substantial loss.

Whether application has been made without unreasonable delay.

33. Judgement herein was delivered on 21/1/2021 and the applicant filed the application for stay of execution and subsequent proceedings on 4/3/2021. He filed the Memorandum of Appeal on 16th February 2021. The application has been brought within two months’ time, which I consider timeous filing. As such, I am of the view that the application has been made without unreasonable delay.

Security of costs.

34. The applicant ought to satisfy the condition of security. In saying so, I rely on the following persuasive authorities. In the case of **Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

35. While in **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [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 of stay.”

36. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Being a succession cause, I am of the view that the applicant be ordered to deposit a reasonable sum so as to take responsibility of pursuing his appeal diligently to avoid delay that may deny the respondents enjoyment of the fruits of the judgement during the pendency of the appeal.

Conclusion:

37. Having satisfied the requisite conditions under Order 42 rule 6, I find this application merited and allow it on the following terms:-

- a) That orders for stay pending appeal are hereby granted
- b) That the applicant shall deposit security of Kenya Shillings Three Hundred Thousands (Kshs.300,000/=) in court within 30 days pending hearing and determination of the appeal and in default the stay orders will automatically lapse.
- c) That costs will be in the cause

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 10TH DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 10th day of JUNE 2021.