



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION APPEAL NO. 13 OF 2019**

**IN THE MATTER OF THE ESTATE OF LEAH NYAWIRA NJEGA (DECEASED)**

**PETER MURIITHI GICHURU.....APPLICANT/APPELLANT**

**VERSUS**

**ISAAC MUREITHI NJEGA.....RESPONDENT**

**RULING**

**Brief facts**

1. This application dated 29<sup>th</sup> September 2020 brought under **Order 42 Rule 6(1) and 51 Rule (1), (2), (3) & (4) Civil Procedure Rules** seeks for orders for stay of the proceedings in Nyeri Chief Magistrate's Succession Cause No. 346 of 2016 pending the appeal herein.
2. In opposition of the said application, the respondent filed a replying affidavit dated 9<sup>th</sup> October 2020.
3. The applicant filed a second affidavit dated 21<sup>st</sup> January 2021 to which the respondent claims was filed without leave of the court. The respondent urges this Honourable court to expunge the Supporting Affidavit from the record.

**The Applicant's Case**

4. It is the applicant's case that the appeal herein had already been filed and was ready for hearing. It is argued that this appeal raises serious issues of law and fact and has overwhelming chances of success and if the Honourable court herein does not stay the proceedings in the trial court, the appeal will be rendered nugatory.
5. The applicant contends that the issues for determination in the appeal herein go to the core of the trial court matter as it touches on whether the respondent was a child of the deceased and if her husband, who was the owner of the land, left him behind and if so then the respondent can administer or inherit the estate. On this basis, the applicant is ready and willing to volunteer himself to undertake a DNA test with the respondent to determine if the respondent is related to the deceased and her husband in any way.

**The Respondent's Case**

6. It is the respondent's case that contrary to what the applicant depones, the appeal is yet to be admitted for hearing and directions be given. Further typed proceedings are missing from the Record of Appeal which the respondent states is an attempt to deny the court the opportunity to decipher all the attempts. The respondent contends that the appeal is meant to delay the matter keeping in mind that the summons for revocation of grant filed on 22<sup>nd</sup> April 2018 is still pending. It was contended further that the appellant has made various attempts to delay the matter for instance he raised a preliminary objection on a day before the hearing of the summons for revocation, on the respondent's mental capacity however the preliminary objection was dismissed; upon dismissal of the preliminary objection, the appellant made an application to have the body of the deceased exhumed to determine whether the respondent is the biological son of the deceased, which the court declined and thereafter the applicant filed an application for stay of proceedings in the trial court which was dismissed on 29<sup>th</sup> November 2019. The appellant has now filed this application which demonstrates the appellant's attempts to frustrate the respondent's right to justice.
7. The respondent depones that he annexed to his replying affidavit a birth certificate showing the deceased was his mother, an affidavit sworn before a Commissioner for Oaths by the deceased Leah Nyawira Njega in which the deceased herself depones that the respondent was her son and an affidavit before a Commissioner for Oaths sworn by the appellant himself deposing to the fact that the respondent was the son of the deceased.
8. The respondent contends that despite the annexures amounting to proof that the deceased is the respondent's mother, the appellant is still

keen and bent on wasting the court's time which is a total abuse of the court process and violation of the respondent's rights under Article 159 of the Constitution which guarantees the respondent the right to have his case disposed of in a just, proportionate, expeditious and affordable manner.

9. The respondent invites the court to peruse the annexures of the replying affidavit opposing the applicant's application for exhumation and in the interest of justice, not to allow the application for stay of the proceedings because the applicant has failed to meet the threshold for granting stay of proceedings. Therefore, the application ought to be dismissed with costs.

10. The applicant further filed the second supporting affidavit dated 21<sup>st</sup> January 2021 in which the applicant contends that the deceased herein is his elder sister and was married to Joseph Njega Muriithi. They had no children and that Mr. Njega Muriithi died on 27<sup>th</sup> June 1996. The respondent is not a child of the deceased or of Mr. Njega Muriithi and the appellant states that he started seeing him in the deceased's home after the death of Mr. Njega Muriithi to which the appellant thought he was an employee or a visitor or a far off relative.

11. The appellant contends that he is ready to volunteer for a DNA Test to show that the respondent has no blood relationship with the deceased and thus no claim to the land that belonged to Mr. Njega Muriithi. He further contends that the birth certificate and baptism card provided are forgeries as his sister and her husband had no children.

12. The applicant contends that the respondent is an imposter and is being used by third parties to sell the deceased's land.

13. Parties hereby disposed of the application by way of written submissions.

### **The Applicant's Submissions**

14. The applicant submits that this being an application for stay of proceedings pending appeal, the jurisdiction of the court is derived from **Order 42 Rule 6 of the Civil Procedure Rules** and the inherent jurisdiction reserved under **Section 1A, 1B, and 3A of the Civil Procedure Act**. The applicant relies on the cases of **Wachira Waruru & Another vs Francis Oyatsi [2000] eKLR** and **Ezekiel Mule Musembi vs H. Young & Company [E.A.] Limited [2019]eKLR**.

15. The applicant contends that the orders appealed from the trial court were made on 27<sup>th</sup> September 2019. The Memorandum of Appeal was filed on 30<sup>th</sup> September 2019 and the application for stay on 29<sup>th</sup> September 2020. It was explained by the fact that the trial court case had not proceeded for hearing and the application was prompted by the fixing of the trial court matter on 30<sup>th</sup> September 2020 to take a hearing date. As such the application was filed promptly.

16. Moreover, the appellant submits that he has taken every step to prosecute the appeal as he has already filed the record of appeal. Thus, the appeal is ready for hearing any time the court gives a hearing date. As such, orders for stay would avoid duplicating efforts by this court with those of the below court and save precious judicial time. No prejudice will be suffered by the respondent should the orders sought be granted.

17. The applicant submits that the deceased never had a biological child nor did she adopt any children. Her husband died on 27<sup>th</sup> June 1996 and had no children with her either. The land comprising the estate belonged to her deceased's husband. Thus, the question of whether the respondent is related to the deceased and her husband by blood goes to the root of the trial court case. The appellant who is a brother to the late husband of the deceased herein and the deponent in the second supporting affidavit, Bernard Kiaru Kagotho are ready to volunteer for DNA tests if only to avoid the route of exhuming the deceased's remains. The applicant relies on the case of **In Re Estate of Cecilia Wanjiru Ndung'u (Deceased) [2013]eKLR** to support his argument.

18. The applicant submits that the respondent's documents have been falsified for example the birth certificate alleges he was born on 27<sup>th</sup> February 1993 but the date of registration is 26<sup>th</sup> April 2010 whereas the deceased's husband died on 27<sup>th</sup> June 1996. At the same time the birth certificate indicates the place of birth as Ngandu Sub Location, the Baptism Card indicates the place of birth as Karatina Hospital. Further, the birth certificate indicates he was born on 27<sup>th</sup> February 1993 while the baptism card indicates 28<sup>th</sup> February 1993.

19. The applicant contends that he has demonstrated why a DNA test is important in view of section 29 of the Law of Succession Act as read with section 3(2) of the Act. As such, the applicant states that the appeal has overwhelming chances of success and if the hearing in the trial court proceeds, the appeal would be rendered nugatory. Thus, a stay of proceedings should therefore be granted. The applicant relies on the case of **M.W.K. vs J. D. K. [2020] eKLR**.

20. The applicant concludes his submissions by praying that the application for stay be allowed as no prejudice will be occasioned to the respondent.

### **The Respondent's Submissions**

21. The respondent submits that the provisions of Order 42 Rule 6 of the Civil Procedure Rules have no place in an application for stay of proceedings. In saying so, the respondent relies on the case of **Kerugoya High Court Civil Appeal No. 326 of 2013 Kenya Power and Lighting Company vs Esther Wajiru Wokabi [2014] eKLR** and prays that this Honourable court finds the application herein inadequate and dismiss it with costs.

22. The respondent further submits that the applicant had presented a similar application on 30<sup>th</sup> September 2019 in the trial court seeking similar prayers as the ones sought herein. The trial court made its finding on 29<sup>th</sup> November 2019 thereby making this application res judicata under **section 7 of the Civil Procedure Act**.

23. The respondent submits that in the event the applicant relies on Order 42 Rule 6(2) of the Civil Procedure Rules which allows an application for stay in the trial court and the appellate court, the Honourable Court ought to find that the applicant cannot fall back on Order 42 Rule 6(2) of the Civil Procedure Rules. The respondent relies on the following authorities, **High Court Civil Appeal No. 326 of 2013 Kenya Power & Lighting Company Ltd vs Esther Wanjiru Wokabi and Maua CMCC No. 46 of 2017 James Mutembei vs Kenya Wildlife Service** which provide that Order 42 Rule 6(2) of the Civil Procedure Rules cannot come to the aid of an applicant who is seeking stay of proceedings.

24. The respondent submits that the applicant ought not to confuse the application herein with an application for stay of execution pending appeal, which is dealt with under Order 42 Rule 6(2) of the Civil Procedure Rules.

25. That notwithstanding, the respondent submits that the test for grant of stay of proceedings was set out in **Global Tours & Travel Limited Nairobi HC Winding up Cause No. 43 of 2000 and High Court of Kenya Civil Case No. 74 of 2011 Christopher Ndolo Mutuku vs CFC Stanbic Limited [2015] eKLR**. The principles to guide the court while determining whether to grant stay of proceedings are:-

- a. Whether an applicant has established that he /she has a prima facie arguable case;
- b. Whether the applicant has filed expeditiously' and
- c. Whether the applicant has established sufficient case to the satisfaction of the court that is in the interest of justice to grant the orders sought.

26. On whether the applicant has established a prima facie arguable case, the respondent contends that from the Memorandum of Appeal, the grounds of appeal are frivolous. The respondent further contends that he produced as proof, a birth certificate showing the deceased is his mother, a deposition/affidavit before a Commissioner for Oaths sworn by the deceased in which the deceased depones that the respondent is her son and an affidavit by the applicant deponing to the fact that the respondent is a son of the deceased. According to the respondent, the birth certificate is sufficient proof that the deceased is the mother to the respondent and the applicant has never legally challenged the birth certificate or impugned it or brought forth another showing otherwise. Additionally, the affidavits by the deceased and the applicant all point to the fact that the deceased is the mother of the respondent herein. What the applicant brought forth are unsubstantiated statements to the effect that the deceased never had any children. As such, the respondent submits that that these arguments by the applicant has shown a prima facie arguable appeal and that further being a biological child of a deceased is not the sole consideration in matters of succession.

27. The respondent relies on Section 29 of the Law of Succession Act and submits that he has shown that he is a dependant of the deceased till she passed on. Based on the foregoing, it is quite clear that the appeal herein is not arguable and thus fails on the 1<sup>st</sup> test of the requirements for granting stay of proceedings.

28. The respondent contends that the delay herein has not been explained. The ruling, the subject of the appeal for which the applicant is seeking stay of proceedings was delivered on 27<sup>th</sup> September 2019 and the application herein was filed on 29<sup>th</sup> September 2020, which is 1 year 2 days since the date of the ruling. In the event the applicant argues that he filed an application for stay of proceedings in the trial court, the ruling declining such stay was made on 29<sup>th</sup> November 2019, which is 11 months ago. The applicant has taken at least 11 months to file the application herein.

29. The respondent contends that the applicant may argue that court activities were scaled down due to covid 19 to justify the delay however downscaling of court activities took place as from 15<sup>th</sup> March 2020. Thus, the applicant ought to explain to the court why it took him almost one year to file the application herein. As such, the application herein was not filed expeditiously. The respondent relies on the case of **Muranga ELC 11 of 2017 Mukunya Mugo "A", Mukunya Mugo "B" vs Elizabeth Mugure Mukunya (2019) eKLR** to support his argument that the applicant does not meet the threshold of filing the application without undue delay.

30. The respondent further contends that it would not be in the interests of justice to stay the proceedings in the lower court pending the appeal herein and relies on the case of **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited**.

31. The respondent to support this contention firstly submits that the respondent initiated an application for Summons for Revocation of Grant filed on 22<sup>nd</sup> February 2018, while the applicant filed a preliminary objection challenging the mental capacity of the respondent, which preliminary objection was dismissed. The applicant subsequently thereafter filed an application seeking exhumation, stalling the hearing, which application was dismissed and then the applicant filed his application herein for stay of proceedings. The respondent contends that the applicant is bent on delaying this matter and precluding the respondent from pursuing the Summons for Revocation of Grant.

32. The respondent submits that just as the applicant is entitled to his right of appeal, the respondent is entitled to his case being determined without unreasonable delay. It has been 2 years 7 months since the respondent moved the court to revoke the grant but the applicant has been precluding the respondent from pursuing his application to the hearing stage. Further if the proceedings herein are stayed, the respondent's rights under Article 159 of the Constitution would be infringed.

33. The respondent concludes his submissions by stating that it would be in the best interest of justice if the trial court is allowed to proceed because any outcome of a DNA test on maternity would not change the proceedings herein.

#### **Issues for determination**

34. After careful analysis, the issues for determination are identified as follows:-

- a. Whether the second supporting affidavit is properly on record;
- b. Whether the applicant has met the prerequisite for grant of stay of proceedings pending appeal.

## **The Law**

### **Whether the Second Supporting Affidavit is properly on record.**

35. According to the applicant he filed a second supporting affidavit in respect to the application for stay on the basis that when he appeared before the Honourable Judge, the respondent had not filed a replying affidavit. The respondent though was given time, did not file a replying affidavit till 11<sup>th</sup> October 2020. And it is on this basis that the applicant filed a second supporting affidavit. The applicant relies on Order 50 of the Civil Procedure Rules and contends that leave is not required to file a further affidavit when a party has not responded to an application. The applicant further contends that the second supporting affidavit does not raise any new issues. Instead it fortifies the issues raised in paragraph 6 and 7 of the supporting affidavit.

36. The respondent on the other hand contends that the applicant did not seek leave of the court to file a Second Supporting Affidavit. He further contends that the said affidavit has no bearing to the application herein. He prays that the affidavit be expunged from the record.

37. On perusal of the court proceedings, the application herein was filed and certified as urgent on 30/9/2020 and an inter parties hearing was scheduled for 12/10/2020. On 12/10/2020, the respondent told the court that he had filed his replying affidavit that morning and a hearing date was scheduled for 25/11/2020. From the proceedings of 6/5/2021, the applicant states that he was not served with any replying affidavit despite the respondent stating that he served the applicant and the applicant appended a stamp. However, from the court record, it is evident that the replying affidavit was served upon the applicant's firm as there is a stamp appended on the copy of the said affidavit.

38. Upon considering the submissions of both parties, it is evident that the applicant did not seek leave to file the second supporting affidavit. Notably the applicant is thus in error in submitting that Order 51 of the Civil Procedure Order 51 Rules applies in the instance herein. Secondly, the applicant contends that the second Supporting Affidavit expounds on the issues raised in his supporting affidavit in particular paragraphs 6 and 7. Looking to the affidavit, it does not raise any new issues. Thus should the said affidavit be expunged from the record? I am guided by Article 159 (2) of the Constitution and hold the opinion that in the interest of justice and for the pursuit of the applicant placing his entire case before the court, I allow the second supporting affidavit and deem it as properly filed. I am keen to note that the respondent shall not be prejudiced any way as the affidavit does not raise any new issues and further from the replying affidavit and submissions the said issues have been addressed by the respondent. I am persuaded by the authority of **Assets Recovery Agency vs Charity Wangui Gethi & Another [2020] eKLR.**

### **Whether the applicant has met the prerequisite for grant of stay of proceedings pending appeal.**

39. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by **Ringera J in Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000:-**

**“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 so, 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.”**

40. Similarly the threshold for stay of proceedings has been illuminated in the passages in **Halsbury's Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332** that:-

**“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 proceedings 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 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.”**

41. It is evident that the applicant in the matter herein has brought his claim under Order 42 Rule 6 of the Civil Procedure Rules. At the very onset, it is prudent to establish that there is a difference between stay of execution pending appeal which is enshrined under Order 42 Rule 6 of the Civil Procedure Rules and stay of proceedings. The case of **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR** is instructive on this point. The court observed that:-

**“Having analysed the provisions of Order 42 Rule 6 of the Rules it is clear to me that the said provisions only apply to applications of stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to applications for stay of proceedings such as the application now before me. It is apparent from the face of the application and from the submissions made by the parties that counsel for both parties were operating on the mistaken belief that the conditions prescribed in Order 42 Rule 6(2) were also applicable to applications for stay of proceedings which is not the case.**

**Having made that finding, it is obvious that Order 42 Rule 6(2) cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations.”**

42. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-

- a. Whether the applicant has established that he/she has a prima facie arguable case;
- b. Whether the application was filed expeditiously; and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

**Whether the applicant has established that he/she has a prima facie arguable case**

43. On perusal of the Memorandum of Appeal exhibited, I am persuaded that the intended appeal is arguable. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. **Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR.**

**Whether the application was filed expeditiously**

44. Initially, the applicant filed a similar application for stay of proceedings in Nyeri Chief Magistrate’s Court Succession Number 346 of 2018 which application was dismissed on 29<sup>th</sup> November 2019. The applicant subsequently filed the current application on 29<sup>th</sup> September 2020.

45. According to the applicant, the Memorandum of Appeal was filed on 30<sup>th</sup> September 2019 from orders that were made on 27<sup>th</sup> September 2019. This application for stay of proceedings was made on 29<sup>th</sup> September 2020. The applicant contends that the delay is not inordinate and has been explained by the fact that the lower court case had not proceeded for hearing whereas the application was prompted by the fixing of the matter in the lower court on 30<sup>th</sup> September 2020. Notably, the applicant has not disclosed that he had filed a similar application for stay of proceedings in the lower court on 30/9/2019 which was declined. It is the respondent who notified this court of the matter

46. The applicant has not explained why it took him over one year to file the present application. In this regard, I am of the opinion that the application herein has not been filed expeditiously. I rely on the persuasive authority in **Pius Kawinzi Kithoka vs Jacinter Kavindu Makau [2012] eKLR** the court made the following observation:-

**“The applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the Court’s discretion. Equity does not aid the indolent.”**

47. I am of the considered view that the delay in filing this application is inordinate and has been explained.

**Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought**

48. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR** the court observed that:-

**“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”**

49. Notably it has been over 2 years and 7 months since the respondent filed his application for Summons for Revocation of Grant however the same has never proceeded because the applicant has stalled the justice system by delaying this case.

50. I am of the opinion this application for stay of proceedings if allowed will cause further delay in determination of this matter thereby occasioning prejudice to the respondent. In my view, it would serve the best interests of justice if the matter were to proceed in the lower court to ventilate the issues as opposed to staying the proceedings.

**Whether the application herein is res judicata**

51. The respondent contends that the application herein is res judicata because the applicant filed an earlier similar application in the lower court and then subsequently filed the present application seeking similar orders for stay.

52. In NIC Bank Kenya PLC vs Joshua Onani Ogembo [2018] eKLR the court observed:-

**“The applicant has explained that they sought the said order in the lower court and it was denied. From the sequence of events as narrated the applicant has shown they moved timeously in seeking the said order. The applicant seeks a chance to be heard. This is a right a party is entitled to unless it can be shown that a party is abusing the court process or is guilty of laches. In my view, the application is not res judicata as the applicant has moved to the High Court seeking orders it was denied in the lower court. No prejudice shall be caused to the respondent if the stay is granted.”**

53. I am persuaded by the above authority and I hold the opinion that the application herein is not *res judicata*.

54. Turning now to the argument that if the application is not allowed the appeal will be rendered nugatory, I rely on the cases of David Morton Silversten vs Atsango Chesoni Civil Application No. Nai 189 of 2001 [2002] 1 KLR 867; [2002] 1EA 296 the Court of Appeal citing Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No. NAI 50 of 2001 held that it is not the law that a stay of proceedings cannot be granted but each case depends on its own facts. In Niazons (Kenya) Ltd vs China Road & Bridge Corporation (Kenya) Ltd Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno J (as he then was) held that:-

**“Where the appeal may have serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted.”**

55. I hold the view that by declining this application the appeal will not be rendered nugatory or the exercise futile because the suit has not been heard and determined. The appellant still has a chance of filing an appeal should he be dissatisfied with the final judgement.

### **Conclusion**

56. It is my considered view that this application has no merit and it is hereby dismissed with costs.

57. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 10<sup>th</sup> day of June 2021.**