



**REPUBLIC OF KENYA**

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

**SUCC CAUSE NO. 222 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE JESANG TABARGA TIGOI (DECEASED)**

**BETWEEN**

**ELIJAH CHERUIYOT.....1<sup>ST</sup> PETITIONERS**

**WILSON KIPKEMBOI KILI.....2<sup>ND</sup> PETITIONERS**

**AND**

**AGGREY KIKAYA.....RESPONDENT**

**RULING**

Before me are Summons dated 17<sup>th</sup> November, 2020 by the Respondent who seeks for the following orders;

**1. Spent**

**2. That there be stay of execution of the preservative orders made on the 3<sup>rd</sup> of November, 2020 pending the hearing and determination of this application in the first instance.**

**3. That there be stay of execution of the preservative orders made on the 3<sup>rd</sup> November, 2020 pending the hearing and determination of an intended appeal to the court of appeal.**

**4. That the Respondent be granted leave to appeal against the ruling delivered on 3<sup>rd</sup> November, 2020 to the Court of Appeal.**

**5. That costs of this motion be provided for.**

The application is supported by grounds on the face thereof as well as by a supporting affidavit of the Respondent sworn on even date and which raises the following issues:-

**1. That the Respondent is the administrator of the Estate of the late HESBON KIKAYA AMBOGA (deceased)**

**2. That this court on 3<sup>rd</sup> November, 2020 did deliver its ruling on the application by the petitioners seeking preservative orders.**

**3. That the court allowed the application.**

**4. That as the administrator of the estate of the late HESBON KIKAYA AMBOGA (deceased) I am aggrieved by the decision.**

**5. That I have prepared a notice of appeal and applied for certified proceedings in readiness for appeal.**

**6. That since no automatic right of appeal exists it has become necessary to seek leave.**

**7. That my intended appeal has merit as I will be raising the following matter before the Court of Appeal to wit;**

**a) The court had no jurisdiction to grant an order preserving the estate as under section 45 of the Law of Succession, Cap 160 no free property existed since the entire estate had been distributed by the confirmed grant.**

b) *The Court had no jurisdiction to grant the orders as the court having addressed the administration of the estate to conclusion it was functus officio.*

c) *The court had no jurisdiction to entertain the application as the issue of the purchase by the estate of the late HESBON KIKAYA AMBOGA and interference with the 0.23 acres can only be resolved by the Environment and Land Court.*

8. *That the order as issued has the effect of interfering with interests that have accrued on the 0.23 acres since purchase in 1999 which is over 21 years now.*

9. *That it is necessary that the order be stayed pending this application and the intended appeal.*

The application was opposed by the Petitioners through a Replying Affidavit sworn on 19<sup>th</sup> November, 2020 by the 1<sup>st</sup> Petitioner Elijah Cheruiyot Kili. The gist of the said Replying Affidavit is that this instant application is bad in law and lacking in merit. The Petitioners aver that the orders being sought by the Respondent/Applicant are untenable in law and cannot be issued as this court is functus officio. Further, the Petitioners aver that this instant application is not tenable as the Respondent has not annexed a draft Memorandum of Appeal. The Petitioners also contend that this application does not satisfy the threshold for grant of stay pending appeal as per the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010. Further, the Petitioners contend that the Respondent has not demonstrated the loss or prejudice he will suffer if the orders of stay are not granted.

The application was canvassed by way of written submissions. The Respondent filed written submissions on 23<sup>rd</sup> April, 2021. The Respondent submits that he intends to pursue an appeal against this court's ruling delivered on 3<sup>rd</sup> November, 2020. This is in line with this court's jurisdiction to grant preservative orders after the confirmation of grant as no free property belonging to the deceased exists. Further, the Respondent submits that this court had become functus officio upon confirmation of the said grant. The Respondent also contends that, this Court lacked jurisdiction to deal the issue of purchase and occupation of the suit property which falls within the exclusive mandate of the Environment and Land Court. The Respondent relied on the case of Rhoda Wairimu Karanja & Another V Mary Wangui Karanja & Another (2014) eKLR to buttress his submissions.

It is the Respondent's submission that he has a meritorious and arguable appeal with high chances of success which will be rendered nugatory if the orders sought are not granted. In support of his submissions, he relied on the following decisions; Re Estate of Kamau Ng'ang'a (deceased) (2012) eKLR, Nduhiu Gitahi and Another V Ann Wambui Warugongo (1988) 2 KAR and Butt V Rent Restriction Tribunal (1982).

On the issue of security for costs, the Respondent submitted that the orders made are not in the nature of a money decree therefore the Respondent is not required to comply with any monetary obligation. He invited this court to be guided by the decision in Re Estate of David Kiongera Kinyanjui (deceased) (2018) eKLR.

The Petitioners also filed their written submission on 9<sup>th</sup> February, 2021. They urged this Court to be guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules that sets out the conditions to be met by an applicant before granting stay of execution pending appeal. Further, they submitted that an application for stay pending appeal is purely discretionary and any party seeking to benefit from it must sufficiently satisfy all the conditions set. They cited the case of Equity Bank Ltd Vs. Taiga Adams Company Ltd (2006) eKLR in support of their submission.

Further, the Petitioners argued that the Respondent herein has not tendered any evidence to show the substantial loss or prejudice that would be occasioned if the orders sought are not granted. They cited the case of Stephen Wanjohi Vs. Central Glass Industries Ltd HCC 6726/91 in support of their arguments.

Further, the Petitioners submitted that the averments by the Respondent that the intended appeal has a high chance of success and therefore a sufficient ground to warrant stay is only tantamount to arguing an appeal at this interlocutory stage. Reference was made to the decisions in; Jason Ngumba Kagu & 2 Others Vs. Intra Africa Assurance Co. Limited (2014) eKLR and Pamela Malutu Vs. Jimmy Nandwa & Another

Lastly, the Petitioners submitted that the Respondent herein has not met the threshold set in the case of Giella Vs. Cassman Brown Co. Ltd 1973 E.A. 358 to warrant grant of the orders sought.

#### **ANALYSIS AND DETERMINATION**

I have considered the application, the response thereto, and submissions by both parties. The conditions for granting of stay of execution pending appeal are well settled. An order for stay is a discretionary remedy. The discretion is however, circumscribed by the conditions set out under **Order 42, Rule 6** of the Civil Procedure Rules. These are that the application should be made without undue delay; should show that substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court.

The Court will not issue any stay orders unless the two grounds set out in *sub-rules (a) and (b)* of *Order 42 Rule 6(2)* are satisfied. *Rule 6(2)* provides that:

**“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 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.”**

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 that of the successful 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. In that regard what is at stake in this cause is the distribution of the estate to the beneficiaries of the estates of the deceased persons. If the stay of execution is not granted, the Respondent argues that his late father's interests in the deceased's estate will be rendered nugatory.

#### **On the issue of substantial loss.**

The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not granted. On the issue, the court in *James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR* held;

**No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

The Respondent has alleged that he will suffer substantial loss if stay of execution of the preservative orders granted on 3<sup>rd</sup> November, 2020 is not granted. The Respondent has stated that he is the administrator of the estate of the late Hesbon Kikaya Amboga (deceased) who bought 0.23 acres of the land parcel known as **UASIN GISHU/NGENYILEL SCHEME/528** from the deceased's estate herein. The Respondent has attached a copy of a sale agreement to show that the deceased herein sold his late father the suit property. The Respondent claims a purchaser's interest in the deceased estate which he alleges that if stay is not granted and the appeal succeeds, he will not be able to recover from the Petitioners herein. The Respondent, however has not tendered any evidence before this court to demonstrate the substantial loss he is likely to suffer if the orders sought are not granted.

The Respondent did not file a draft Memorandum of Appeal or state the grounds upon which he intends to appeal. It is therefore not possible for the court to assess the genuineness or arguability of the appeal.

In the circumstances of this case, it is actually difficult to see how the Respondent's intended appeal will be rendered nugatory if an order of stay is not granted. If the appeal were to resolve in the Respondent's favour, the Petitioners herein can be called upon to compensate the Respondent by way of damages. As the Court reiterated in *Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others (2013) eKLR*

**“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”** (Emphasis added).

#### **On the issue of security.**

As regards the furnishing of security, this is not a monetary claim hence security does not apply.

#### **On whether there was inordinate delay**

The Ruling of this Court was made on 3<sup>rd</sup> November, 2020. This application was filed on 17<sup>th</sup> November, 2020. The Notice of Appeal was filed on 12<sup>th</sup> November, 2020. I find that the Respondent's application was filed without unreasonable delay.

In view of the foregoing, I am not persuaded that the Respondent's intended appeal will be rendered nugatory if stay of execution is not granted. Further, the Respondent herein has not availed any evidence before this court to show that, indeed he has lodged an appeal in the

Court of Appeal.

Accordingly, the Respondent application dated 17<sup>th</sup> November, 2020 is in want of merit and is dismissed with costs to the Petitioners.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 14<sup>th</sup> day of July, 2021.**

In the presence of:-

Mr. Kibichy for the Petitioners.

Mr. Mogambi for the respondent

Ms Gladys – Court assistant