



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. APPLICATION NO. E002 OF 2021

IN THE MATTER OF THE ESTATE OF JOHN NDUNGU MUBIA (DECEASED)

MARY NJOKI NDUNGU.....APPLICANT

VERSUS

ELIJAH NGUNJIRI MUBIA.....1<sup>ST</sup> RESPONDENT

JOHN NDIRANGU KIRAGURI.....2<sup>ND</sup> RESPONDENT

LAYFIELD JOHNSON MURIITHI.....3<sup>RD</sup> RESPONDENT

RULING

**Brief facts**

1. This application dated 1<sup>st</sup> March 2021 is brought under **Rules 49 and 63 of the Probate and Administration Rules and Order 42 Rule 6 of the Civil Procedure Rules**. It seeks for orders of stay of execution of the decree in Nyeri Chief Magistrate Succession Cause No. 673 of 2018 and for orders for extension of time to file an appeal against the judgment delivered on 6<sup>th</sup> January 2021.
2. In opposition of the said application, the 1<sup>st</sup> and 3<sup>rd</sup> respondents have filed Replying Affidavits dated 19<sup>th</sup> March 2021 and 12<sup>th</sup> August 2021 respectively.

**The Applicant's Case**

3. It is the applicant's case that judgement was delivered on 6/01/2021 and being aggrieved by the decision of the trial court, the applicant gave instructions to lodge an appeal but the statutory period to file an appeal had already lapsed.
4. The applicant contends that she was not financially empowered to lodge an appeal after delivery of judgement. The applicant states that it is in the interest of justice that she be granted an enlargement of time to file an appeal as she has an arguable appeal with a high probability of success. Additionally, she argues that if leave and stay of execution is denied, it shall render the intended appeal nugatory and she is likely to suffer substantial loss as she will be deprived of her right to own property.
5. The applicant states that the purpose of stay of execution pending appeal is to preserve the subject matter, in this case, L.R. No. TETU/KARAIHU/235 and that she is ready to abide with the conditions set by the court for grant of stay of execution. She believes that the respondents will not suffer any prejudice if stay of execution pending appeal is granted.

**The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Case**

6. It is the 1<sup>st</sup> respondent's case that the application is bad in law, incompetent and an abuse of the court process as it is premised on the wrong provisions of the law. The 1<sup>st</sup> respondent contends that contrary to Order 42 Rule 6 of the Civil Procedure Rules, the applicant has not brought this application without unreasonable delay and she has not demonstrated how she stands to suffer any substantial loss. In any event, the 1<sup>st</sup> respondent states that the application being grounded on **Order 42 Rule 6 of the Civil Procedure Rules** is a misapprehension of law as the Law of Succession Act is a sui generis law that does not require the aid of any other law.
7. The 1<sup>st</sup> respondent argues that the applicant did not seek leave to appeal at the time the judgment was read in open court and thus the filing

of the intended appeal ought to be refused on that ground. Further, no decree has been first extracted before execution and as such there is no threat of execution at the moment. The suit property remains intact and no one has been deprived of their right as all the members of the family have their own portions of land where they live and work on.

8. The 1<sup>st</sup> respondent further states that the applicant is delaying this matter in order to forestall the distribution of the estate in terms of the judgment.

### **The 3<sup>rd</sup> Respondent's Case**

9. The 3<sup>rd</sup> respondent states that the application is an afterthought and is meant to delay the execution of the lower court judgment. The 3<sup>rd</sup> respondent contends that the applicant had a counsel in the lower court and for her to argue that she did not have funds to engage an advocate is untrue.

10. The 3<sup>rd</sup> respondent states that although the applicant was given time to refund his money, she did not do so. As a sign of good faith, the applicant ought to be ordered to deposit the sum of money in an interest earning account.

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

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

12. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules** the case of **Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others** to argue that she has satisfied the conditions laid out in granting stay of execution pending appeal. The applicant argues that the appeal is arguable as the probate court has no jurisdiction to determine issues of customary trust and adverse possession. She relies on the case of **High Court Nairobi, Succession Cause No. 864 of 1996, In the Matter of the Estate of Mbai Wainana (Deceased)** to support her contention.

13. The applicant submits that if stay is not granted and the appeal succeeds, the appeal would be rendered nugatory. The applicant intends to appeal against the entire judgment of the trial court which held that the deceased indebted to the 3<sup>rd</sup> protestor and granted the 3<sup>rd</sup> protestor access to have his entire debt cleared by the administrator within 90 days failure to which the 3<sup>rd</sup> protestor may realize the security as per the agreement from the petitioner's portion of land. The applicant states that she stands to suffer substantial loss given the 90 day period within which to pay the 3<sup>rd</sup> protestor's loan of Kshs. 153,000/-, a decision which the applicant intends on appealing entirely.

14. The applicant relies on **Section 79G of the Civil Procedure Act** and submits that the delay in filing the appeal is due to lack of funds to cater for legal fees. She further states that the delay in filing the application is not inordinate as judgment was delivered on 6<sup>th</sup> January 2021 and the application was filed on 1<sup>st</sup> March 2021. The applicant submits that her application has merit and the same ought to be allowed.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

15. The 1<sup>st</sup> and 2<sup>nd</sup> respondent reiterate what they have deponed in the replying affidavit and add that the applicant has not satisfied the conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules**. Further that the applicant does not stand to suffer any substantial loss as everyone has their own portion of land to which they are in occupation of. Further that the reasons for delay are not sufficient as the applicant could have filed the appeal on her own and seek counsel later. Lastly no security has been offered by the applicant. As such the respondents pray that the application fails.

16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the applicant has not sought leave to appeal. The right to appeal in succession matters is not automatic and the respondents rely on the case of **John Mwita Murimi & 2 Others vs Mwikabe Chacha Mwita & Another [2019] eKLR** to support their contention. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that through this may be perceived as a technicality under **Article 159 (2)(d) of the Constitution**, the court should pay due regard to procedure which ought to be followed by litigants. The respondents rely on the case of **Moses Mwiagi and 14 Others vs IEBC and 5 Others (2016) eKLR** to buttress this point.

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents state that the applicant has not met the conditions set out to file an appeal out of time as developed in the case of **Mwangi vs Kenya Airways Limited [2003] eKLR**. The respondents argue that the appeal has no basis and the applicant has not demonstrated any loss that she stands to suffer and further state that they are the ones who have been in occupation of parcel of land for years. As such it is the respondents who are likely to suffer loss if the orders sought are granted.

18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents rely on the cases of **Titus Kiema vs North Eastern Welfare Society [2016] eKLR** and **AG vs James Hoseah Gitau Mwara [2014] eKLR** and submit that there is nothing to stay as no decree has been extracted and there is no threat of execution. Further that the prayers in the said application are premature and based on unfounded fear of execution and in any event the suit property is intact and shall remain as such. The respondents rely on the case of **RWW vs EKW [2019]eKLR** and submit that the purpose of stay is to preserve the subject matter of the dispute and that in any event, the respondents claim that they are the biggest losers in the instant case as they were born and raised on the suit property. The applicant's husband was registered on the land back in 1960 to hold the land in trust of the family and that is why the family still resides there. The respondents further state that before their mother died, the property was in the process of being transferred to each family member as everyone had their rightful share only for the applicants' family to change their mind once she passed on.

### **Issues for determination**

19. After careful analysis, the main issues for determination are:

- a. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;
- b. Whether the applicant ought to be granted leave to appeal out of time.

### The Law

#### **Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

20. 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:-

**1. “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.**

**2. 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 1<sup>st</sup> 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.**

21. 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/her 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.

22. 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:-

**3. 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.**

**4. 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.**

**5. 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.**

**6. 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.**

### Substantial loss

23. 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.**

24. 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.”**

25. The applicant states that she will suffer substantial loss as L.R. No. TETU/KARAIHU/235 shall be transmitted and partitioned to the detriment of the applicant. She contends that she intends to appeal the decision of the trial court to the effect that distribution of the suit property should be as per the sketch and mutation forms which were prepared by the deceased back in 1990.

26. The effect of implementation of the grant is that the land L.R TETU/KARAIHU/235 will be subdivided and each beneficiary takes their share. The applicant is already aggrieved by the judgment of the magistrate. If the orders are denied, the applicant is likely to suffer loss in the event that her appeal is successful.

27. I am of the considered view that the applicant has demonstrated that she will suffer substantial loss.

**The application has been made without unreasonable delay.**

28. Judgment was delivered on 6<sup>th</sup> January 2021 and the applicant has brought the present application on 1<sup>st</sup> March 2021. This is around 3 weeks out of the statutory time for filing an appeal. Though the delay may not be inordinate, the reasons for the delay are not plausible. The applicant claims the delay was caused by financial constraints on her part. The respondents on the other hand state that there was nothing stopping the applicant from lodging the appeal on her own and thereafter seeking counsel when she obtained the funds. The respondent have not produced any evidence to the contrary on the applicant’s financial position. After all, the delay of 21 days is not inordinate and ought not to lead to denial of the applicant’s right to appeal.

**Security of costs.**

29. The applicant ought to satisfy the condition of security. In the persuasive case of **Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

**“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.**

**Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....**

**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.”**

30. Similarly in **Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

**“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may**

ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

31. 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. Notably, the applicant has deposed in her affidavit that she is willing to abide by the terms set by the court in granting stay.

32. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of **Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR** where the Court upheld the decision of **Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991** and stated that:

**“That right of appeal must be balanced against an equally weighty rigid right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”**

33. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondents their right of enjoying their judgment. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents they stand to suffer prejudice if the orders sought are granted as they were born and raised on the suit property. It is argued that there is no threat of execution and in any event, the suit property is intact and shall remain so because all the members have their own portions of land that they use without interfering with each other’s rights. The distribution of the estate as is will not leave any party destitute. In that regard, I find that on a balance of interests it would prejudice the applicant more for she will have lost the right to challenge the judge merit.

#### **Whether the applicant ought to be granted leave to appeal out of time.**

34. It is trite law that the powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

35. The law on extension of time is to be found in **Section 95 of the Civil Procedure Act** which states as follows:

**Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**

36. **Section 79G of the Civil Procedure Act** provides:-

**Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.**

The parameters for the exercise of a court’s discretion have been concisely laid out in the case of **Mwangi vs Kenya Airways Ltd [2003] eKLR** where the Court of Appeal expressed itself thus:-

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are; first, the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”**

#### **The length and reason for the delay.**

38. I have mentioned earlier that the delay was less than one(1) month and has been explained in the foregoing analysis.

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

39. 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.**

40. On perusal of the Draft Memorandum of Appeal, the appeal raises bona fide points worthy of consideration by the appellate court. Without going to the merits of the appeal, the applicant has raised issues of jurisdiction of the probate court which I believe are arguable in the appellate court.

#### **The degree of prejudice to the respondents if the application is granted.**

41. As discussed above, I hold the view that the respondents shall not suffer prejudice if the application herein is allowed.

**Conclusion**

42. Consequently, I am of the considered view that this application has merit and is hereby allowed in the following terms:-

- a. That the applicant is hereby granted leave of seven(7) days to file appeal out of time in default of which the orders will be automatically vacated.
- b. That the orders for stay pending filing and determination of the appeal are hereby granted on condition that the applicant deposits within thirty(30) days Kshs.300,000/= in court as security for costs.
- c. That the costs of this application shall be in the cause.

43.It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 14<sup>th</sup> day of OCTOBER 2021**