



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MARSABIT
SUCCESSION CAUSE NO.8 OF 2018
IN THE MATTER OF THE ESTATE OF RICHARD CHURKO
STEPHEN 'alias' RICHARD CHURKO GUYO (DECEASED)

GRACE WAMBUI NGUGI.....1ST OBJECTOR/RESPONDENT

NANCY SHALLO CHURKO.....2ND OBJECTOR/RESPONDENT

COLLINS GUYO STEPHEN.....3RD OBJECTOR/RESPONDENT

VERSUS

FATUMA GALGALO GUYO.....PETITIONER/APPLICANT

AND

ZACHARIA GUYO GUMI.....INTERESTED PARTY

RULING

1. The petitioner/Applicant has filed a notice of motion dated 17th January 2020 seeking for orders for stay of execution of this court's judgment delivered by Chitembwe J. on the 24th September 2019. The grounds in support of the application are that the applicant has filed an appeal against the judgment at the Court of Appeal at Nyeri, being Civil Appeal No.311 of 2019, which appeal is yet to be heard. That the 1st respondent herein has issued a notice of mention of the matter in this court and the applicant is apprehensive that if any orders are issued by this court before the appeal is heard and determined she will suffer loss and prejudice.

2. The application was opposed by the 1st respondent on the grounds that there has been unexplained delay in filing the application. That the 1st respondent has made a formal application for the confirmation of grant of letters of administration issued by this court. That there is no substantial loss that would accrue to the applicant if the grant is confirmed. That the greater part of the estate of the deceased comprises of liquid assets and that the respondents are capable of refunding any cash allocated to them in the unlikely event that the appeal succeeds. That the application has been brought for the whole purpose of delaying the completion of the proceedings herein thus allowing the applicant to continue wasting the estate and to continue enjoying the deceased's monthly pension to the exclusion of the respondents. That it is therefore the respondents who stand to suffer loss, damage and prejudice if the application is allowed.

3. The applicant was represented by **Mr. Momanyi, Advocate**, while the respondents were represented by **Mr. Kinyanjui, Advocate**. Mr Momanyi submitted that the appeal was filed within the required time and without any delay. That the applicant will be prejudiced by further proceedings in the case when the appeal is pending while the respondents will not suffer any prejudice as they have never at any time accessed the assets of the estate. Further that if the respondents are allowed to inherit the property of the estate the applicant will suffer substantial loss. That the respondents have not exhibited anything to show that they are in a position to refund any money allocated to them in the event that the appeal succeeds. That the estate properties are still in existence and hence security of the same is guaranteed. That the appeal will be rendered nugatory if the matter proceeds before the appeal is heard and determined.

4. Mr. Kinyanjui on his part submitted that the court has already made a finding as to who are the beneficiaries of the estate. That the applicant cannot be allowed to have the control of the estate solely because she has appealed. That the application is pre-mature in that the trial court in its judgment gave the parties 45 days to do valuation and inventory so that the court can give further directions on confirmation of grant. That the grant has not been confirmed and as such there is nothing to stay as distribution cannot occur.

5. Counsel submitted that there is no evidence of substantial loss disclosed in the notice of motion. That there is no evidence that the respondents are not capable of refunding the liquid assets allocated to them upon confirmation of grant. That the applicant has not offered any security in the event that the appeal fails. That a grant of stay of proceedings will derail and delay the expeditious conclusion of the succession cause.

6. The respondent relied on the following authorities where stay of execution was considered: **JMM V PM (2018)eKLR**, **Focin Motorcycle Co. Limited v Ann Wambui & Another (2018)eKLR**, **Superior Homes (Kenya) Limited v Musango Kithome (2018)eKLR** and **In re estate of Michael Kiarui Njoroge (deceased) (2019)eKLR**. Mr Momanyi on his part submitted that all the above cited cases involved money decrees as opposed to the matter in consideration which involves estate property.

7. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the advocates for the parties. The issues that were before the trial court were whether the 1st respondent and her children were wife and children of the deceased and whether they were beneficiaries of his estate. The trial court found in favour of the respondents and held that they were entitled to the share of the estate. The court made orders that the property of the estate be valued before the court makes final orders as to the distribution of the estate and confirmation of the grant. The applicant was aggrieved by the finding of the learned judge and filed an appeal, which appeal is pending determination before the Court of Appeal at Nyeri.

8. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the Civil Procedure Rules which requires an applicant seeking a stay of execution pending appeal to demonstrate that -

(a) Substantial loss may result to the applicant unless the order was made;

(b) The application was made without unreasonable delay; and

(c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.

9. A stay of execution should only be granted where sufficient cause is shown. In **Antoine Ndiaye v African Virtual University (2015)eKLR** Gikonyo J opined that -

...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...

10. Grant of stay of execution pending appeal is a discretion of the court. In **Butt v Rent Restriction Tribunal (1982) KLR** the court gave guidance on how such discretion should be exercised and held that -

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal court reverse the judge’s discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

11. It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In **RWW vs. EKW [2019] eKLR**, it was observed that:

“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 the success of a 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.

12. The above are the principles to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The judgment of the High Court in this matter was delivered on the 24th September 2019 and the notice of appeal filed with the court on the 1st October 2019. The memorandum of appeal was filed with the Court of Appeal on the 2nd December 2019. Though there was delay in filing the appeal the delay was, in my view, not inordinate.

13. The applicant contends that she will suffer substantial loss if the orders sought are not granted as the respondents will end up inheriting the estate property when they have no right to do so. The respondent on the other hand contends that there is no loss to be suffered as confirmation of the grant is yet to be done.

14. It is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In **Machira t/a Machira & Co. Advocates v East African Standard (No 2)** (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held that –

“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 ... 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.”

15. The High Court is yet to make final orders in this matter in respect to confirmation of grant. There is then no immediate risk of execution. I agree with the submission of the respondent that the application is pre-mature as there are no orders capable of being executed. The applicant has not established that she will suffer any loss, leave alone substantial loss, if the orders sought are not granted.

16. The other consideration is security. In the case of **Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** (2014) eKLR the court held that:

“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 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.”

The applicant in this matter has not offered any security in the event that the appeal fails. The condition of security has therefore not been met.

17. The upshot is that there is no merit in the application. The same is thereby dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 14TH DAY OF OCTOBER, 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

Miss Muthomi H/B Mr. Ondari - for Applicant

Mr. Kinyanjui - for Respondents

Parties: Applicant - Absent

Respondents Grace Wambui and Collins Guyo - Present

Interested Party - Absent

Court Assistant – Mr. Kashane

30 days Right of Appeal.