



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**SUCCESSION CAUSE NO. 25 OF 2017**

**[FORMERLY NAIROBI SUCCESSION CAUSE NO. 2301 OF 2019]**

**RE ESTATE OF JANET WAMBUI KIHU**

**FRANCIS NG'ANG'A KIHU.....APPLICANT**

**VERSUS**

**LISPAH WAHU KIMANI.....1<sup>ST</sup> RESPONDENT**

**HENRY KAMAU MACHARIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant (Francis Ng'ang'a Kihui) prays for *stay of execution* of the decree pending appeal.
2. By a judgment dated 6<sup>th</sup> February 2020, the High Court found that he was *not* entitled to a share of the deceased's land known as Loc. 5/Gitura/120. Instead, the property was to devolve to one Poline Wanjiku Nyoike for a life interest and in trust for her children.
3. The applicant was aggrieved and lodged a notice of appeal on 18<sup>th</sup> February 2020. A draft memorandum of appeal is annexed to his summons dated 3<sup>rd</sup> September 2020. In his deposition of even date, he avers that the intended appeal "*raises triable issues and has a high chance of success*". He deposes further at paragraph 6 that-

*Its (sic) is only right being a family matter that a stay order be issued for sanity to prevail and to protect the entity (sic) of the assets in the estate to avoid disharmony.*
4. The summons is contested through an affidavit sworn by Daniel Muchoki, the respondents' counsel, on 2<sup>nd</sup> September 2021. He avers that the notice of appeal was served out of time on 3<sup>rd</sup> March 2020. He contends that the summons has been made with substantial delay and was only served on his firm on 3<sup>rd</sup> June 2021. He opines that the intended appeal is hopeless.
5. On 26<sup>th</sup> October 2021, learned counsel for both parties consented that the summons be dispensed with by written submissions. The applicant lodged the submissions on the same day while those by the respondents were filed on 25<sup>th</sup> October 2021.
6. The summons is stated to be brought under **Article 159** of the **Constitution** and Rule 73 of the **Probate and Administration Rules**. The applicant is thus invoking the inherent power of the court to ensure that the ends of justice are not defeated.
7. However, in an application of this nature, the court will only grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.
8. In **Butt v Rent Restriction Tribunal** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Cotton L.J. in **Wilson v Church (No 2)** 12 Ch. D [1879] 454 at 459-

*I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory.*

9. I am satisfied that the applicant lodged his notice of appeal on 18<sup>th</sup> February 2020. By dint of Order 42 Rule 6 (4) of the **Civil Procedure Rules**, an appeal is deemed to have been filed under the Rules of the Court of Appeal. The applicant however does not contest that he failed to serve the notice within the prescribed time. The less I say about it the better.

10. On a plain reading of the grounds in the annexed draft memorandum of appeal, I cannot say with confidence that the intended appeal is arguable or has high chances of success as urged by the applicant. I say that *obiter* and without a formal finding.

11. Like I stated, the impugned judgment was delivered way back on 6<sup>th</sup> February 2020. Despite filing a notice of appeal on 18<sup>th</sup> February 2020, the present summons for stay was not filed until 3<sup>rd</sup> September 2020. It was also not served on the respondents until 3<sup>rd</sup> June 2021. There was thus a delay of nearly *seven months* from the date of the judgment to the filing of the instant summons. The applicant has not explained at all the reasons for the laches.

12. The test was well explained in **Ivita v Kyumbu** [1984] KLR 441: If the delay is *prolonged* and *ill-explained* it is *inexcusable*. I thus hold that the summons was presented with unreasonable delay.

13. In ground 2 of the summons, the applicant pleads that “*there is imminent threat*” of execution which would render the appeal nugatory. The affidavit in support does not attach any such evidence.

14. To be fair to the applicant, there is a pending summons by the respondents to have the Deputy Registrar execute the transfer instruments for the suit land. But it has no return date. The only other averment at paragraph 6 of the supporting affidavit is that being a family matter a stay should be granted “*for sanity to prevail and to protect the entity (sic) of the assets in the estate to avoid disharmony*”.

15. From the materials before the court now, I find that the applicant has failed to show that he will suffer substantial loss. In the end I am not satisfied that there is sufficient cause to stay execution of the decree.

16. The summons by the applicant dated 3<sup>rd</sup> September 2020 is accordingly *dismissed* but with *no* order on costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 7TH DAY OF DECEMBER 2021.**

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

Mr. Muchoki for the 1<sup>st</sup> and 2<sup>nd</sup> respondents instructed by Muchoki D. M. & Company Advocates.

No appearance by counsel for the applicant.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.