



**REPUBLIC OF KENYA**

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

**SUCCESSION APPEAL NO. E004 OF 2021**

**JANE WACUKA MBUGUA.....APPELLANT**

**VERSUS**

**ABRAHAM KIMELI KOSKEL.....1<sup>ST</sup> RESPONDENT**

**HARRY KIPKEMBOI KOSKEL.....2<sup>ND</sup> RESPONDENT**

**LYDIA CHEPCHIRCHIR KIPLAGAT.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling made by Hon. L.P. Kassan (Chief Magistrate) on 28<sup>th</sup> day of May, 2021 in Eldoret Chief Magistrate's Court Succession Cause No. 134 of 2019)*

**Coram: Hon. Justice R. Nyakundi, J**

**Ms. Cheruiyot Kirui & Company Advocates for the Objector**

**Ms. Chepseba Lagat & Company Advocates for the 1<sup>st</sup> Respondent**

**Ms. Mc Law Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**RULING**

The Applicant Lucy Wacuka Mbugua has filed an appeal and seeks a stay of proceedings in Eldoret CMCC No. 134 of 2019 pending the hearing and determination of the intended appeal. The sum of the reliefs sought are as premised in the notice of motion filed in court on 23<sup>rd</sup> June, 2021 expressed to be brought Under Order 42 Rules 6 of the Civil Procedure Rules and 3(A) of the Civil Procedure Act, Rule 49 and 73(1) of the Probate and Administration Rules. The reasons in support of the application constitute the following:

- i) That the Applicant herein being aggrieved by the ruling of the Hon. L.P. Kassan (Chief Magistrate) delivered on 28<sup>th</sup> May, 2021 in Eldoret CMC Succession Cause No. 134 of 2019 has since filed this appeal via a memorandum of appeal dated and filed 23<sup>rd</sup> June, 2021.**
- ii) That the said Memorandum of Appeal was duly served on the Respondents and the applicant has applied for certified proceedings and ruling to enable her compile a record of appeal.**
- iii) That the 1<sup>st</sup> Respondent has since filed summons for confirmation of grant issued to him as the administrator in the said cause and the same has been fixed for confirmation on 28<sup>th</sup> July, 2021.**
- iv) That the Applicant is apprehensive tht unless the orders sought herein are granted on priority basis the proceedings and confirmation of the grant will proceed rendering the appeal herein nugatory and an academic exercise.**
- v) That the applicant has raised triable issues in her appeal and the same has high chances of success hence the same shall be rendered nugatory if the orders sought are not granted.**
- vi) That is Application has been brought timely and without unreasonable delay.**

**vii) That unless the orders prayed are granted the Applicant will suffer irreparable and substantial loss and damage and no prejudice will be occasioned to the Respondents if the orders sought are granted.**

The Respondent and administrator to the **Estate of John Kibet Kipkosgei** now deceased has opposed the application for stay of proceedings in his replying affidavit dated 13<sup>th</sup> September, 2021 in which he averred as follows:

- a. That we did not involve her in the filing of the said summons as she is neither a beneficiary, a wife to my late brother Alfred Kiprop Kosgei nor a creditor of the said estate (annexed and marked AKK1 is a copy of the chief's letter dated 27<sup>th</sup> March, 2019)**
- b. That the Appellant failed to indicate that the deceased had other women with whom my late brother Alfred Kiprop Kosgei had other children with i.e. the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**
- c. That the Appellant herein seeks to reap where she did not sow and claiming property in the Estate of John Kibet Kipkosgei out of the estate for herself yet she is a stranger to the estate of John Kibet Kipkosgei.**
- d. That this application is brought in bad faith and I pray that it be dismissed.**

From the pleadings the notice of motion has two narratives. First, the Applicant having reviewed the impugned ruling canvasses that it will be prejudicial for the probate court to proceed with confirmation and distribution of the Estate without determining the issue of whether she is a dependant and beneficiary to the intestate Estate. Secondly, is the position taken by the Respondent adjudging the Applicant as a busy body not entitled to any share of survivorship to the deceased estate. I will therefore proceed to consider these facts and the applicable law.

**DETERMINATION: -**

The approach to be adopted by the court on application of this nature is as anchored under Order 42 Rule 6 of the Civil Procedure Rules. Some of the determinants to guide the court include: sufficient good cause, that the Applicant will suffer substantial loss which could not be compensated in damages, that there is proof the application was filed without undue delay, that if stay is not granted the appeal if successive would be rendered nugatory. See the principles in **Machira T/a Machira & Company Advocates -Vs- East African Standard, Butt Vs. Rent Restriction Tribunal (1979) eKLR Silverstar Vs. Chesoni (2002) eKLR 867**. In the case **Dynamics (Pty) Limited & Another -Vs- Daniel Vadivello & Another (2021) SCSC139 Vidot J** held “the grant of a stay of execution is a discretionary and equitable remedy”.

The question here to be answered is whether, if the confirmation of grant proceeds to the final stage including distribution the Applicant will run into the risk of suffering prejudice or injustice. In her affidavit the Applicant has made a case on the strength that the summons for confirmation as obtained and ordained by the Respondent omitted to recognize her as a legitimate dependant of the deceased. It was in that respect an application was filed for determination by the court on the material placed before it that she be enjoined as a spouse of the deceased. In that context in a ruling dated 28<sup>th</sup> May, 2021 the learned trial magistrate opined as follows:

**“To allow the prayed substitution would likely jeopardize the rights of the other two deceased's wives and their children. I shall strike a balance by dismissing the application and ordering parties interested in deceased property to follow up with deceased estate when it is confirmed. I shall maintain the status quo pending confirmation of the deceased estate. Each party shall pay own costs.”**

A cursory glance of the attached ruling to the affidavit gives an indication that the claim by the Applicant was only differed for consideration by the probate court after confirmation of grant. The degree of inquiry here taken verbatim from the ruling of the learned magistrate was a strand for that question relevant to inheritance to be established when the grant is already confirmed. That means the Applicant was given a lee way to re-agitate the same grounds over and over again in different sessions before the same court. It is also to be borne in mind that the nature of the issue emanating from an objection before confirmation should materially be decided on the merits and not to await confirmation of the grant. It is clear that the Applicant had a case to be argued and determined so that she can reap the fruits of the estate. I do not find it plausible that these circumstances warranted the objection to be heard and determined at the tail end of confirmation of grant. The risk of confirmation without a decisive order on whether she is a beneficiary or not might as well render the Applicant completely ruined with substantial loss not recoverable in damages.

For the reasons that the Applicant sought that grant of letters of administration obtained by the Administrator be set aside or revoked because it was fraudulently obtained was a matter for immediate consideration by the court. It is clear the particulars of claim raised serious allegation of deception against the administrator concerning the manner in which he obtained the grant of letters of administration to the deceased's estate could not wait to be resolved after confirmation. It is undisputed that the Applicant made a claim of beneficial interest to the deceased's real estate before further distribution to the other beneficiaries. These prevailing circumstances prompted the Applicant to move the court for a resolution as a lawful beneficiary of the deceased. The session magistrate had the opportunity to require proof by affidavit or viva voce evidence given by such other next of kin or heir to law as the case may be that the Applicant alongside others is a lawful beneficiary or not. Yet from the impugned ruling there is no evidence exhibited that the Applicant locus standi in the matter was fully ruled upon relating to the administration and the distribution of the estate. In the case of: **Attorney General Rivers Vs. Ude(2006) 6-7 S.C. 131: (2006) 17NWL (part 1008) 436 at 461: Oduste Vs. Odusote (1971) 1 ALL NLR 219 at 222 the court held that:**

**“Judicial discretion is a sacred power which inheres to a judge. It is an armour which the judge should employ judicially and judiciously to arrive at a just decision. Same should not be left to the whims and caprices of a party to the action. It is not in tandem with the dictates of public policy which demands, inter alia, that administration of justice shall be discharged without any form of prompting by the parties.”**

**It is clear that a judicial officer should exercise his discretion judicially and judiciously as well. See: University of Lagos Vs. Olaniyan (1985) 16 NSCC (Part 1) 98 at 113; Eronini Vs Iheuko (1989) 3SC (Part 1) 30 (1989) 2 NSCC (Part 1) 503 at 313;**

With regard to the application before the trial court in sum it was invited to rule on the issue of dependency of the Applicant in line with Section 29 of the Law of Succession Act. The effect of the ruling is that the issue was left in limbo pending the determination of the confirmation of grant. Let me say that the Applicant from the memorandum of appeal is aggrieved with that findings of fact and law by the learned trial magistrate. The complaint by the Applicant is that the Respondent failed to file respective affidavits to obtain grant in exclusion of her rights and interest. The effect of the declaration made by the trial court is that if subsequently the Applicant wins the appeal the beneficiaries of the estate could have shared out the estate denying her any entitlement as a beneficiary.

For the reasons I have just given I think that the question is whether the claim has no real prospect of succeeding on appeal? But the point which is of crucial importance is at what stage is to be the scope of that inquiry on whether the Applicant is a beneficiary or heir apparent to the estate of the deceased. I would approach that further question in this way the method by which issues of fact are tried before the lower court is different from appellate jurisdiction. After the normal processes of discovery and interrogatories have been completed the parties are allowed to lead evidence before the session magistrate. To that rule there are recognized exceptions when it comes to the appeals court. The factual matters relied upon in support of the recast Applicant's case are essentially the same as those relied upon to support the appeal before this court. The Applicant's case is strongly disputed by the Respondent. On appeal we rely mainly on written submissions in relation to the grounds framed in the memorandum of appeal. The court would then proceed to determine whether the trial court materially erred in fact and law? Second whether it was wrong to decide that there was no real issue with regard to the Applicant's case to be determined on merit. On the basis of these analysis the appeal is not wholly speculative. The Applicant has a good arguable case against the Respondent.

The question I ask myself is the procedure for determining the arguability of the claim which emanates at an interlocutory stage as shown by the record of the lower court. In my view if the issues are addressed by reference to the pleaded case the focus of the inquiry would be to advance a case by way of viva voce evidence in relation to the claim raised by the Applicant. Whilst one can understand that parties have a legitimate expectation to be heard on appeal, sometimes such an approach on interlocutory appeal may sometimes be wholly self-defeating and contrary to cost' efficient conduct of litigation. In order to determine whether the learned trial magistrate had erred sufficiently to justify the dismissal of the claim, as a court it's appropriate on the balance of convenience to revert the outstanding issue for trial to that same court. It follows therefore that though the court has jurisdiction to preserve the subject matter, pending the hearing and determination of the appeal that exercise of discretion dependent on the circumstances of this case in terms of the legal accords under Section 1(A), 1(B) and Section 3(A) of the Civil Procedure Act be distilled in the court of first instance. As a consequence the impugned ruling has no legal validity to confer rights on any of the parties.

This discussion would not be complete without a mention on the condition to furnish security for due performance of the decree. In the instant case the record sufficiently demonstrate a claim still under interrogation with no final judgment for the condition on security to be met by the Applicant. In line with the judicial discretion the twined rights of both parties can at the end of it all be vindicated without an order to furnish security for due performance of the decree. Moreover I take note that the value of substantive justice is in the hurdles on the locus standi of the Applicant and the outcome of the objection against the Administrator of the estate in question.

What comes from the foregoing is that the court has moved away from dispensing with the appeal questioning the legality and propriety of the impugned ruling to genuinely ask the lower court to deal with it in the interest of justice of the claimants. I have no hesitation to add that the merit of the Applicant's case as stated was not merely a generalization of issues but an alleged infringement of rights as an owner of a beneficial interest to the estate of the deceased. The initial approach of the court was to exercise the discretion for the issue to be considered by the administrator during the confirmation of grant. To my mind the reasonableness of the order as adverted to is a kind of discretion that did not hold the scales of justice evenly.

Having considered the circumstance of this case it is my considered view that the application for stay of execution pending hearing and determination of appeal has merit. However notwithstanding that the higher justice would be to refer the canvassing of the issues raised by the Applicant to the lower court to be retried afresh before another magistrate besides Hon. L. Kassan on a priority basis. The costs therefore will be in the cause. It is so ordered.

**DATED, SIGNED AND DISPATCHED VIA THE EMAILS AT ELDORET THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021.**

**(See Email: ([cheruiyotkiruicompany@gmail.com](mailto:cheruiyotkiruicompany@gmail.com)))**

**R. NYAKUNDI**

**JUDGE**