



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 856 OF 2014

IN THE MATTER OF THE ESTATE OF CHRISTOPHER NJOMO KAMAU (DECEASED)

MARION WAKANYI KAMAU.....1ST APPLICANT

MARY WANJIKU KAMAU.....2ND APPLICANT

PAULINE MUGURE NGENGA.....3RD APPLICANT

VERSUS

GERALDINE NDUTA NJOMO.....1ST RESPONDENT

RICHARD NG'ETHE WAMBUI.....2ND RESPONDENT

RULING

1. The Applicants through summons dated 26th July, 2019 seek two orders; that this Honourable Court do grant them leave to lodge an appeal to the Court of Appeal against the ruling delivered by Lady Justice L.A Achode on 25th June, 2019; and that there be a stay of execution of the Orders granted on 25th June, 2019 pending the hearing and determination of that Appeal.

2. The application is brought under the provisions of Rules 49, and 73 of the Probate and Administration Rules, Section 47, 82 and 83 of the Law of Succession Act, Section 5 of the Anatomy Act, Section 146 of the Public Health Act and Article 28, 31 and 40 of the Constitution of Kenya 2010. It is supported by an affidavit sworn by the 1st Applicant Marion Wakanyi Kamau, in her own behalf and on behalf of the second and third Applicants who are also co-administrators of the estate of the deceased herein.

3. Evidently, the Applicants are aggrieved with the court's decision of 25th June, 2019 and intend to appeal. They express apprehension that if stay orders are not granted, the appeal will be rendered nugatory as the remains of the deceased will be exhumed and they will suffer mental anguish. It was their position that the notice of appeal was filed within the prescribed 14 day period and the intended appeal has reasonable chance of success. In addition, they filed a draft memorandum of appeal to demonstrate this.

4. The 1st Respondent filed a replying affidavit dated 25th September, 2019 on his own behalf and on behalf of the 2nd respondent. The gist of the Replying Affidavit is that the application is bad in law and lacking in merit for failing to file and serve the memorandum of Appeal within the stipulated time as provided under the Court of Appeal Rules. The Respondents state that the Summons is intended to thwart their efforts to get a share of the estate of the deceased as beneficiaries while they still refuse to obey court orders of 25th June, 2019.

5. The application was canvassed by way of written submissions on the basis of the material filed by the respective parties. The applicants submitted that the High Court's jurisdiction to grant a stay of execution pending appeal is provided for under Order 41 rule 6 and Order 22 Rule 22 of the Civil Procedure Rules. They relied on the cases of **of Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai 15 of 1900[1990] KLR 365** and **Multimedia University and Another vs Professor Gitile N. Naituli [2014] eKLR** in support of their case.

6. The respondents submitted that Rule 82(1) of the Court of Appeal Rules 2010 which required an Appeal to be lodged within 60 days from the date the notice of Appeal was launched had not been complied with. Further, that the Applicants had not satisfied the conditions provided under Order 41 Rule 6 of the Civil Procedure Rules. They relied on the cases of **Nairobi Bottlers Limited v Antony Surre Lukeya [2016] eKLR** and **Kenya Shell Limited vs Kibiru [1986] KLR** in support of their case.

7. I have considered the application and the response thereto, and submissions by both counsels. In determining an application for leave to appeal the Court must consider whether there is an arguable case or serious question to be presented before the appellate Court. As regards the application for stay of execution, the usual principles for demonstration of substantial loss and that the appeal if successful would be rendered nugatory, must be considered.

8. The Applicants urge that the Court was wrong in granting orders to exhume the deceased's body with a view to carry out DNA test analysis. They argue that this would infringe on their rights to privacy, bodily integrity and human dignity provided under Articles 28 and 31 of the Constitution. Indeed, the Court ought to protect the Applicants rights to privacy under Art.31 in relation to 'information relating to their family or private affairs unnecessarily required or revealed'.

9. However, the Court must accept that it could be wrong, and it has been held repeatedly by the Court of Appeal that an arguable case for purposes of stay of execution need not be a case that must in the end succeed. I find that the Applicants may have an arguable case on the question whether the Article 28 and 31 were infringed in granting orders of exhumation of the deceased. I therefore accordingly, grant leave of court to appeal.

10. 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.

11. 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.”

12. The orders which the Applicants seek to stay execution thereof were made on 25th June, 2019 while the instant application seeking stay was filed on 26th July, 2019, within the statutory prescribed timeline after delivery of the said orders. In the circumstances, this court is satisfied that the application was made timeously and therefore has met the first limb of **Order 42 Rule 6(2) (a)** of the **Civil Procedure Rules**.

13. 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.

14. 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 Appellants with those of the Respondents. In that regard what is at stake in this cause is exhumation of the deceased to obtain necessary samples for purposes of carrying out Deoxyribonucleic Acid Test. If the stay of execution is not granted, the Respondents have orders in their favour to proceed with the exhumation process.

15. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in James Wangalwa & another v Agnes Naliaka Cheseto Misc. Application No 42 of 2011 [2012] eKLR.

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 Vs .Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. 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.”

16. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. If no stay of execution is granted, the exhumation and DNA testing, which is the very act objected to by the Applicants, will be done in accordance with the order of the Court made on 25th June, 2019. Their appeal, should it eventually succeed, will have been rendered nugatory

17. **Order 42 rule 6(2) (b)** grants the court powers to order the Applicants to provide security for the due performance of such decree as may ultimately be binding on them. In this case, the issue is exhumation of a body. No cost is being incurred by the Respondents pending the hearing and determination of the intended appeal. I therefore find no justifiable cause for the Applicants to provide security.

18. In balancing the interests of the Respondents to access Justice in an expedited determination of the civil process that leads to the enforcement of their right to inherit from their deceased father, if that be the case, against the Applicants' right to pursuit of appellate remedies, the Court finds that the application is merited and is therefore granted with the following orders:

I. A stay of execution is granted for 60 days to allow the Applicants to move the Court of Appeal for appropriate relief.

II. Costs will abide the final determination of the matter.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF FEBRUARY, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants

In the presence ofAdvocate for the Respondents