



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 48 OF 2017

IN THE MATTER OF THE ESTATE OF NASOTOKINI OLE SANE ALIAS NASOTOKIN LESANE – DECEASED

STEVEN NDUNGI KINYANJUI1ST OBJECTOR

GEORGE KARORI WAINAINA2ND OBJECTOR

VERSUS

RESIA ENE NASOTIKIN

NADUNG'U NASOTIKIN.....ADMINISTRATORS

SAKIMBA OLE LESANE

RULING

1. By summons dated and filed on 17th July, 2019, brought under section 47 of the Law of Succession Act, and rule 73 of the Probate and Administration Rules, the Administrators/Applicants have applied for stay of execution of the judgment and decree of this court, (**Nyakundi, J**), dated 7th June, 2019. The summons is supported by the affidavit of Sakimba Ole Lesane, the 3rd Applicant, sworn on the same day, 17th July, 2019.
2. The Applicants argue that they have an arguable appeal; that the Applicants and beneficiaries of the estate will be dispossessed and that if stay is not granted they will suffer irreparable loss.
3. The application is opposed by the Respondents through a replying affidavit by George Karori Wainaina, sworn on 8th October, 2019 and filed on 9th October, 2019. The Respondents on their part contend that the application is intended to delay conclusion of the matter and the subsequent transfer of the 16 acres decreed by the court. They therefore see no merit to the application and urge the court to dismiss it with costs.
4. During the hearing of the summons Mr. Kahia submitted that the Applicants intend to appeal against the decision of this court given on 7th June, 2019. According to counsel, the court gave a period of 90 days within which the Applicants were to comply with the judgment and, in default, the Respondents would be at liberty to execute. He argued that the application was filed on time and if stay is granted, it would cause no prejudice to the Respondents.
5. Counsel further argued that if stay is not granted and transfers are effected, should the appeal succeed, then it would require that the changes effected on the land be reversed, which would be an inconvenience and expensive.
6. Mr. Wachira, learned counsel for the 1st Respondent, opposed the application. He submitted that no memorandum of appeal has been filed; that no decree has been extracted and that the Applicants have not taken any steps to show that they are appealing against the decision. Mr. Mulali learned counsel for the 2nd Respondent associated himself with Mr. Wachira's submissions and urged the court to dismiss the application with costs.
7. I have considered the application, the responses thereto as well as the submissions by either side. This is an application for stay of execution. Whether or not to grant stay is a matter at the discretion of the court. Order 42 of the Civil Procedure Rules, confers on this court wide discretion to grant stay of execution where circumstances permit. There are, however, other considerations that the Court must take into account when considering an application for stay. Order 42 rule 6(1) and (2) provides;

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 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 order set aside.

2. No order of stay 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 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

8. In ***Butt v Rent Restriction Tribunal*** (Civil App No. NAI 6 of 1979), the Court of Appeal stated that;

i. 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.

ii. The general principal 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.

iii. 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.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

9. It is clear from Order 42 rule 6 as well as the above decision, that the Court, in considering an application for stay of execution, exercises judicial discretion which it should exercise judiciously. And whether or not to grant stay, the Court must consider the circumstances of the case, the essence being, to do justice to the parties.

10. The Applicants are dissatisfied with the decision of this court and want to exercise their statutory right of appeal. In the impugned judgment, the court ordered that some 16 acres be transferred to the Respondents within 90 days. In default the court ordered the Deputy Registrar of this court to execute documents to facilitate compliance with the decree.

11. The judgment requires the Applicants to give sixteen acres of land to the Respondents which are to be excised from the parcel of land, the subject of these succession proceedings. If execution takes place it means the applicant's appeal will face complications. Should the Court of Appeal overturn this court's decision, there would have to be a cancellation of the subdivisions already carried out and the transfers effected in execution of this court's decree.

12. In the circumstances, I do not find *overwhelming hindrance, to dissuade this court from granting stay so that the appeal, if filed may not be rendered nugatory. Rather, I am persuaded that it would be in the interest of justice to grant stay of execution, but on certain conditions.* This is so because from the reading of the judgment, it is clear that parties have still to go on and confirm the grant before distributing the estate. It will therefore be appropriate to obviate a situation where parties are held in abeyance indefinitely, not knowing when the Court of Appeal will determine the appeal that is yet to be lodged before it.

13. In that regard, it is important to separate the disputed 16 acres decreed in favour of the Respondents and preserve them, while allowing the rest of the property to be shared out upon confirmation of grant. This, in my view, will be in the best interested of all the parties to this dispute, so that none is disadvantaged and the quest for justice is not unnecessarily delayed.

14. Consequently, I allow the application and make the following orders

a) Stay of execution of the judgment and decree of this court dated 7th June 2019 is hereby granted.

b) The disputed 16 acres decreed in favour of the Respondents be separated from the estate to await the determination of any appeal by the Court of Appeal

c) The administrators do proceed with the summons for confirmation of grant excluding the 16 acres in (b) above.

d) Each party do bear their own costs for this application.

Dated, Signed and delivered at Kajiado this 7th day February 2020.

E.C. MWITA

JUDGE