



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**(CORAM: CHERERE-J)**  
**SUCCESSION CAUSE NO. 160 OF 2014**  
**IN THE MATTER OF THE ESTATE OF GIBSON HOSEA ATENG(DECEASED)**  
  
**BETWEEN**  
  
**RUFUS JUMA ATENG.....1<sup>ST</sup> PETITIONER/RESPONDENT**  
  
**SALOME ATIENO ADALA..2<sup>ND</sup>PETITIONER/RESPONDENT**  
  
**AND**  
  
**GIBSON OMONDI ATENG.....1<sup>ST</sup>OBJECTOR/APPLICANT**  
  
**JOYCE ACHIENG ATENG.....2<sup>ND</sup> OBJECTOR/APPLICANT**  
  
**RULING**

**Introduction**

1. By a judgment dated 03<sup>rd</sup> October, 2019, this court after hearing an objection by the Objectors/Applicants and the response by the Petitioners issued the following orders: **THAT**

**1. The objection has no merit and it is disallowed.**

**2. Since Reuben Odhiambo Onyango has declared that he has no interest in the deceased's estate, it is ordered that the deceased's estate shall devolve equally as follows:**

- a. ¼ to the family of SIMON PETER ONYANGO (deceased)**
- b. ¼ to the family of ELIAKIM HENRY OCHIENG (deceased)**
- c. ¼ to SALOME ATIENO ADALA (daughter)**
- d. ¼ to RUFUS JUMA ATENG' (son)**

**3. LR. NO. 37/113/4/DACC Road, Nairobi has elicited a lot of interest from each of the deceased's family members. It is impracticable that each one of them can adequately be accommodated into that property that comprises a residential house. The family of ELIAKIM HENRY OCHIENG who include the 2<sup>nd</sup> Objector/Applicant are currently in occupation of that property. The interest of justice dictates that the property be valued and sold and the proceeds thereof be shared into four equal parts, a piece for the benefit of the family of SIMON PETER ONYANGO (deceased); the family of ELIAKIM HENRY OCHIENG (deceased); SALOME ATIENO ADALA (daughter) and RUFUS JUMA ATENG' (son).**

4. The family of ELIAKIM HENRY OCHIENG (deceased son) shall have first priority amongst interested purchasers and shall remain in occupation of the property until the property is disposed off. This order is however subject to review in the event that the property has not been disposed off in the next 6 (six) months.

5. It has not come out clearly from the evidence how the parties intend to distribute Title No. I.R. 25550 (Original No. 37/326/237). If the same is not distributable, the same shall be valued and sold and the proceeds thereof be shared into four equal parts, a piece for the benefit of the family of SIMON PETER ONYANGO (deceased); the family of ELIAKIM HENRY OCHIENG (deceased); SALOME ATIENO ADALA (daughter) and RUFUS JUMA ATENG' (son).

6. This being a family matter, each party shall bear its own costs.

### Application

2. By a notice of motion dated 30<sup>th</sup> October, 2019 filed on even date brought under Order 42 rule 4 of the Civil Procedure Rules and Section 3A Civil Procedure Act, Applicants pray for orders **THAT:**

**1. Pending the hearing and determination of the intended appeal, there be a stay of execution of the judgment delivered on 03<sup>rd</sup> October, 2019**

**2. Costs be in the cause**

3. The application is based on the grounds among others that the Applicants are aggrieved by this court's judgment delivered on 03<sup>rd</sup> October, 2019; that valuation of **LR. NO. 37/113/4/DACC Road, Nairobi (disputed asset)** has been conducted and potential buyers identified and that the appeal shall be rendered nugatory if the Respondents proceed with the execution of the judgment.

4. The application is supported by an affidavit sworn and filed on 10<sup>th</sup> December, 2019 by **GIBSON OMONDI ATENG (1<sup>st</sup> Applicant)** in which he reiterates the grounds on the face of the application. Annexed to the affidavit is a copy of the impugned judgment and a notice of appeal filed on 15<sup>th</sup> October, 2019.

5. The application is opposed by the Respondents who state that the application is based on hearsay and is an abuse of the court process.

6. I have considered the application in the light of the supporting affidavit, the grounds of opposition and the written submissions filed by counsel for the parties.

7. The legal basis for grant of stay pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010** as espoused in **Kiplangat Kotuk Versus Rose Jebur Kipng'ok (2015) eKLR; Kenya Commercial Bank Limited Versus Sun City Properties Limited & 5 Others (2012) eKLR and Kenya Shell Limited Vs. Kibiru [1986] KLR** is that the Applicant is required to demonstrate that: -

**“Substantial loss may result unless the order is made. The application has been made without unreasonable delay. Such security as the court orders for the due performance of the decree has been given by the applicant.”**

8. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay.

9. I have considered **Mugahv Kunga (1988) KLR** where the Court of Appeal stated;

**“The practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort”.**

10. I have also considered **Mukuma v Abuoga [1988] KLR 645** where the Court of Appeal stated that;

**“Where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. .... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.....**

11. In the circumstances of this case, the Applicants who have been in occupation of **disputed asset** which this court found forms part of the deceased's estate have laid claim over that property and I have no doubt that the appeal is likely to be rendered nugatory in the event that the asset is disposed off before the intended appeal succeeds.

12. Whereas it is not my duty, at this stage, to determine if the Applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court's discretion under section 3A of **the Act** to afford the Applicants an opportunity to prosecute their intended appeal. From the foregoing, I am persuaded that the Applicants have made out a case for stay of execution.

13. Nonetheless, I am also minded to ensure that the *disputed asset* is preserved in a manner that would be beneficial to all the parties in the event that the appeal does not succeed.

14. Consequently, this court makes the following orders:

1. Pending the hearing and determination of the intended appeal, this court grants an order that there be a stay of execution of the judgment delivered on 03<sup>rd</sup> October, 2019

2. Pending the hearing and determination of the intended appeal, the Applicants shall have exclusive occupation and use of LR. NO. 37/113/4/DACC Road, Nairobi

3. The Applicants are as a result directed to deposit a monthly sum of Kshs. 20,000/- into an interest earning account in the name of both advocates w.e.f 10<sup>th</sup> May, 2010 being a nominal sum in respect of the occupation and use of LR. NO. 37/113/4/DACC Road, Nairobi

4. In the event that the appeal succeeds, the total sum paid by the Applicants and interest thereof shall be refunded to them but in the event that the appeal fails, the total sum and interest shall be distributed as follows:

e.  $\frac{1}{4}$  to the family of SIMON PETER ONYANGO (deceased)

f.  $\frac{1}{4}$  to the family of ELIAKIM HENRY OCHIENG (deceased), father and husband to the Applicants respectively

g.  $\frac{1}{4}$  to SALOME ATIENO ADALA (daughter)

h.  $\frac{1}{4}$  to RUFUS JUMA ATENG' (son)

5. Costs of this application shall abide the costs of the intended appeal

DATED THIS 14<sup>th</sup> DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistant - Ms. Amondi/Ms. Okodoi

For Applicants - Sala&Mudany& Co. Advocates

For Respondents - OtienoC.O.Ayayo& Co. Advocates

Order

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March, 2019.