



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1723 OF 2015

IN THE MATTER OF THE ESTATE OF BETH WAGO KIMANI (DECEASED)

AND

SUCCESSION CAUSE NO. 2814 OF 1997

IN THE MATTER OF THE ESTATE OF STEPHENSON NJUGUNA KIMANI (DECEASED)

BETWEEN

CATHERINE MUGURE NJOROGE.....1ST APPLICANT

RAHAB WAMBUI KAIRO.....2ND APPLICANT

AYUB MUHUNI KIMANI.....3RD APPLICANT

VERSUS

LOISE NJERI MUNA.....RESPONDENT

RULING

1. The Applicants through summons dated 16th September, 2019 seek a stay of execution of the Orders made on 29th April, 2019 pending the hearing and determination of the intended Appeal. The application is brought under the provisions of Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. It is supported by an affidavit sworn by the 1st Applicant Catherine Mugure Njoroge, on her own behalf and on behalf of the second and third Applicants who are also co-administrators of the estates of the deceased persons herein.

2. Evidently, the Applicants are aggrieved with the court's decision of 29th April, 2019 and intend to appeal. They express apprehension that if stay orders are not granted, the appeal will be rendered nugatory and they may suffer substantial loss. It is their position that the notice of appeal was filed within the prescribed 14 day period and the intended appeal has reasonable chances of success. They aver that they applied for typed proceedings to enable them compile the record of Appeal.

3. The Respondent filed a replying affidavit dated 17th October, 2019 stating that the applicants have blatantly refused to comply with the orders issued on 29th April, 2019. The Respondent avers that the summons is made in bad faith and intended to waste time and cause further wastage of the two estates. She argues that the application has been made very late in the day and there is no justification in the delay of 5 months before filing this application. She asserts that the applicants have not demonstrated the loss they will suffer, or the prejudice that will be occasioned if the stay orders are not granted. Further, she avers that the application does not satisfy the legal conditions for a grant of stay pending appeal having not provided security for costs.

4. The application was canvassed by way of written submissions on the basis of the material filed by the respective parties. The applicants submit that the High Court has power to grant a stay of execution pending appeal as provided for under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. They assert that they are likely to suffer substantial harm if the sum of Kshs. 2.9 million is distributed without first paying the outstanding outgoings. Further, that they have an arguable appeal which will be rendered nugatory if the stay orders are not granted and that this application was made without unreasonable delay. They rely on the case of the **estate of the late Wambui Njeru (deceased) [2018] eKLR** in support of their case.

5. The respondent submits that the Court should be guided by **Order 42 Rule 6** of the Civil Procedure Rules that governs stay of execution pending appeal. She asserts that the application herein was filed after 150 days since the order of court was made and the said delay has not

been explained, thus the court should not allow the application. She further submits that the Applicants have not produced evidence to show the loss or prejudice that would be occasioned if the orders sought are not granted. She asserts that the application does not meet the threshold for the orders sought to be granted and should be dismissed with costs. She relies on the cases of **Kenya Shell Limited vs Benjamin Karuga and Ruth Wairimu Karuga[1982-1988]KAR 108** and **Machira T/A Machira & Co. Advocates East African Standard(No. 2)[2002]KLR 63** in support of her case.

6. I have considered the application, the response thereto, and submissions by both counsels. 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.

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.”

7. 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.

8. 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 Respondent. In that regard what is at stake in this cause is the distribution of the sums of money to the beneficiaries of the estates of the deceased persons. If the stay of execution is not granted, the Applicants argue that if the sum is distributed, the estate will have no cash to pay outstanding expenses and if the appeal succeeds they will not be in a position to recover the funds.

9. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which Musinga, J (as he then was) explained substantial loss in the following terms:

‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’

10. In the circumstances of this cause the applicants allege that they will suffer substantial loss in the estate if money in the account is distributed to the beneficiaries in line with the orders of the court. The administrator’s duties and responsibilities are explicit and outlined in **Section 79, 82 and 83 of the Law of Succession Act Cap 160**.

All the property of the deceased vests in the administrators/executors. Their duties entails to;

- a. Enforce by suit all causes of action that survive the deceased,
- b. Sell or otherwise turn to account – where necessary or desirable in execution of their duties,
- c. Provide and pay out of the estate, expenses of a reasonable funeral of the deceased
- d. Get in all free property.
- e. Pay out of the estate all expenses.
- f. Ascertain and pay out of the estate of the deceased all his debts.
- g. Produce within 6 months to the court a full and accurate inventory of the assets and liabilities of the deceased.
- h. A full and accurate account of all dealings therewith up to the date of account.

11. It is the duty of the administrators who are the applicants herein to pay out all estate expenses before distribution of the estate and there after distribute to the beneficiaries the residue of the estate. The applicants argued that they are yet to pay out estate expenses and the distribution of the sum would make the estate bankrupt. However, I note that the estate has other assets which are available for distribution and include plots in Ruiru, Githurai and Galu Kinondo. The said plots are to be sold and the proceeds shared equally among beneficiaries of the estate.

12. The court is also not convinced by the applicants' argument that they have been preparing accounts of the estate and are likely to go bankrupt if the amount in question is distributed to the beneficiaries. The court notes that the two grants of the deceased persons were confirmed in October 2017 and October 2018 respectively. There has been more than sufficient time for the administrators to complete the process of distribution of the assets to the beneficiaries. This they have not done and no good reason has been advanced.

13. The assets and property in the estate is supposed to be distributed to the beneficiaries of the deceased. Consequently, this Court is unable to fathom what substantial loss will be occasioned to the Applicants if their prayer for stay of execution pending the filing of the intended appeal is not allowed. As regards the furnishing of security, this is not a monetary claim hence security does not apply.

14. Furthermore, the orders which the Applicants seek stay execution thereof were made on 29th April, 2019 while the instant application seeking stay was filed on 17th September, 2019 five (5) months after the order of the court was issued. The Applicants did not attempt to explain the delay in filing the Application. I therefore find that there was inordinate delay which has not been explained to the satisfaction of this Court.

15. In view of the foregoing, this court finds and holds that the circumstances of this cause are such that it cannot exercise its discretion to grant the orders sought, for to do so would not serve the interests of justice in the cause. The Applicants application is therefore found to lack merit and is hereby dismissed with costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 21ST DAY OF JULY, 2020.

L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants

In the presence ofAdvocate for the Respondents