



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO.304 OF 2007

IN THE MATTER OF THE ESTATE

OF TERIKI TAPKIGEN ROKOCHO.....DECEASED

KOBILLO CHEPKIYENG.....1ST PETITIONER

ESTHER KIPSAT.....2ND PETITIONER

VERSUS

ESTHER KABON ROKOCHO.....1ST OBJECTOR

WILSON KIPRONO ROKOCHO.....2ND OBJECTOR

RULING

1. The applicants moved this court by a notice of motion application dated 17.7.2019 seeking the following orders:

i. Spent

ii. That pending the inter-parties hearing this honorable court be pleased to stay further proceedings in this matter pending the hearing and determination of the intended appeal by the objector/applicants against the ruling and orders of this honorable court given on 10.7.2019

iii. That this court stays further proceedings in this matter pending the hearing and determination of the intended appeal by the applicants against the ruling and orders of the honorable court given on 10.7.2019

iv. That the court be pleased to give an interpretation and clarification of its orders dated 10.7.2019 in relation to dependency of the 2nd objector, whether the said orders determines the rights of the 2nd objector from benefiting from the deceased's estate without a hearing being conducted and whether the deceased's registration over that parcel of land known as SOY/SOY BLOCK 6(Kongasis)/6 is illegal or sustainable in view of the fact the same ought to have developed upon her from the estate of her husband but the same does not appear in the schedule of assets in the confirmed grant in Nairobi High Court Succ. Cause no. 313 of 1978, In the Matter of the Estate of Rokocho Bartore.

v. That costs of the application be provided for.

2. The grounds in support of the application are that the applicants' application dated 18.7.2018 seeking to strike out these proceedings was dismissed and the applicants intend to appeal against the said ruling. The 2nd objector was raised by the deceased as his son under the Keiyo Customary Law and he has established his home on the said land. There is danger that the intended appeal may be rendered nugatory if stay of proceedings is not granted since the petitioner may rely on the impugned ruling to use for confirmation of grant and distribute the estate and defeat any outcome of the intended appeal and that the 2nd objector could be evicted from the suit property which compromises his matrimonial home.

3. Further that the intended appeal raises many questions of law which need interpretation of the court.

4. The supporting affidavit has been sworn by Wilson Kiprono Rokocho who averred that the deceased and the 1st objector were co-wives both married to Rokocho Bartore. He has married and established his matrimonial home on the suit land. He was handed over to the deceased under Keiyo customary law at the age of 3 years and the deceased raised him as her own son till the year 2003 when she died.

5. In addition to the above, the petitioner in 2007 proceeded and applied for letters of administration without informing him yet they were aware he was a beneficiary of the deceased estate. The court further needs to clarify on the ruling, which did determine his rights without inquiring whether he qualified as a dependant or a beneficiary of the deceased and it did not inquire on the existence of the customary law.

6. He further deposed that he was seeking for the courts interpretation and directions in regard to the registration of the suit property on grounds that it was registered on 5.7.1995 in the name of Rokocho Bartore as shown in the green card yet it was not part of the assets listed in the succession cause in Nairobi, then could this have been done fraudulently. The grant issued in Nairobi has never been rectified from the date it was issued in 1993.

7. He has an arguable appeal and it is in the interest of justice that if the proceedings are not stayed then it shall be rendered nugatory.

Response

8. There is no ground in opposition or replying affidavit. There is an order dated 18.8.2020 which the petitioners are yet to comply with)

Applicant's submissions

9. The applicants through counsel argue that the ruling which is subject of the appeal was delivered on 10.7.2019 and they lodged an appeal on the same day, thus this instant application was filed expeditiously and without undue delay.

10. They have an arguable appeal with high chances of success. A draft appeal was annexed to the application. The suit property Soy/Soy Block 4(Kongasis)/6 was registered in trust for the 2nd objector and therefore the same did not form part of the estate of the deceased, citing the decision In *the Matter of the Estate of Salome Mukami Kariuki(deceased)[2016]eklr*, where the court held that:

“...a testator can only therefore freely dispose of such property as belongs to them absolutely or property that they have absolute control over. Property held in trust does not belong absolutely to the trustee, although in law he is the legal owner thereof. He deals with such property subject to the trust. He holds the same for the benefit of others, and he cannot legally deal with it in a manner adverse to the interests of the beneficiaries. The property does not belong to him, so he cannot sell it or gift it in any manner to anybody. He can only deal with it in ways that advance the interests of the beneficiaries”

11. The court was urged to issue the conservatory orders so that the appeal is not rendered nugatory, drawing from the East African Court of Justice in Arusha in *Attorney General of the Republic of Uganda v. East African Law Society [2013]eklr*, it was held that:

“the first is the possibility of conflicting decisions. It is our considered view a stay may be granted where there are multiple proceedings pending in both divisions of the court and the decision of the appellate division might affect the outcome of other proceedings.”

12. The applicant also urges the court to give a clarification on the validity of registration of the suit property in the name of the deceased and whether the ruling summarily determined the rights of the 2nd objector without making an inquiry whether he qualifies to be a dependant or beneficiary of the deceased based on Keiyo Customary Law.

Petitioners' submission

13. Mr. Magut counsel for the petitioners strongly opposed the application for stay of proceedings, saying that the applicants did not want the matter to proceed on merit. He urged that the application be dismissed with costs.

Analysis and determination

14. The issues that arise for determination are:

- i. Whether the application is merited
- ii. Whether the reliefs sought can be merited
- iii. Costs of the application

15. The applicants/objectors in this case are asking the court to stay proceedings in this suit waiting the outcome of the appeal. In *Global Tours & Travel limited (Nairobi) H.C. Winding up Cause No. 43 of 2000* quoted with approval in *Kenya Wildlife Service v. Mutembei (2019) eklr*, the court held:

“The court stated; As I understand the law whether or not I grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of Judicial Discretion to be exercised in the interest of justice. The sole question is whether it is in the interest to order a stay of proceedings, and if it is on what terms it should be granted.

In deciding whether to order a stay, a court should essentially weigh the pros and cons of granting or not granting the order, and in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie

merits of the intended appeal in the sense of not whether it will probably succeed or not or whether it is an arguable one.

The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

Invariably, the court has the discretion to either grant stay of proceedings or decline, depending on the circumstances of this case.

16. In addition, stay of proceedings was discussed as below in **Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332** that:

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.

17. The applicants have appealed against the decision of this court delivered on 10.7.2019. They argue that the appeal raises triable issues and thus the appeal may be rendered nugatory if stay is not granted. The applicants annexed a notice of appeal dated 10.7.2019 and a draft memorandum of appeal. The issues raised in the appeal is in regard to the ownership of parcel of land **Soy/Soy Block 4(Kongasis)/6** and that whether the parcel of land formed part of the estate of the deceased **Rokocho Bartore**. The Court of Appeal shall determine the same least this court sits on appeal its own ruling.

18. In addition to the above, the applicants averred that they wanted this court to clarify on the ruling dated 10.7.2019, yet they have already shown they want to appeal against it. Can this be possible, shall it not be that the applicants are asking this court to give another version of the said ruling and appealing on it. The applicants have not asked for a review of this ruling which they had to prove that there is a mistake on the face of it. That is not the case in this instant application.

19. **Article 51 of the Constitution** provides as below:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.

The applicants herein have a right to move to the Court of Appeal and have their appeal heard. This right however cannot be used against other parties who also have a right to be heard before a court of law. The suit had proceeded by viva voce evidence and so far the 2nd objector is the only witness who had testified on the 27.6.2016. The petitioners would suffer a great injustice if the matter is stayed, having been filed in 2007 and any dissatisfaction with the outcome or perception that the court summarily concluded the matter does not warrant a revisit for clarification, especially because there is no application for review. IF my decision does not make legal sense, the parties are at liberty to challenge the same and address their concern in the appeal, and there is no clarification to be made.

Virtually Delivered and dated this 10th day of December 2020 at Eldoret

H. A. OMONDI

JUDGE