



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 74 OF 2017**

**ALEXANDER DISMAS KOSGEL.....APPELLANT**

**-VERSUS-**

**GRACE CHEBOR MUHERIA.....1<sup>ST</sup> RESPONDENT**

**KIPKERING ARAP CHUMO.....2<sup>ND</sup> RESPONDENT**

**-AND-**

**JACOB BUHANGI ELAKI & 16 OTHERS.....INTERESTED PARTIES**

**RULING**

[1] The Appellant herein, **Alexander Dismas Kosgei**, (hereinafter the Applicant) filed the application dated **7 August 2017** pursuant to the provisions of **Order 42 Rule 6(1), (2), (3)** of the **Civil Procedure Rules, 2010** and **Rule 73 and 63** of the **Probate and Administration Rules**. He prayed for orders that:

[a] Spent

[b] Spent

[c] Spent

[d] That a stay order be issued by this court staying the execution of the order of the subordinate court dated **13 June 2017** pending the hearing and determination of the appeal herein.

[e] That an order for security for costs be made.

[f] That the costs of the application be provided for.

[2] The Application is premised on the grounds that the Applicant will suffer irreparable loss should the order of the subordinate court be implemented as judgment to the effect that those who purchased land from the estate should look to him for their share or compensation in lieu thereof; that the Applicant will suffer irreparable loss should the 2<sup>nd</sup> Respondent be registered as owning six acres of land while this appeal is pending, as the appeal shall then be rendered nugatory; and that the estate of one of the children of the deceased, namely **Lucy Chepkurgar Langat** (now deceased), had been left out and should the Court rule on appeal that her estate is entitled to a share of the deceased's estate, it will be impossible to comply with such a determination.

[3] The application is supported by the affidavit of the Applicant, sworn on **7 August 2017** in which he deposed that following the Judgment of the subordinate court dated **13 June 2017**, the Respondents extracted the Decree without involving his Advocate and thereafter engaged a team of surveyors with a view of implementing the Decree. That he then moved to file this appeal and the instant interlocutory application, and obtained a temporary stay order which was served on the County Surveyor and the Land Registry at Kapsabet. The Applicant further averred that from the time of the lower court Judgment, he had moved with speed to seek redress in respect thereof and that he is prepared to offer security for the implementation of the court order upon the determination of the appeal.

[4] The Respondents opposed the application. They filed their respective Grounds of Opposition herein on **7 September 2017** and **27 September 2017** contending that the Applicant's claim on behalf of the estate of **Lucy Chepkurui Langat** is farfetched and was not part of

the Applicant's claim before the lower court. It was therefore the contention of the Respondents that the orders being sought herein are irregular and go against the provisions of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**; and therefore that the Court does not have the jurisdiction to grant the same.

[5] The application was canvassed by way of written submissions. The Applicant's written submissions were filed on **3 August 2018** by the law firm of **M/s Birech, Ruto & Co. Advocates**; while the 1<sup>st</sup> Respondent's written submissions were filed on **13 September 2018** by **M/s S.K. Kitur & Co. Advocates**. The firm of **Kipkosgei Choge & Co. Advocates** also filed written submissions on **13 November 2018**. The Applicant's argument was that he has an arguable appeal, granted the evidence that the Respondents had initiated the process of execution of the lower court's Order. It was further the contention of the Applicant that he had demonstrated that he stands to suffer grave prejudice should the substratum of the appeal, namely the subject estate, be distributed in the manner ordered by the subordinate court. Counsel relied on **Keter & 6 Others vs. Kiplagat & 2 Others [2004] 2 KLR 159** to underscore the prerequisites for an order of stay of execution.

[6] On behalf of the 1<sup>st</sup> Respondent, the Court was urged to note that the Applicant is only aggrieved by part of the Judgment in so far as it relates to the transfer of 6 acres to the 2<sup>nd</sup> Respondent; and therefore that he had failed to show that he has an arguable appeal or that he stands to suffer irreparable damage or loss. Reliance was placed on **Nairobi HCCC No. 224 of 2001: Andrew Njuguna Kuria vs. Rose Kuria; Machira t/a Machira & Company Advocates vs. East African Standard (No. 2) [2002] KLR 63** and **Mbogo & Another vs. Shah [1968] EA 93** in persuading the Court to find that no good cause has been shown for the exercise of its discretion in favour of the Applicant.

[7] Counsel for the 2<sup>nd</sup> Respondent similarly urged the Court to dismiss the application for the reason that **Lucy Chepkurgat Langat** (deceased), whose cause the Applicant now purports to plead, had died at the time the **Succession Cause No. 1 of 2012** was filed at Kapsabet Law Courts; and yet was not enjoined to those proceedings or this appeal. It was further argued that this appeal and the instant application are but an attempt by the Applicant to frustrate his sister, the 1<sup>st</sup> Respondent, from getting her share of their father's estate by delaying the execution of the lower court Judgment. He likewise urged for the dismissal of the application dated **7 August 2017** with costs.

[8] The question of jurisdiction having been raised by **Mr. Choge**, it is imperative that I deal with it first and foremost. His argument was that given the provisions of **Rule 73** of the Probate and Administration Rules, the instant application is incompetent and ought to be struck out. That provision states thus:

**"A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a Summons supported if necessary by an affidavit."**

[9] Whereas it is true that stay of execution is not specifically provided for in the Probate and Administration Rules, it is plain on the face of the application that it was brought by way of Summons; and that **Rules 63 and 73** of the Probate and Administration Rules were cited as some of the enabling provisions in addition to **Order 42 Rule 6** of the **Civil Procedure Rules**. In the premises, it cannot be said that the application is incompetent; and it is also immaterial that the Summons was not signed by the Deputy Registrar; granted the constitutional imperative embodied in **Article 159(2)(d)** of the **Constitution**. Accordingly, no prejudice would result in using the conditions set out in **Order 42 Rule 6** as the touchstone for the exercise of discretion in this matter.

[10] **Order 42 Rule 6 of the Civil Procedure Rules** provides that:

**"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 to 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..."**

Thus, the only conditions an applicant for stay of execution of decree or order needs to satisfy, as set out in **Rule 6(2) of Order 42** aforementioned, are:

**[a] that substantial loss may result to the applicant unless the order is made;**

**[b] that the application has been made without unreasonable delay.**

**[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.**

[11] The rationale for the circumspection has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, in which it was held that:

**"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

[12] In the premises, the first issue to consider, then, is whether the Appellant/Applicant has demonstrated to the requisite standard that it risks to suffer **substantial loss** unless the order of stay is made. It was the case of the Appellant/Applicant that the Respondents had extracted the Order of the lower court for execution without involving his Advocate and thereafter engaged a team of surveyors with a view of implementing the Judgment and Order of the lower court. The Respondent backed up his assertions by annexing copies of the Order dated **13 June 2017** to his Supporting Affidavit sworn on **16 June 2017**. It is similarly not in dispute that, in consequence thereof, the Applicant was constrained to move the lower court for an interim orders of stay to preserve the *status quo*; which orders were granted on **30 June 2017** and extended for 21 days on **1 August 2017** pending orders of this Court. Copies thereof were also annexed to the Supporting Affidavit and marked **Annexure "ADK3"** and **"ADK4"**. And, as has been pointed out hereinabove, on the **16 August 2017**, this Court was persuaded to issue orders of stay pending the hearing and determination of the instant stay application.

[13] A consideration of the Applicant's grounds of appeal shows that he is basically challenging the lower court's Judgment on the grounds that the directions of the **High Court in Eldoret High Court Succession Cause No. 115 of 2014** were not complied with by the trial court; that the interest of the beneficiaries of the estate of **Ruth Chepkurui Langat** (deceased) were not taken into account; and that the 2<sup>nd</sup> Respondent's claim to 6 acres of the deceased's estate was improperly and prematurely taken into account. These, to my mind, are arguable issues; and, the subject matter being land, the interests of justice would require that the **status quo** now obtaining be maintained pending the hearing and disposal of the appeal.; the subject matter being the requisite security.

[14] There is every indication that the Applicant moved with due dispatch to challenge the decision of the lower court dated **13 June 2017**. His appeal was filed on **22 June 2017**.

[15] In the result, I would allow the application dated **7 August 2017** and grant orders as hereunder:

[a] That an order be and is hereby issued staying the execution of the Order of the subordinate court dated **13 June 2017** pending the hearing and determination of the appeal herein.

[b] That the costs of the application to abide the outcome of the appeal.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF FEBRUARY 2019**

**OLGA SEWE**

**JUDGE**