



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO.13 OF 2017**

**MILKA WANJIRU NJOGU.....APPLICANT**

**V E R S U S**

**SARAFINA MUTHONI GICHIRA.....RESPONDENT**

**RULING**

1. The applicant Milka Wanjiru Njogu filed a Notice of Motion under **Order 42 rule 6 of the Civil Procedure Act** seeking orders that an order of stay of execution of the orders issued by Wanguru Senior Principal Magistrate's Court made on 14/3/2017 cause No. 30/2016 be issued pending the hearing and determination of the appeal. It is based on four grounds, namely:-

**a) THIS application is filed without inordinate delay.**

**b) THAT the Appellant/Applicant lodged an Appeal herein on the 4<sup>th</sup> day of April 2017.**

**c) THAT the Respondent herein is in the process of executing Wang'uru Senior Principal Magistrate Judgment/Orders delivered on 14<sup>th</sup> day of March 2017.**

**d) THAT if the Wang'uru Lower Court Judgment and the subsequent Orders are executed, this application and the entire Appeal which has high chances of success will be rendered nugatory subjecting the Appellant/Applicant into irreparable loss.**

2. It is also supported by the Affidavit of Milka Wanjiru Njogu sworn on 28/7/2017. The application was filed under a certificate of urgency. The court issued an interim order of stay pending the hearing and determination of the application interparties.

3. The respondent opposed the application and filed a replying affidavit sworn on 30/8/17.

**Applicant's Case**

The judgment of the Succession Court was that the dependants of the deceased to share equally the deceased's estate **Kambare/Nyagati/2857**. Being aggrieved with the same, the appellant proceeded to file the appeal on 04/04/2017 and also filed in Wang'uru Court an application for stay of execution on 18/04/2017. Vide the court order issued on 20/07/2017, the Court dismissed the application for stay of execution for lack of merit.

She claims that the court dismissed her application on grounds that she did not provide security and that the appeal is not a ground for stay of execution. However, she did not annex a copy of the ruling for our perusal.

**Respondent's Case**

The respondent on the other hand claims that the appellant is a daughter-in-law to the deceased while the respondent and her sister are daughters of the deceased. That the trial court upon hearing the parties made a finding that the proceedings were intestate and ordered for equal distribution of their father's estate.

**Submissions:-**

**Applicant's**

It is submitted that the applicant is apprehensive that if the orders are not granted the respondent will proceed with execution and the appeal will be rendered nugatory. That this is a land matter where the appellant has been in occupation and she stands to suffer irreparably as she

entirely relies on the same with her nine children. It is further submitted that the appeal raises triable issues.

The respondent relied on the Replying Affidavit and did not file submissions

I have considered the application.

### **Stay of Execution pending appeal**

The principles of granting stay of execution in High Court are provided for under **Order 42, rule 6 of the Civil Procedure Rules.**

#### **Order 42, rule 6**

*No order for stay of execution shall be made under subrule (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.*

4. The appellant needs to satisfy the court on the following conditions before they can be granted the stay orders:

**a) Substantial loss may result to the applicant unless the order is made,**

**b) The application has been made without unreasonable delay, and**

**c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.**

#### **In Socfinac Company Limited-V-Nelphat Kimotho Muturi [2013]eKLR**

G V Odunga, Judge held that in the absence of evidence that the appellant stands to suffer substantial loss coupled with the fact that the respondent has a judgment in his favour there would be a much larger risk of injustice if the court found in favour of the appellant. He stated as follows;

***In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No.Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions.***

The appellant needs to satisfy the court on the following conditions before they can be granted the stay orders:

**a) Substantial loss occurring**

The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

#### **In Charles Wahome Gethi v Angela Wairimu Gethi [2008] Eklr**

The Court of Appeal held the following view on the issue of substantial loss;

**The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.**

#### **In James Wangalwa&Another V Agnes NaliakaCheseto [2012] eKLR**

The Court held;

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

*“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

5. In the present application, the appellant states that the ruling disinherited her children and herself off the land they have developed and depended on for over 40 years since she was allocated by the deceased. That the respondent has already filed an application seeking transmission of the land to the beneficiaries. That if the ruling is executed and the suit land sub-divided, the parties will incur a lot of expenses reverting back the suit land to the original number.

6. The appellant has demonstrated that if the said orders are executed, she will suffer substantial loss . This is because she is likely to be disinherited and deprived off her source of livelihood which she has depended on for the last forty years.

#### **b) Requisite security**

The appellant has not given option of security but it is appreciated that the court also has discretion to order the kind of security they should give.

#### **c) Was there undue delay?**

The appellant being aggrieved with the judgment of the trial court delivered on 14/03/2017 proceeded to file memorandum of appeal on 12/04/2017. She filed an application for stay of execution on 18/04/2017 whereupon it being dismissed on 20/07/2017 filed the current application on 28/07/2017. The appellant filed their memorandum of appeal and application timeously and without delay.

7. The Applicant has satisfied the conditions for granting stay of execution. The respondents will not be prejudiced in any way if the stay of execution is ordered. The applicant has stated she has a good appeal which is likely to succeed. The court should therefore exercise discretion and give her an opportunity to be heard on appeal. For the reasons stated, I find that the application has merits. I order as follows:-

***1) The application is allowed and there will be an order of stay of execution of the orders issued in Wang'uru SPM Succ Cause No. 30/2016 pending the hearing and determination of the appeal.***

***2) The applicant to provide security by depositing Kshs 50,000/- or a security of like value to be approved by the Deputy Registrar.***

***3) No orders as to costs as the dispute involves family members.***

**Dated at Kerugoya this 7<sup>th</sup> Day of February, 2019.**

**L. W. GITARI**

**JUDGE**