REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 488 OF 2012

IN THE MATTER OF THE ESTATE OF SOLOMON MWANGI WAWERU.....DECEASED

ELIZABETH MUCHIRI MWANGI.....APPLICANT/RESPONDENT

VERSUS

FRANCIS MUCHIRI MWANGI

EPHANTUS KIMORI MWANGI

TIMOTHY MUGAMBI MWANGI.....RESPONDENTS

AND

NGOTHO COMMERCIAL AGENCIES.....OBJECTOR/APPLICANT

RULING

1. The Notice of Motion before Court is the one dated 24/8/18. Vide this application, Ngotho Commercial agencies seeks orders;

1. Spent.

2. THAT this Honourable Court do order a stay of execution of the Ruling and order made by this Honourble Court on the 12th day of June 2018 pending the hearing and final determination of the Applicant's appeal.

3. Spent.

4. Spent.

5. THAT the costs of this application be provided for.

2. The same is premised on grounds;

1. **THAT the Applicant has an arguable appeal with a high probability of success.**

2. THAT if the said stay of execution is not granted, the Applicant's appeal will be rendered nugatory and the Applicant will suffer irreparable damage.

3. THAT unless this application is granted, the Respondent(s) threaten to have grant made in respect of the subject properties in execution against the Applicant.

4. THAT the Applicant is ready willing and able to deposit such sum as this Honourable Court may order to be so deposited in a joint escrow account to the order of both the Applicant and the Respondent(s) Advocates.

5. THAT substantial loss will result to the Applicant unless the orders sought are granted.

6. <u>THAT</u> this application has been made without any unreasonable delay.

7. <u>THAT</u> this application ought to be granted in the interest of Equity and Justice.

3. It is further supported by the affidavit of Thomas Njenga Ngotho.

4. The gist of the application is that the Applicant is aggrieved by the ruling of Court dated 12/6/18. The Applicant has since filed a Notice of Appeal dated 26/6/18 and a Memorandum of Appeal on 9/8/18.

5. The Applicant is apprehensive that should a stay not be granted if properties Kiambogo/Kiambogo Block 2/17214 and 17215 were to be disposed off by the Respondents, the respondents would not be in a position whatsoever to refund the same if the intended appeal is successful.

6. The application is opposed and the respondents have raised ground of objections to wit;

1. THAT the same is bad in Law and incurably defective.

2. THAT the civil procedure is not applicable in the present application.

3. THAT the court is factus officio.

4. THAT a stay will not serve any useful purpose other than clog the judicial system and hinder the administration of the estate and its distribution.

5. Affidavit or affidavits to be sworn.

7. A 4th respondent Elizabeth Mwangi has opposed the application and filed a replying affidavit in which she states that the applicant has not met the fundamental principles central to the granting of an order for stay of execution and in particular, it is urged that the applicant has not demonstrated that it will suffer substantial loss if the order is not given.

8. The 4th respondent adds that there is no automatic right of appeal has to the Court of Appeal for the decision of the High Court exercising its original jurisdiction without the leave of the High Court or where leave is refused, with leave of the Court of Appeal.

9. The absence of leave to file an appeal to the Court of Appeal renders the current application incurably defective and the court cannot grant a stay of execution where an appeal is non-existent.

10. The application was canvassed by way of written submission.

11. I have had occasion to consider the Notice of Motion dated 24/8/18. I have had due regard to the supporting grounds and affidavit, the grounds of opposition and the replying affidavit. I have put into account the entire submission by the parties even on areas that I may not reproduce here.

12. Of determination is whether the applicant has achieved the legal threshold for the grant of a stay of execution pending appeal.

13. I would wish to right away deal with a preliminary issue relating to the format of the application. It is urged that the application is defective as under the Law of Succession Act (Cap 160 Laws of Kenya), the Court is to be moved by way of a summons and not by way of Notice of Motion.

14. Bearing in mind Article 159 (d) of the Constitution, I am persuaded that this defect in form is a technicality that the Court can overlook in the wider interest of doing substantive justice to the parties. I find and hold that the application is deemed regular. Am fortified in this finding by the provision in rule 73 of the Probate and Administration Rules. That rule provides;

" Rule 73…Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

15. In HCSC 2226 of 2008, Lucy Wanjiru Kibaba and Another Vs Lucy Wanjiru Muchene [2013] eKLR G.B Kariuki J (as he then was) stated;

"…that technicalities of procedure in succession matters are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance with a view to do justice to the parties…

…The court in succession matters, however, under Section 47 of the Law of Succession Act has jurisdiction to entertain any dispute under the Law of Succession Act without due regard to technicalities. I agree with Hon. Mr. Justice Lenaola in <u>RE ESTATE OF ISAKA MUTHEMBWA KITHOME (supra)</u> where he stated that forms are a technical matter and that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate. I hold that the failure of the applicant herein to follow the right form and refer to the correct section and Rules cannot be a basis to deny

her a hearing and determination of her application on merits."

16. In view of the above, I will move to determine the application at hand on substantive merit.

17. Order 42 rule 6 of the Civil Procedures rules provides as follows;

> **(1) 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.**
>
> **(2) 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 them 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.**

18. The grant of an order for stay of execution is a discretionary power exercised by the courts. **Githua J in Alhyder Trading Company Limited vs Lucy Jepngetich Mibei** had this to say on this discretionary power;

> **" I must state at this juncture that the decision whether or not to grant stay of execution pending hearing of an appeal is at the discretion of the court. The conditions set out under Order 42 Rule 6 of the Civil Procedure Rules are only meant to be guidelines to assist the court in the exercise of its discretion."**

19. The Court has to examine whether the applicant has demonstrated that substantial loss would result if the order is not made and that the application has been made timeously. The applicant has in addition to offer security for due performance of the decree.

20. The order dismissing the applicant's objection was made by court on the 12/6/18. It is not until the 24/8/18 that the application for stay was lodged in court. This is exactly 73 days since the orders were made. It is about 21/2 months after. This delay is not explained. In my view the drafters of the rules could not possibly by use of the words "unreasonable delay" have intended that a party would be aggrieved by orders made by court, go to slumber for 21/2 months and then approach the court for stay. If the courts were to countenance such delays, this would be a sure recipe for anarchy in the administration of justice. To summon a party who is already enjoying the fruits of Judgement back to court to answer an application that seeks to take away the fruits of Judgement 21/2 months after the order was made is in my view unjust.

21. It is the duty of an applicant to move to court without unreasonable delay and unreasonable delay here cannot be stretched to cover a period of 21/2 months after the order or decree is made.

22. I associate myself with the decision in **M Ndaka Mbiuki –vs – James Mbaabu Mugwiria** where the court in reference to the condition to file an application without unreasonable delay stated;

> **"…This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed."**

23. On whether the applicant has demonstrated that substantial loss would result if the order sought is not made, I am quick to go back to the record and note that the orders of court of 12/6/18 dismissed the objection by the applicant. This cause is pending confirmation of grant. There is no, strictly speaking, a decree capable of execution.

24. I quote with approval the decision by **Odunga J**. who when striking out an application for stay of execution stated;

> **"… In this case the Objector claims that unless the stay is granted his appeal will be rendered nugatory in that there is a possibility that the deceased's estate may be distributed and third parties may thereby acquire interest therein. However, there is no evidence that there has been a confirmation of the probate in order to pave way for disposal of the properties of the estate. In other words it is contended that there is no decision that is capable of being executed at this stage. The rules do contemplate that there ought to be a decision in place capable of being executed".**

25. Even then, I note that the applicant did not seek leave, and it is admitted as much, to appeal against the order by this court. The court of appeal in **Rhoda Wairimu Karanja & Another –vs- Mary Wangui Karanja & Another** while citing with approval its earlier decision in

Francis Gachoki Murage –vs- Juliana Wainoi Kinyua & Another stated inter alia;

> **"We think we have said enough to demonstrate that under the Law of Succession Act, there is not express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."**

26. The application for leave to appeal in Succession matters is central to an application for stay. Without leave, an order for stay would be in vain. The court in **Curryian Okumu –v- Perez Okumu & 2 others (High Court Mombasa, Succession Cause No 46 of 2014 (Thande J)** had this to say on the matter;

> **" Secondly the Applicant has not sought leave to appeal within the statutory period or at all. An order made by the High Court under the Law of Succession Act is not appealable to the Court of Appeal as of right. Leave must be sought and obtained."**

27. The Court proceeded to discuss the application for stay and stated'

> **" However, given that the proposed appeal from the Ruling of this Court of 11/5/16 to the Court of Appeal is not automatic, the Applicant in addition to seeking stay ought to have sought leave to appeal. Without leave to appeal, an order for stay would be in vain. By reason of the two omissions stated above, this Application must fail."**

28. As regards whether the applicant has offered security for the due performance of the decree, I note the applicant has offered to provide any security that the Court may deem reasonable and necessary. In view of the findings above, this offer has no impact on the Court's final findings in regard to the application.

29. With the result that in the totality of the material before me and the respective findings as analysed above, I reach the inevitable conclusion that the application before Court is without merit. I decline to exercise discretion in favour of the applicant and proceed to dismiss the application with costs to the respondents.

Dated and Delivered at Nakuru this, 12th day of June, 2019.

A. K. NDUNG'U

JUDGE