



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 372 OF 2012

TABITHA WANGITHI MURIUKI.....PETITIONER/APPLICANT

V E R S U S

WATHIBA KIMOO.....PROTESTOR/RESPONDENT

RULING

1. The application pending before the Court is dated 04/01/2019 seeking stay of execution of the judgment delivered on 19/12/2018 pending hearing and determination of the appeal before Court of Appeal at Nyeri.

2. The application was based on the grounds that as per the judgment, the Court distributed the deceased's estate **Inoi/Kamondo/609** equally. That the Court erred in arriving at that position and she has preferred an appeal against the whole decision. That there is real and present danger that certain prejudicial actions maybe undertaken in respect of the said land in execution of the judgment. That the appeal has a reasonable probability of success as demonstrated by the draft Memorandum of Appeal.

3. In response, the respondents stated that the application is only intended to deny the fruits of her judgment as they have litigated the matter since 2012. That she is aged and in poor health and the application is meant to frustrate her and ensure she does not get her share of the estate during her lifetime. That she has not offered any tangible security and the appeal has no chances of success.

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 appellants need 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 judgement 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 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.

5. The applicant 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.

Refer to **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** – High Court while considering the issue of substantial loss stated.

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.”

6. The judgment of the court was that the estate of the deceased which is comprised of half share in **Inoi/Kamondo/609** be shared equally amongst Penina Wangithi Kimoo, Hellen Wangechi Kimoo and the applicant herein. That the share of the applicant is for the benefit of the estate of Peter Muriuki Kingoo. That the respondent is not entitled to share of the estate of her co-wife, she retains her half share out of **Inoi/Kamondo/609**.

7. The applicant has only stated that there is real and present danger that while the appeal is pending, certain prejudicial actions maybe undertaken in respect of the said parcel of land in execution of the said judgment. She has not stated what loss she is likely to suffer. My view is that she has not demonstrated the loss she is likely to suffer. The applicant bears the burden to prove that she will suffer substantial loss. Mere allegation that there is real danger is not sufficient. Unless she demonstrates that she will suffer such loss. Proof that she will suffer substantial loss is key. What the respondent may do is to execute the judgment. Execution is a lawful court process and may not result to substantial loss. I therefore find that the application is without merit and is dismissed with costs.

b) Requisite security

The applicant 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 applicant being aggrieved with the order of the trial court delivered on seeking stay of execution of the judgment delivered on 19/12/2018 proceeded to file application for stay of execution on 07/01/2019. The applicant filed application timeously and without delay.

8. The applicant despite bringing the application within reasonable time, has not demonstrated that she will suffer substantial loss. She does

not claim that any party intends to dispose of the parcels of land if the Court does not grant the orders sought. The application lacks merits and is dismissed with costs.

Dated at Kerugoya this 14th day of June 2019.

L. W. GITARI

JUDGE