



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 344 OF 2005

IN THE MATTER OF THE ESTATE OF JULIUS MUTHAMIA KANAMPIU

JERUSHA NKOROI MUTHAMIA.....PETITIONER

VERSUS

LUCY KINYA M' EBUTHANIA.....OBJECTOR

AND

SAMUEL KATHIA MUKINDIA.....INTERESTED PARTY

RULING

1. The Petitioner has sought in the application dated 13th May 2019 for a stay of further proceedings in this cause pending the hearing and determination of the intended appeal in the court of appeal.

2. The application is supported by the affidavit of **Jerusha Nkoroi Muthamia** and on the following grounds; (1) That this Honourable Court delivered its judgement on 28th February 2019 in which it revoked the grant that had been issued to the applicant; (2) That the applicant is dissatisfied with the Judgement and has since instructed his advocates to appeal against it; (3) That the applicant has by letter filed on 4th March 2018 requested for certified copies of the proceedings. The applicant has also filed its notice of appeal (Annexures J2a,b& 3 respectively). That the objector has filed an application for confirmation of grant and served the same to her advocates. That if the application for confirmation is allowed to proceed before the intended appeal is filed, heard and determined, the applicant will be greatly prejudiced and her intended appeal shall be rendered nugatory.

3. The objector, **Lucy Kinya M' Ebuthania** opposed the application through replying affidavit dated 28th May 2019. She averred that this honourable court legally and correctly held that she was a wife of the deceased hence the petitioner needed his consent in petitioning for letters of administration. Thus, it legally revoked the grant of letters of administration issued to the petitioner herein. That the petitioner has not demonstrated in her application that her intended appeal is arguable or how his appeal shall be rendered nugatory if the orders sought are not granted.

4. The matter was fixed for hearing on 29th May 2019. Parties consented that I determine the application based on the affidavits filed.

Analysis and Determination

5. The petitioner herein petitioned for letters of administration on 9th September 2005. Grant of letters of administration was issued on 2nd November 2007. The petitioner filed summons for confirmation of grant on 3rd July 2008. And the grant was confirmed on 29th December 2008 and the estate of the deceased was distributed solely to the petitioner. The Respondent filed summons for revocation of grant on 7th October 2009 claiming to be a wife of the deceased. Parties agreed that this Honourable Court should determine the application through analysis of the filed affidavits and witness statements. This Honourable Court considered the matter and on 28th February 2019 revoked the grant issued to the petitioner. And appointed **Jerusha Nkoroi Muthamia and Lucy Kinya M' Ebuthania** as joint administrators of the estate. The court also directed the objector to file summons for confirmation of grant within 14 days.

6. I have heard many litigants argue an application for stay of proceedings as if it were for stay of execution pending appeal. Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is said to be a serious, grave and fundamental interruption in the right of a party to conduct his litigation. Therefore the threshold of impeding ones right to conduct his litigation expeditiously should only be imposed upon sufficient and justifiable reason. On this emphasis see *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.”

7. See also the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** and **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where it was held;

“As I understand the law, whether or not to 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 of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the 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 but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

Timeous application

8. The application herein was filed on 13th May 2019, two months after the delivery of the judgement. The petitioner has also filed its notice of appeal and applied for certified copies of the proceedings. I take the application to have been filed without unreasonable delay.

Prima facie Case

9. This I am not able to gauge this because the applicant has not annexed her draft memorandum of appeal. In her supporting affidavit she does not make reference to the kind of relief she is seeking in the intended appeal. She only stated that she is aggrieved by the decision in question and that she will be prejudiced and her appeal shall be rendered nugatory unless these proceedings are stayed. Nonetheless, the following factors are relevant.

10. The objector has only filed a summons for confirmation of grant. The applicant is one of the administrators of the estate of the deceased. The confirmation hearing is yet to take place. The estate has not been distributed. And, above all, the process of confirmation of grant has been tailored to ensure all interests and claims are tackled before confirmation of grant. It is most significant to note that, during confirmation hearing, the court should identify and ascertain the estate property, rightful beneficiaries and distribute the estate to the rightful beneficiaries and all person beneficially entitled to the estate. See rule 41 of the Probate and Administration Rules. In light of the foregoing, I do not see how the intended appeal shall be rendered nugatory. The beneficiaries ought to know their positions without delay. Similarly, no estate should remain un-administered in eternity or for unreasonably long period of time. Therefore, a stay of such proceedings would be unjustified interruption of the right of beneficiaries to have the estate distributed expeditiously. In the circumstances, I find that the applicant has not shown that she will suffer any prejudice or that her appeal shall be rendered nugatory if stay of the proceedings is not granted.

11. The upshot therefore is that the application dated 13th May 2019 lacks merit and is dismissed. This being a family matter each party shall bear their own costs.

Dated, signed and dated this 22nd day of July, 2019

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F. GIKONYO

JUDGE

IN THE PRESENCE OF

H. Gitonga for applicant

J.G Gitonga for respondent

Respondent – present

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F. GIKONYO

JUDGE