



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.634 OF 2003

IN THE MATTER OF THE ESTATE OF EDWARD NG'ANG'A KABUE- DECEASED

BEATRICE WANJIKU NG'ANG'A.....1ST APPLICANT

JANE MUMBI NJENGA.....2ND APPLICANT

SOPHIA NJERI.....3RD APPLICANT

PAULINE WANJIRU.....4TH APPLICANT

NANCY WAIRIMU.....5TH APPLICANT

-VERSUS

JAMES KABUE (SECOND HOUSE).....1ST RESPONDENT

PETER KABUE (FIRST HOUSE).....2ND RESPONDENT

PETER KABUU (THIRD HOUSE).....3RD RESPONDENT

PHILICIA WANJIKU (SECOND HOUSE).....4TH RESPONDENT

RULING

1. The Application dated 28.5.2019 which is coming for consideration in this Ruling seeks the following orders;

(i) THAT this Court be pleased to grant leave to file a Notice of Appeal out of time.

(ii) THAT this Court be pleased to extend time within which the Applicants are to make an application for leave of this Court to file an appeal in the Court of Appeal against the Order and Ruling delivered herein on 26.4.2019.

(iii) THAT this Court grants prayer 2 above – leave to appeal against the said ruling delivered on 26th April, 2019.

(iv) THAT this Court grants stay of distribution pursuant to the said Ruling delivered on 26th April 2019 pending appeal.

(v) THAT the Costs of this Application be provided for.

2. The Application supported by the Supporting Affidavit of NANCY WAIRIMU – the 5th Applicant in which she stated that a copy of the Ruling dated 26.4.2019 was obtained on 23.5.2019.

3. The Application was opposed by Respondents who filed a Replying Affidavit filed in court on 12.6.2019 sworn by PETER KABUU NGANGA the 3rd Respondent and one of the executors of the Will dated 21.7.1996.

4. The Parties were directed to file written submissions which I have duly considered. The Applicants are in essence seeking stay pending

Appeal.

5. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

6. The supreme court in the case of **Republic v Ahmad Abolfathi Mohammed & another [2018] Eklr** where the court stated that :

*“This does not mean that the court’s inherent power is unlimited. Where there is a clear and explicit rule in statute, no such power can be invoked against a clear expression in the law or statute. The Indian Supreme Court in the 1968 case of **Padem Sen v State of UP AIR 1961, SC 218** recognized this principle. Referring to a provision in Section 151 of the Indian Penal Code, the court noted that, “it is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code”.*

7. The grant for probate herein which was issued to the executors on 31.1.2005 has not been confirmed.

8. It is in the interest of justice that the Applicants be given an opportunity to ventilate the Appeal before the grant is confirmed.

9. This being a family dispute, I find that it is not necessary to order security for costs.

10. I accordingly allow the Application dated 28.5.2019 in the following terms;

(i) THAT the Applicants are granted leave to appeal out of time against the Judgment of this Court dated 26/4/2019.

(ii) THAT the Applicants are granted 28 days leave to file a notice of Appeal to the Court of Appeal.

(iii) THAT stay of execution is granted against the orders of this Court pending the intended Appeal.

(iv) THAT Confirmation of the grant herein to await the outcome of the Appeal.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 12TH DAY OF JULY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI