REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

SUCCESSION CAUSE NO. 333 OF 2015

IN THE MATTER OF THE LATE KING ARAP TALAM SIMON -DECEASED

THROUGH

SALLY SIGEI TALAM.....APPLICANT

VERSUS

SABINA TALAM.....RESPONDENT

RULING.

The applicant herein, Sally Sigei Talam moved this court vide a Notice of Motion application under a Certificate of Urgency dated 14th November 2018. The application is buttressed with a supporting affidavit. The applicant prayed that the application be dispensed with in the first instance and that this court stays the execution orders made on the 29th of October 2018 pending an inter parties hearing and determination of this application as well as pending the hearing and final determination of the appeal yet to be filed by the applicant.

The deceased died intestate on 6th of December 2006 and left behind two widows. The 1st widow bore with the deceased 11 children while the 2nd widow has 6 children.

Letters of administration intestate were consequently issued on 2nd march 2016 to Sally Sigei Talam and Sabina Talam. A copy of the same was produced and marked as ST1.

Summons for confirmation of the grant was filed on 5th September 2017. A hearing of the application never took place due to numerous adjournments, all of which were sought by the respondents. This consequently led to this proceeding and confirming the application for letters of administration on the 29th of October 2018.

The counsel for the applicant proceeded and made an oral application for stay of execution as they intended to lodge an appeal. This court ordered the counsel for the applicant to make a formal application for stay and it is that application that is the subject of this ruling.

The respondent herein, Sabina Talam, vide her replying affidavit to the applicant's written submissions, dated 12th February 2019 opposed to this application on the grounds that the applicant had employed delay tactics to prolong this suit since maintenance of the status quo favoured her and her children, at the expense of the respondent.

The respondent further claims that this court lacks jurisdiction to hear and determine this application since it declared itself *functus officio* upon confirmation of the letters of administration.

The respondent claims that the applicant's application is frivolous, vexatious and an abuse of the court's process.

The respondent further claims that this application was brought out of time without the leave of court.

Upon perusal of the written submissions by both parties, a number of issues for determination emerges.

First, on jurisdiction. Before this court is an application for stay of execution order and not an appeal. The respondent claims that this court proclaimed itself *functus officio* upon confirming the letters of administration intestate. However, it is the assertion of this court that indeed it proclaimed itself *functus officio* on the confirmation of letters of administration but not on an application for stay of execution pursuant to

Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010.*

This court confirmed the letters of administration intestate on 29th October 2018. This application was however lodged on the 15th of November 2018. There was a delay of around 17 days.

The Civil Procedure Rules grants the courts unfettered discretion to enlarge time. ***Order 50 Rule 6 of the CPR*** grants the courts powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court. Furthermore, the legal basis for grant of stay pending appeal is ***Order 42 Rule 6 of the Civil Procedure Rules, 2010*****.** Basically, the Defendant/Applicant is required to demonstrate that: -

> ***"Substantial loss may result unless the order is made. The application has been mad without unreasonable delay. Such security as the court orders for the due performance of the decree has been given before the applicant."***

The applicant hasn't established on balance of probabilities that unless the order for stay is granted, she stands to suffer irreparable loss.

There was no unreasonable delay on the part of the

defendants/applicants. There has been a delay of 17 days which in my

view is not fatal to this application. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in ***CHRIS MUNGA N. BICHAGE –VS- RICHARD NYAGAKA TONGI & 2 OTHERS (2013) eKLR*****,** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

> ***" …. The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated ……"***

As to whether the appeal is arguable, the applicant did not file a memorandum of appeal and this court lacks sufficient information on which to base such a finding.

I therefore find that sufficient grounds have not been established to warrant granting of the orders sought. The application lacks merit and is dismissed with costs to the Respondents.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of July, 2019.

In the presence of;

Mr. Ngigi for the 2nd house

Mr. Mbabu holding brief for Mr. Kemboi for the 1st house applicants.