



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HC CIVIL APPEAL (P&A) CASE NO. 35 OF 2018**

**IN THE MATTER OF THE ESTATE OF MALONZA NDEMWA SOI (DECEASED)**

**STEPHEN MWALILI MALONZA.....APPLICANT**

**AND**

**KATHINI MALONZA.....RESPONDENT**

**RULING**

1. **Stephen Mwalili Malonza**, the Applicant, by way of general summons brought pursuant to **Section 47** of the Law of **Succession Act, Rule 59 and 73** of the Probate Administration Rules; seeks stay of execution of the Ruling dated **4/7/2018** in Kitui Chief Magistrate's **Probate and Administration Cause NO. 15 of 2013**, Estate of **Malonza Ndemwa Soi** pending hearing and determination of the appeal.
2. The application is premised on grounds that; the learned Principal Magistrate continues to make orders in Lower Court file which are likely to prejudice or alter the subject matter of the appeal; an application for stay made in the matter has been dismissed by the Principal Magistrate; the Principal Magistrate has directed the clan to distribute the Estate of the deceased while aware that clans have no powers to administer the Estate of a deceased person; and therefore the wider interest of justice would require proceedings to be stayed so that the court can conclusively determine issues raised in the appeal.
3. The Application is supported by an affidavit deposed by the applicant where he averred that after the court revoked the grant, it directed the clan to distribute the Estate of the deceased and the clan has already filed two (2) different sets of proposed distribution of the Estate and it is bent on mentioning the case to proceed with the distribution; that unless the order sought is granted the subject of the appeal will have been altered such that there will be nothing to be dealt with thereby rendering the appeal nugatory.
4. In a reply thereto, **Kathini Malonza**, the Respondent deposed that there were good reasons as to why the Lower Court refused stay of the proceedings in the primary Succession Cause. That stay of execution will allow the Applicant who has been wasting the Estate by way of selling the same to 3<sup>rd</sup> Parties to continue doing it. That he has disposed off her (Respondent) entitlement, being **Land Number Yatta B2/Kwa Vonza/203** while he is keeping the rest of the Estate in Mutoni area.
5. That the appeal is intended to disinherit her as she will die and leave the entire Estate to him; being the wife of the deceased while the Applicant is his son.
6. Further, she averred that after the ruling of the court, the clan gave her the land at kwa Vonza and the Ruling of the Lower court having been complied with there is nothing to distribute, what remains is to select Administrators of the Estate who will distribute the Estate and the appeal is meant to appease buyers who bought parcels of land from the Applicant that belongs to her (Respondent).
7. The application was canvassed by way of written submissions.
8. It was urged for the Applicant that it is as a matter of good judicial police and good practice for proceedings to be stayed when a decision is challenged in a higher court. That interest of justice can be best served by staying the proceedings as stated in the case of **Mary Wamaita Guthu and Another Vs. Grace Njuki Ndungu & 3 others (2016) Eklr.**
9. It was submitted for the Respondent that a similar application filed in the Primary suit was dismissed because there were more benefits of distributing the suit than sustaining the benefits of the Applicant being an administrator as stated in the ruling of the Lower Court. That the Applicant does not want the Estate to be distributed. That on 23/8/2018, pursuant to the court order, the clan came up with an agreement as pertains the Estate of the deceased but the Applicant refused to co-operate with the clan members are not the interests of the Estate.
10. Further it was argued that there was nothing to stay as the court did not distribute the Estate or appoint administrators and that the Applicant's intention is to scuttle and waste the Estate of the deceased. In this regard she relied on the case of In the matter of the **Estate of Njoroge Kungu (Deceased) Succession Cause NO. 3051 of 2012** where it was held that:

*“Thus, in the present case this court must satisfy itself that the Applicant’s application does not have as its main object to frustrate the Respondent’s benefit of the outcome of the suit. It will be recalled that the present matter originated from an appeal by the Applicant against a decision of a subordinate court which adopted an award. Despite having participated in the arbitration proceedings and the evidence of the same being on record, the Applicant disowned the award and appealed against it. His appeal was unsuccessful. He subsequently exercised his right to appeal further by filing a notice of appeal and the present application. An examination of the evidence on record makes it difficult for this court to conclude that the Applicant has a justifiable cause in seeking for a stay of the execution. **The opposite is less difficult to conclude; that is, the Applicant is keen to scuttle the process of distribution of the deceased’s estate as initially agreed by him and upheld by this court.** Instructive guidance on the considerations that the court must take into account when balancing the Applicant’s right of appeal vis-a vis the Respondent’s right to benefit from the decision that is sought to be appealed from can be found in our case law”.*

11. I have duly considered rival submissions of both counsels.

12. This court is clothed with jurisdiction to ensure ends of justice are met in order to prevent abuse of the process of the court. In this regard it is duty bound to make necessary orders to this end. **(Also See Rule 73 of Probate and Administration Rules)**

13. The Applicant seeks stay of proceedings pending hearing of an appeal that has been filed against the Ruling of the subordinate court. In determining the issue, this court must be guided by principles of staying orders. If this court is persuaded to suspend judicial proceedings in the lower court by deterring the Respondent from taking the action of not causing the matter in the lower court to proceed, it may be important to question whether the Applicant is not only likely to suffer irreparable loss but also whether he has an arguable case.

14. In the impugned ruling, the trial court revoked the grant of letters of administration intestate that had been issued to the Applicant pursuant to **Section 76 of the Law of Succession Act.**

**Paragraph 12 of the Ruling states thus:**

***“ The court further directs all the family member to sit down and come up with a list of the beneficiaries of the estate and have authenticated by local administration for estate to be distributed a fresh taking into account all beneficiaries. The family should also agree on an administrator/s to guide the entire exercise. Mention on 5.9.2018. Application to be served”.***

15. The order issued will pave way for issuance of a fresh grant to Administrator(s) acceptable to all beneficiaries/survivors of the Estate of the deceased. This being the case, the Applicant would not suffer any substantial loss as a result of the order made. Infact the court should have fast tracked the matter by appointing Administrator(s) of the Estate soon after delivering the ruling considering the fact that the deceased passed on in 2004. This is a case where justice can only be seen to be done if a fresh grant is issued to pave way for the distribution of the Estate.

16. In the result I find the application lacking merit. Accordingly, it is dismissed with costs to the Respondent.

17. I direct the Deputy Registrar to place the file before the **Chief Magistrate’s court** on the **24/9/2019 for further orders.**

18. It is so ordered.

**Dated, Signed and delivered at Kitui this 19<sup>th</sup> day of September, 2019**

**L.N. MUTENDE**

**JUDGE**