



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 146 OF 2018

CATHERINE JELAGAT KIPYEGO.....1ST APPELLANT

DICKSON KIPROP KIBOS.....2ND APPELLANT

VERSUS

LIZAH JEPCHUMBA CHEROMEI.....RESPONDENT

RULING

1. By an application dated 23rd November 2018 the applicant seeks orders of stay of further proceedings in **Eldoret Chief Magistrate's Court Succession Cause No. 249 of 2016** pending the hearing and determination of **Eldoret High Court Civil Appeal No. 146 of 2018**.

2. The application is based on the grounds that the appellant **CATHERINE JELAGAT KIPYEGO (1ST APPELLANT)** and **DICKSON KIPROP KIBOS (2ND APPELLANT)** filed a petition in Eldoret Chief Magistrate's Court **Succession Cause No. 249 of 2016** and the respondent objected to the same. The court delivered its ruling on 25th October 2018 enjoining the respondent (**LIZAH JEPCHUMBA CHEROMEI**) as co-administrator. The trial court granted stay and ordered issuance of certified proceedings which have not been supplied. The delay in filing the record of appeal has not been occasioned by the appellants. The appellants are dissatisfied with the ruling and have filed an appeal before this court, against the whole ruling. The essence of the trial court's decision is that such impending confirmation, if indeed pursued, will negatively affect the appellant's interest in the estate of the deceased and will further render the appeal nugatory.

APPLICANT'S CASE

3. The applicants depose in the supporting affidavit that they are administrators in Eldoret CM Succession Cause no. 249 of 2016 , and had petitioned for confirmation of the grant in relation to the Estate of Kosgey Kibos, when the respondent was joined as a co-administrator by virtue of a ruling dated 25th October 2018, which recognized her and her children as beneficiaries of the estate. The import of that ruling is that the respondent is now at liberty to seek confirmation of the grant and distribution of the deceased's estate in her favour-this would negatively affect the applicant's interest in the estate, and they would suffer substantial loss. The applicants filed submissions and relied on **Order 42 Rule 6(1) and 2 of the Civil Procedure Rules** to contend that the main reason for their application is not prejudicial to the interest of the respondent's children, as their well-being is not hinged to the outcome of this matter, as the 1st applicant also has school going children and they require school fees and upkeep which and she has single headedly been catering for the children, and one of them was even forced to drop out and join a school that was less costly. They are apprehensive that the respondent may apply for a grant ad colligenda bona, which if granted, will amount to interference with the estate.

4. The applicant's relied on the cases of **James Wangalwa & Another v Agnes Naliaka Cheseto, Misc. Application no. 42 of 2011 (2012) eKLR** and **In Re Estate of George Kagimbi Mbote (Deceased) (2017) eKLR** to support their prayer for stay of execution pending an appeal.

The applicants contended that if stay is not granted the trial court may issue orders that the render this appeal nugatory.

5. RESPONDENT'S CASE

The respondent submits that under order 42 Rule 6(1) of the Civil Procedure Rules it is clear that an application for stay of execution or proceedings pending appeal is to be in the first instance made to the court from which the appeal arises from and the appellate court can only entertain such an application that is as a result of being aggrieved from the decision on stay made. She relied on the case of **Titus Kiema vs North Eastern Welfare Society (2016) eKLR** where a similar application was dismissed on grounds of lack of jurisdiction.

The respondent submits that the court lacks jurisdiction to deal with the said application.

The respondent further submits that the appellants do not stand to suffer any substantial loss if the order for stay is not granted as the orders of the ruling dated 25th October 2018 does not expect an action or obligation from the appellants.

6. The respondent maintains that together with the children she begot with the deceased they stand to be prejudiced and suffer unfathomable loss not quantifiable in monetary terms if the order for stay is granted. All the said children are said to be minors in their formative stages and of school going age susceptible to immense social, psychiatric and psychological injuries if their immediate needs are not met, a scenario likely to happen if stay is granted.

The respondent relied on the case of **Global Tours & Travels Limited NAIROBI HC WINDING UP CAUSE NO. 43 OF 2000** on the discretionary nature of orders for stay of proceedings.

ISSUES FOR DETERMINATION

- a) Whether this court has jurisdiction to entertain this application as a court of first instance.
- b) Whether the application is merited.

7. WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN

THIS APPLICATION AS A COURT OF FIRST INSTANCE

The Application is brought under Order 42 rule 6 which provides;

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

8. The provisions state that the court of first instance for an application for stay is the subordinate court. However, sub-rule 6 clothes the High Court with the jurisdiction to grant orders for stay provided that the procedure for instituting the appeal has been followed.

In that regard, I hold that this court has jurisdiction to entertain the application unless the procedure for instituting the appeal was not complied with.

9. WHETHER THE APPLICATION IS MERITED

Under **Order 42 rule 6**, there are certain conditions to be certified for orders of stay of execution to issue. The applicant must prove that he/she is likely to suffer substantial loss, the application has been made without unreasonable delay and such security deemed sufficient will be provided by the applicant.

10. Whether the Applicant stands to suffer substantial loss

The Applicants' apprehension is that the respondent will apply for a grant and consequently distribute the deceased's estate in her favour and possibly to the exclusion of the 1st applicant's children.

In **James Wangalwa & Another –vs- Agnes Naliaka Cheseto in Misc. Appl No. 42 of 2011 [2002] eKLR** Gikonyo J. stated that;

“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.

11. The apprehension that the respondent will apply for a grant is not enough to amount to substantial loss. However, the applicant has submitted that the issue in contention is whether the respondent and her children are indeed dependants. In the event the appeal succeeds it follows that any distribution of the estate before the appeal is heard would render the appeal nugatory.

Whether the Application has been made without unreasonable delay

The court delivered its ruling on 25th October 2018. The Application was filed on 28th November 2018. The application was made without unreasonable delay.

As regards security, given that the ruling appealed against is not one of monetary value there is no need for security to be provided.

The application seeks to maintain the status quo before the ruling enjoining the respondent as an administrator. From the foregoing there is a possibility of the appeal being rendered nugatory in the event the respondent applies for a grant, and under the circumstances this court grants to stay proceedings in Eldoret **CMCC Cause No. 249 of 2016** pending the determination of the appeal.

Delivered, Signed and Dated this 3rd day of October 2019 at Eldoret

H. A. OMONDI

JUDGE