



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 35 OF 2018**

**IN THE MATTER OF THE ESTATE OF ACHIM HUBERITUS QUANDT ALIAS AHIM HUBERTUS QUANDT (DECEASED)**

**AND**

**JURGEN QUANDT.....PETITIONER/APPLICANT**

**VERSUS**

**CINDY TERRY SHEPARD.....1<sup>ST</sup> OBJECTOR/RESPONDENT**

**KEN TADAYO.....2<sup>ND</sup> OBJECTOR/RESPONDENT**

**MARGARET JEBET LAGAT.....3<sup>RD</sup> OBJECTOR/RESPONDENT**

**JOHANNE CHEPKELION.....4<sup>TH</sup> OBJECTOR/RESPONDENT**

**RULING**

The applicants filed an application on 19<sup>th</sup> September 2018 seeking orders that there be stay of execution of the decree and orders of the subordinate court made on 16/3/2018 pending the final hearing and determination of the appeal.

The application is based on the grounds that the deceased died intestate and the subordinate court delivered its judgment in favour of the objectors in the matter. No grant of letters of administration or confirmation has ever been issued. The subordinate court purported to distribute the estate of the deceased to strangers who have no blood relationship to the deceased and do not qualify under Cap 160.

The appellant has preferred an appeal against the decision and the respondents are likely to execute the decree at any time rendering the appeal nugatory. The appellant stands to suffer substantial loss and injustice if the appeal succeeds as the subject matter will no longer be in existence.

**APPLICANTS' CASE**

The applicant invoked *Order 42, rule 6* of the *Civil Procedure Code* and submitted that the fact that there was partial execution cannot be a bar to granting stay of further execution since the estate is yet to be administered as required by law.

The issues raised in the appeal are serious matters of law and unless the court grants the orders sought then the estate of the deceased is likely to be wasted by the objectors who are strangers within Section 29 of the Law of Succession Act.

The remaining part of the estate is sufficient security for due performance of the decision of the court pending appeal. The legitimacy of the power of attorney is the issue on appeal and is therefore not a ground for the court to deny the orders sought in the application.

The arguments advanced in the replying affidavits do not address the issues raised in the application before court. Failing to grant the orders sought will amount to allowing the estate to be wasted by intermeddlers before the appeal is heard and determined. It is obvious that substantial loss will result if the orders sought are not granted. The applicants invited this court to invoke section 50 of the Law of Succession Act and grant the orders sought.

**3<sup>RD</sup> & 4<sup>TH</sup> OBJECTORS'/RESPONDENTS' CASE**

The 3<sup>rd</sup> and 4<sup>th</sup> objectors filed their submissions on 8<sup>th</sup> march 2019. They submitted that the estate was equally distributed as judgment was

delivered and the application before the court is to deny them proprietary rights.

They further submitted that the grounds of appeal are unmerited, baseless and lack any substance thus it is just an abuse of the court process. Further, that the appellant has not satisfied the conditions of *Order 42 Rule 6*.

The applicant has no authority to depose to the issues in this succession as he donated his powers to Bernhard George Rothstein and there is no evidence that the power of attorney has been revoked. His authority to act has ceased hence the person holding power of attorney ought to execute on behalf of the donor.

#### **ISSUES FOR DETERMINATION**

- a) Whether the application meets the threshold for orders of stay under Order 42 rule 6 of the Civil Procedure Rules.
- b) Whether the Application is Res-Judicata

#### **WHETHER THE APPLICATION MEETS THE THRESHOLD FOR ORDERS OF STAY UNDER ORDER 42 RULE 6 OF THE CIVIL PROCEDURE RULES**

Order 42 Rule 6 of the Civil Procedure Rules provides;

**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.**

#### **Whether the Applicant shall suffer substantial loss**

The applicants have not laid out their case for substantial loss. However, given that the subject matter is the administration of the estate of the deceased, it is plausible that if the same is distributed then the subject matter of the appeal shall cease to exist and render the appeal an academic exercise. However, the provisions are that the applicant must satisfy the court that substantial loss may result unless the orders are granted and in my opinion the petitioner has not. It is not enough to merely state that substantial loss shall be occasioned on the applicant.

#### **Whether the Application was filed without unreasonable delay**

The application was filed on 17<sup>th</sup> September 2018. The orders of the subordinate court were given on 16<sup>th</sup> March 2018. The application was filed 6 months after the decision of the subordinate court. The applicant did however file a similar application in the subordinate court and the same was dismissed with costs. The 6-month period taken to apply for stay has not been adequately explained. The applicant did not even bother to give the timelines within which the orders sought in the lower court were denied. It is however probable that the delay was caused by pursuing stay in the lower court.

#### **Security**

The applicant has provided that the remaining part of the estate do serve as security for stay. The applicant has not stated what the remaining part of the estate that shall be sufficient security is.

#### **WHETHER THE APPLICATION IS RES-JUDICATA**

The respondents contended that the application should be dismissed as it is res judicata for the fact that the applicant made a similar application in the lower court and the same was dismissed. That the applicant should have appealed that decision instead of filing an application for stay in the present court.

I do find that this court being an appellate court, the applicant should have filed an appeal rather than a fresh application. The application is therefore res-judicata.

In the premises the application fails as the applicant has failed to meet the threshold of *Order 42 Rule 6* and for it's improperly before this court.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 9<sup>th</sup> day of October, 2019**

In the presence of:

Mr. Kipruto for the appellant/Applicant

Firm of Kibichi for the respondent absent

Ms. Abigael – Court assistant