



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA OF NAIROBI

SUCCESSION CAUSE NO. 2338 OF 2009

IN THE MATTER OF THE ESTATE OF WALLACE NDERU KAMAU

MARGARET WANGECI NDERU.....1ST PETITIONER

CHARLES KAMAU NDERU.....2ND PETITIONER

-VERSUS-

ALICE WACEKE NDERU.....OBJECTOR

RULING

Before court for determination is an application for consideration brought to court by way of Notice of Motion under a certificate for urgency on the 18th of January 2018 brought under **Order 22 Rule 22, Order 42 rule 6 (2) and Order 50 Rule 6 of the Civil Procedure Rules and S. 3A of the Civil Procedure Act** seeking the following orders:

- 1. That service of application be dispensed with in the first instance owing to its urgency**
- 2. That pending hearing and determination of this application there be a stay of execution of the judgement of this honourable court delivered on 22nd September 2017.**
- 3. That there be stay of execution of the judgement delivered on 22nd September 2017 and all consequential orders pending the hearing and determination for this application.**
- 4. That this court be pleased to extend time within which to appeal.**

The application was based on the following grounds, on the affidavit of Alice Wacheke Nderu, and on further grounds to be adduced at the hearing:

- i. That judgement herein was delivered on 22nd September 2017 against the objector and by Hon. M. W. MUIGAI J.**
- ii. That the objector is dissatisfied with the whole judgement and has applied for an extension of time within which to lodge an appeal.**
- iii. That the appeal has merit and high chances of success as the objector/applicant are challenging the orders awarded by this honourable court.**
- iv. That the objector/applicant is willing and able to deposit security of costs in court if directed by court in a joint interest account pending the hearing and determination of this application.**
- v. That unless the orders sought are granted, the applicant will suffer irreparable loss as the petitioners/respondents may execute at any time rendering the appeal nugatory.**

The Objector has sought for extension of time to lodge an appeal which the Objector believes has merit and high chances of success as the objector in challenging the orders awarded by this honourable court on the 22nd September 2017.

The Objector claims that due to the aforesaid orders contained in the judgment, the objector will suffer irreparable loss as the petitioners may execute leaving her with no other avenue.

The Objector was/is willing to deposit security for costs in a joint interest earning account if the Court orders the same.

The Objector further avers that she filed a Notice of Appeal on the 9th November 2017 however; she was indisposed and could not give further instructions to her advocate.

The Petitioners through their Counsel have stated that there is no executable order that was granted by this Honourable court and hence the application for a stay of execution is misguided and untenable.

The petitioners there was/is no notice of appeal or viable appeal filed. The Notice of appeal was filed a long time after the judgment of the Court and hence there has been inordinate delay. Further to that, the petitioner avers that the objector has not illustrated what loss would be suffered. In addition, the petitioner states that this is geared towards unnecessary prolonging the finalization of this case.

DETERMINATION

Stay of execution of judgment is grounded on **Order 42** and **Order 51** of the **Civil Procedure Rules 2010** and **Section 3A** of the Civil Procedure Act.

Order 42 Rule 6 (1) & (2) CPR 2010 provides as follows:-

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 be 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside"

2. No order of stay 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 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

The corner stone of the jurisdiction of the court under **Order 42** of the **Civil Procedure Rules** is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo J.** in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto** where it was held *inter alia* 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors, which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein VS. Chesoni,.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"

On whether or not the application was brought without undue delay, I am not satisfied that the claim of indisposition without proof can stand. The judgement was delivered on 22nd September 2017. The Objector applied for extension of time to lodge an appeal on the 18th January 2018. I find that there was unreasonable delay and no evidence was fashioned to prove the alleged indisposition either. I find no sufficient reason to grant stay of execution. The security of costs is not applicable as this not a monetary decree but estate of deceased available for distribution by beneficiaries of the deceased's estate.

I have carefully considered the application before me and the law and I am persuaded that proof of substantial loss and proof that the appeal will be rendered nugatory have not been established as stated above. as was held in **Hassan Guyo Wakalo vs Straman Ea Ltd;**

"In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

See the case of **Masisi Mwita vs Damaris Wanjiku Njeri [2016]eKLR.**

I find thus substantial loss, being one of the requirements under the rules has not been proved in the present case. I therefore find no reason to deny the petitioners the fruits of their judgement especially bearing in mind that there is no execution order.

Counsel for the petitioner opposed the application and insisted that the applicant has not satisfied the requirements of **Order 42CPR** in that

no substantial loss has been demonstrated nor has it been deposited. The court in its judgment delivered on 22nd September 2017 stated in relation to the marriage and the children;

“The court notes that the objector claimed that she lived with the deceased from 1990-2009 when the deceased passed on. The evidence did not confirm this fact as the deceased was gainfully employed in Nairobi and lived with his wife the petitioner until 2000 and he could only visit Meru and Oloitoktok. The objector even if she lived with the deceased all this time, the presumption of marriage cannot be invoked as she was married but separated from her former husband whom they divorced in 2007. The objector did not have a child with the deceased. there is no basis to infer the presumption of marriage without evidence of long cohabitation and general repute of being held out as man and wife....the High Court Civil Case 624 of 2004 where the court granted ejection/eviction orders on 30th November 2009....the objector has attached receipts of building material ...unfortunately the objector unlawfully encroached on property she did not own.”

The Court’s Judgment is based on the evidence before Court found that Objector has no place in this marriage/family and the same applies to her children who are not entitled to inherit from the deceased estate. The Objector, Alice Waceke Nderu illegally encroached on the petitioner’s property and failed to prove their stay as man and wife to the deceased. The objector also gave false/ misleading information with regard to the purported ‘*ngurario*’ which ceremony would have confirmed her as a wife of the deceased.

I therefore see no need to allow a stay of execution as applied for as the Objector does not have any legal standing in this family and is therefore not a beneficiary of the estate.

DISPOSITION

- 1. The prayer in the Notice of Motion dated 18th January 2018 seeking stay of execution is hereby dismissed.**
- 2. The administrators and beneficiaries of the deceased estate with the 3 children of the marriage as upheld by the court in its judgement shall stand.**
- 3. The judgment of the court of 22nd September 2017 remains as is and is not stayed.**
- 4. Any aggrieved party may apply or exercise right of appeal within 30 days in the Court of Appeal.**
- 5. Costs in the cause.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR THE PETITIONERS

NO APPEARANCE FOR THE OBJECTOR

COURT ASSISTANT- JASMINE