



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1118 OF 2009

IN THE MATTER OF THE ESTATE OF SAMUEL GICHUHI MUGAMBI ALIAS GICHUKI s/o MUGAMBI (DECEASED)

NAOMI WANJIKU GICHUHI.....PETITIONER

VERSUS

1. RUTH WANGECHI KAMAU

2. NN WAMBUI IRUNGU

3. ARGARET MUMBI KAGIRI

4. ESTHER WMBUI KAGUMYA

5. MARY WANGUI NDERITU.....PROTESTORS

RULING

The Petitioner/Applicant has brought an application dated 27th April 2018 seeking for the following orders: -

1. That the execution of the decree passed on 26th January 2018 be stayed pending the intended appeal to be filled in due course in the Court of Appeal.
2. That cost of this Application be provided for.

The applicant filed an affidavit of even date in support of the said application stating: -

1. The judgment in the cause has been delivered and since she is not satisfied with the same, she will prefer an appeal to the Court of Appeal.
2. Stay of execution is necessary to stop the protestors from interfering with the estate of the deceased by distribution of the estate as decreed by court.
3. The estate belongs to a large family and the protestors should not be allowed to proceed with distribution according to the impugned decree at the prejudice of the whole family pending determination of the intended appeal.

The application is opposed by the affidavit of Esther Wambui Kagunya on her own behalf and on behalf of other protestors stating the following *inter alia*: -

1. The estate has been rightly inherited by only the widow and the children of the deceased hence the intended appeal has no chances of success.
2. The Petitioner/Applicant will not suffer any prejudice if the estate of the deceased is shared among the beneficiaries according to the judgment of the court.
3. The applicant has not attached the memorandum of appeal as required by law.
4. The application does not meet the threshold for granting of stay

The applicant filed another affidavit dated 28th may 2018 contesting the Respondents' reply and reiterating her averments as stated in her first affidavit dated.

The issue for determination is whether the Applicant has made a satisfactory case to warrant the grant of stay of execution of this Court's decision in the cause.

There is no specific provision in the Law of Succession Act for making an application to stay the execution of a decision in succession cause. In *Kungu Muthua –v- James Icharia Kungu (2015) eKLR*, where the court was dealing with a similar application, the judge found that Rule 49 of the Probate and Administration Rules was the applicable provision read together with rule 73.

The applicant did not cite any provisions of the law to support her application however this Court has inherent jurisdiction to ensure justice and prevent abuse of the court process as is provided in **Rule 73 of the Probate and Administration Rules**:

Nothing in these Rules shall limit or otherwise the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The grant of stay of execution could fall in either or both categories depending on the circumstances, by serving the ends of justice or preventing an abuse of the court process. An order for stay of execution is an order in the exercise of the court's discretion. It can only issue when the Court is satisfied on the basis of the law and the evidence adduced, that the Applicant stands to suffer irreparable loss, and that the application is made without unreasonable delay: see Gikonyo J's decision in *Turbo Transporters Ltd -v- Absalom Dova Lumbasi [2012] eKLR*.

The applicable law regarding stay of execution is stipulated at **Rule 6 of Order 42 of the Civil Procedure Rules 2010**, thus: -

“1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except insofar 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.

The Applicant filed a notice of appeal. However, she has not produced any document to show that indeed she has filed any appeal. The applicable law with regard to an intended appeal to the Court of Appeal is **Rule 5(2)(b) of the Court of Appeal Rules** which provides:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may

a.

b. in any civil proceedings where Notice of Appeal has been lodged in accordance with Rule 75, order stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.”

The notice of appeal is merely an intention to appeal and is not by itself sufficient to support an application for stay. See *Kungu Muthua ~v~ James Icharia Kungu (2015) eKLR* where the court stated;

“However, a notice of appeal is not by itself sufficient; there is need for further evidence of the necessity to disturb a decision of this Court by way of appeal. But the question arises as to how an intention to appeal may be discerned. The Black's Law Dictionary 8th ed (2004) defines the word “appeal” as follows:

“A proceeding undertaken to have a decision reconsidered by a higher authority; especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal”

The notice of appeal filed by the Applicant herein only constitutes preliminary evidence of an intention to appeal but much of its convincing force is blunted by the failure to follow it up with the actual appeal. It only discloses the desire to have a decision reconsidered, but it does not make clear the end of having that decision reviewed or possibly reversed. If the Applicant had provided supplementary evidence to demonstrate that he has taken deliberate procedural steps towards appealing the decision of this Court, then there would be no justification in not allowing his application for stay of execution. However, no such evidence was provided...While this hardly constitutes a conclusive basis on which to deny the Applicant's application for stay of execution, it makes apparent the need for further proof that an actual appeal has been or is being lodged. Otherwise, the

Respondent may be deprived of his long-awaited victory without justifiable cause.”

It is noteworthy that in ***Rhoda Wairimu Karanja & Another -v-Mary Wangui Karanja & Another (2014) eKLR*** the Court of Appeal held: -

“There is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes”

Moreover, **Rule 5(2)(b)** of the **Court of Appeal Rules** envisages that an Applicant who seeks to secure a stay of execution should demonstrate an arguable case and show that the intended appeal would be rendered nugatory if the stay is not granted. While it is not the place of this Court to speculate on whether such a case has been or has not been made out by the Applicant, the applicant has not placed before this court to support her application.

The Court is also guided by **sub-rule (2) of Rule 6 of Order 42** of the **Civil Procedure Rules** which requires the Court to satisfy itself that the Applicant will likely suffer substantial loss unless the execution is not stayed, and that the application was made without unreasonable delay. The only reason advanced by the Applicant to support her claim is that the *‘estate is for a large family and it would be serious for protestors taking advantage of the decree of court before the appeal is heard and determined and that the applicant’s age is advancing’*. These allegations are not sufficient basis on which to sustain the argument that the Applicant will suffer substantial loss if the stay is not granted.

The Court must balance the Applicant’s right of appeal vis-à-vis the Respondent’s right to benefit from the decision that is sought to be appealed from. In the case of **Board of Governors, Moi High School Kabarak & Another -v- Malcolm Bell & Others, SC Petitions No. 6 & 7 of 2013**, the Supreme Court of Kenya, referring to the South African Supreme Court of Appeal’s decision in **New Clicks South Africa (Pty) ~v~ Minister for Health and Another 2005 (3) SA 238 (SCA)**, held as follows: -

“The advantages and disadvantages likely to follow upon the granting of the order must be weighed. If overall, and with due regard to divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application.”

In view of the foregoing I find that the application has no merit. The application is hereby dismissed with no orders as to costs.

Dated, delivered and signed at Nyeri this 16th Day of November 2018

Mumbua T Matheka

Judge

In the presence of:

CA Esther

Ms. Macharia for Ms. Mwai for the respondent

Applicants present