



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 187 OF 2017

LAWRENCE GATUKU KARANJA.....1ST APPELLANT
JOSEPH WAINAINA KARANJA.....2ND APPELLANT
MARGARET NDUTA KARANJA.....3RD APPELLANT
BONIFACE WAWERU KARANJA.....4TH APPELLANT
MOSES MWAURA KARANJA.....5TH APPELLANT
ALFRED KINYANJUI KARANJA.....6TH APPELLANT

VERSUS

JOSEPH WAINAINA GATUKU.....1ST RESPONDENT
STANLEY MURAGA KARANJA.....2ND RESPONDENT
JANE NJERI KARANJA.....3RD RESPONDENT

RULING

1. Before me is an application by way of a Notice of Motion filed on 7th December, 2017 and brought under Order 42 rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and other enabling provisions of the law. The application seeks to stay the execution of the judgment delivered by the subordinate court at **Gatundu** on 29/11/2017 in **Succession Cause No. 36 of 2010**, pending the hearing and determination of the appeal filed in this court by the six Applicants. On the hearing date, however the 4th Applicant withdrew from the application. The 6th Applicant had withdrawn earlier.

2. The 1st Applicant, **Lawrence Gatuku Karanja** has sworn a supporting affidavit on his own behalf and on behalf of the other Applicants. The Application is premised on the grounds that after judgment was delivered in the lower court, the court rejected an application for stay of execution.

3. He has deposed further that the Respondents had applied for the confirmation of grant in the lower court but failed to annex a schedule in regard to the mode of distribution. That the application was heard, and judgment delivered. In the circumstances, he filed the present appeal and instant application for stay of execution pending hearing and determination of the appeal. He stated that if the orders sought are not granted, the applicants will suffer substantial loss as distribution of the estate will proceed.

4. The Application is opposed by the Respondents. The Respondents swore a joint replying affidavit. They deposed that their application to confirm the grant in the lower court had contained a schedule of the proposed mode of distribution. And that the appeal and the application for stay of execution will jeopardize their interests and should be dismissed.

5. The application was canvassed by way of oral submissions. On behalf of the Applicants, the 1st Applicant submitted that the applicants had been in long occupation of and developed their respective land portions which are the subject matter of the suit. Thus, if the stay orders sought are not granted, they stand to suffer substantial loss.

6. The 2nd Respondent in urging the motion on behalf of his co-Respondents relied on the two affidavits filed by them, and the ruling by the trial court. He submitted that the Applicants had unlawfully distributed the estate during the pendency of the succession cause, sub-divided the land continue to intermeddle with the estate. He prayed that the Applicants be restrained, alluding to a similar prayer in the Motion filed

by the Respondents on 10th July 2018. The prayer in the said Motion seeks to restrain the 1st Applicant from interfering with, or committing waste, selling or destroying habitations, structures, or plants on land parcel **No. Kiganjo/Nembu/203**, pending the determination of the appeal.

7. There is no dispute that the parties herein were involved in the lower court succession cause relating to the estate of the late **Gatuku Gathengi** their acclaimed progenitor. In the decision of the lower court now appealed from, the trial magistrate distributed the estate among the parties. It is apparent the parties were and are still in occupation of different parts of the suit land. Some of them, including the Applicants are aggrieved that the lower court ordered that the location of each beneficiary's portion be determined through balloting. Evidently, the Respondents support the decision.

8. The court has considered all the material canvassed in respect of this motion. To be successful, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must:-

- i) approach the court without unreasonable delay.
- ii) satisfy the court that substantial loss may result unless the order sought is granted.
- iii) furnish security for the due performance of the decree appealed from.

9. At this point, the court is not concerned with the merits or validity of the grounds of appeal or indeed the judgment appealed from. Undoubtedly the Applicants have approached the court timeously. Have the Applicants demonstrated that substantial loss will result if the orders sought are denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Limited - Vs- Kibiru & Another [1986] KLR 410**. It is relevant even though the instant appeal is not in respect of a money decree.

10. Holdings 2, 3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.”

11. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. (emphasis added)

12. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,..... render the appeal nugatory.

This is shown by the following passage of **Cotton L J** in **Wilson -Vs- Church (No 2) (1879) 12ChD 454** at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

13. In the instant case, the Applicants have by their affidavits expressed apprehension that they will suffer substantial loss if distribution proceeds. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt: **“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with**

preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....”

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

See also **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR.**

15. A tension is created by two rival but equally important propositions in cases of this nature: the court’s duty to ensure that an intended appeal is not rendered nugatory through likely substantial loss on one hand, and concern that a successful litigant should not be deprived of the fruits of his judgment without just cause on the other. The subject matter is the distribution of an estate. If the stay orders are denied, the subject matter may dissipate.

16. It is my considered view in this case, that the Applicants might suffer substantial loss if the stay order is denied and therefore there is a just cause in the court staying execution. However, the Respondent’s interests must also be considered. In order to maintain an even keel between the interests of both parties, I would grant a conditional order to stay the execution of the lower court judgment.

17. The nature of this case does not lend itself to the demand for a security in the form of money or bonds. I note however that the Respondents had filed an application on 10/7/18 seeking orders to restrain the present 1st Applicant from interfering with the suit land, structures and vegetation thereon pending appeal. The application has not been heard. Nonetheless it is in my view only fair that the Applicants also be stopped from committing any acts that would render the lower court judgment if upheld, unperformable.

18. Thus, in order to preserve the substratum of the appeal, I would order as a condition to the stay, that the Applicants do execute, by way of security, an undertaking not to interfere in any way, or to alienate or commit any waste in any manner whatsoever on the suit land namely **Kiganjo/Nembu/203** and structures or vegetation thereon pending the determination of the appeal, and further, that in the event of default by the Applicants of this condition, the stay order granted will be liable to be set aside by this court.

19. The undertaking is to be made by way of a joint letter to the Deputy Registrar of this court, duly executed by all the remaining Applicants, namely the 1st, 2nd, 3rd and 5th Applicants and should be received in the court registry by close of business on 23rd November 2018, failing which the stay order granted herein will automatically stand discharged. Needless to say, if no undertaking is received in the stated period, the Respondents will be at liberty to proceed with execution and/or to set down the application filed on 10/7/18 for hearing.

20. I further direct the 1st, 2nd, 3rd and 5th Applicants to expedite the filing of the record of appeal which should be filed, in any event, before the end of February, 2019. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 16TH DAY OF NOVEMBER, 2018.

C. MEOLI

JUDGE

In The Presence of:

The 1st, 2nd and 3rd Respondents

The 1st, 2nd, 3rd, and 5th Applicants are absent despite notice.

Court Clerk - Nancy