



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2491 OF 2014**

**IN THE MATTER OF THE ESTATE OF GEORGE KAGIMBI MBOTE (DECEASED)**

**RULING**

1. This application was brought under certificate of urgency by way of a Notice of Motion dated 20<sup>th</sup> December 2016, pursuant to **Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act Cap 21** Laws of Kenya. The application sought orders that pending the hearing and determination of the application inter partes, and pending the determination of the intended appeal the *status quo ante* and orders subsisting prior to the delivery of the ruling on 15<sup>th</sup> December 2016 in the matter do prevail. That Administratrix Rosalia Wairimu Kagimbi, either by herself or through representatives, agents or servants or whosoever, be restrained by way of injunction from occupying, wasting, disposing off or otherwise interfering with the Objectors/Applicants' peaceful occupation of their matrimonial home being Plot No. 3485/10 in Kahawa Sukari. That the court do grant the Objectors/Applicants' leave to appeal against the said ruling in this matter.

2. The Objectors relied on grounds that they were aggrieved by the ruling of court delivered on the matter on 15<sup>th</sup> December 2016 which set aside the orders granted on 24<sup>th</sup> November, 2014 and 1<sup>st</sup> December 2014, and intended to go on appeal.

3. Mrs. Njuguna filed submissions on behalf of the Objectors and contended that the said order effectively reversed:

- i. an injunction which restrained the Administratrix, or her agents from occupying, wasting, disposing off or otherwise interfering with the Objectors peaceful occupation of their matrimonial home in Kahawa Sukari.
- ii. an order of stay of execution on an irregular distress for rent and a proclamation of attachment of movable properties by the Administratrix against the Objectors.
- iii. an order requiring that rent collected from Ruiru/ KIU Block 13/468 be deposited in a joint account opened in the name of the advocates of both parties.

4. Mrs. Njuguna submitted that the Objectors would suffer substantially if the Administratrix through her agents were at liberty to irregularly proclaim and attach their movable property, occupy and transfer their matrimonial home and/or deny the Applicants their legal entitlement of rent collected from Ruiru/Kiu Block 13/468, all of which would cause extensive loss to them.

5. Counsel urged that the Administratrix had issued a Notice of Eviction to the Applicants from their said matrimonial home in Kahawa Sukari by the 21<sup>st</sup> of December 2016 and being aggrieved they had filed a Notice of Appeal. They were therefore apprehensive that unless the execution of the said ruling and any

other resultant decree sought to be appealed against were stayed, they were bound to suffer substantial loss and the appeal rendered nugatory.

6. Counsel asserted that the intended appeal raised valid and triable issues and had high chances of success and that the Petitioner would not suffer any incurable prejudice, should the application be allowed.

7. The Application was supported by the affidavit of Fidelis Wanjiru Kimani dated 20<sup>th</sup> December 2016, in which she avers that the deceased was her late husband who died on 28<sup>th</sup> June 2014. That on 28<sup>th</sup> October 2014 Objectors filed an application seeking an injunction to restrain the Administratrix or her agents from occupying, wasting or disposing of or otherwise interfering with their matrimonial home in Kahawa Sukari and further seeking a stay of execution, on an irregular distress for rent and a proclamation of attachment of movable properties by the Administratrix against them.

8. The court granted the sought orders on 24<sup>th</sup> November, 2014 and on 1<sup>st</sup> December 2014 respectively and also ordered the rent collected from Ruiru/KIU Block 13/468 to be deposited in an account opened in joint names of the advocates of both parties. Subsequently, the Administratrix through an application dated 24<sup>th</sup> November 2015 sought and succeeded to have the said orders discharged and set aside by the court in a ruling delivered on 15<sup>th</sup> December 2016.

9. Learned Counsel Mr. Maina filed on behalf of Rosalia Wairimu Kagimbi a Replying Affidavit dated 9<sup>th</sup> February 2017 which averred that the Application dated 20<sup>th</sup> December 2016 was bad in law, a nonstarter and an abuse of the court process. That it was aimed at frustrating and preventing her from enjoying the fruits of successful litigation contrary to the overriding objective of the rules of procedure in handling civil cases which is to do justice and to prevent abuse of court process.

10. He contended that the ex-parte orders granted in favor of the Objectors on the 24<sup>th</sup> November 2014 and 1<sup>st</sup> December 2014 were obtained by misleading the court through fraudulent misrepresentation of the facts in issue. That after both parties were accorded a fair trial the judge analyzed both the facts and the law presented in court and made the right determination to set aside the aforesaid orders on 15<sup>th</sup> December, 2016.

11. The Administratrix contended that at the end of the vigorous litigation process which the Applicant had subjected her to for two years, she should enjoy the fruits of litigation through issuing a notice to the Applicant/Objector to vacate the suit premises and release the sums of money held in the joint account held by the counsels on record to her. She urged that the notice of eviction issued to the Applicant was legal and due process was followed in issuing it and the Applicant has no locus standi to illegally seek to occupy property which does not belong to her. That the Applicant blatantly ignored the outcome of the aforesaid ruling and contemptuously refused to comply with the orders therein.

12. The Administratrix averred that the Objector has come to court with tainted hands where equity demands that he who comes to equity ought to do so with clean hands. That she has failed to comply with the orders of the aforesaid ruling and is only interested in delaying justice as was noted by the Judge in the said ruling, while she unfairly enjoys the orders which were rightfully lifted by the ruling of 15<sup>th</sup> December 2016.

13. That in any case the orders sought by the Applicant cannot issue in law as this is a matter that had already been litigated, heard and decided and therefore is Res Judicata. That the affidavit contains half-truths and misrepresentations and orders prayed ought to be sought in the Court of Appeal since it does not auger well for the Court to stay its own orders. She asserted that the Notice of Appeal is a sham calculated to delay justice and the Objector does not deserve the orders sought.

14. The Administratrix contended that the continuous illegal holding of funds in the joint account was greatly inconveniencing her. That for instance the deceased's mother one Julia Mukami Mbote was sick and admitted at the Avenue healthcare parklands hospital and was in dire need of medical attention and

the said sum of money was required to cater for her medical expenses.

15. The Administratrix submitted that the Objector was illegally occupying a house belonging to her without any order while she paid rent where she stayed to the tune of Kshs. 65,000. She urged the court to dismiss the application with costs as she stands to suffer irreparably if the orders of stay are granted.

16. The second application was filed by the Administratrix under a Notice of Motion dated 20<sup>th</sup> January 2017 pursuant to Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya. It has asked the court to vary and/or review its Ruling delivered on 15<sup>th</sup> December 2016 in the following terms:

a. That all the money collected from the estate of the deceased held in joint account number [particulars withheld] at NIC Bank Limited in the names of Nyaguthie Njuguna & Co. Advocates and Maina Rogoi & Co Advocates be released to the Applicant immediately;

b. that an order for eviction of the objectors from Plot No. 3485/10 Kahawa Sukari and delivery of vacant possession thereof to the applicant do hereby issue;

c. that the officer commanding Ruiru police station to ensure compliance of order 3 above and;

d. that the costs of the application be borne by the respondents.

17. The grounds of the application state that the Applicant was the wife of the deceased and the legal Administratrix to the estate of the deceased; that her application dated 24<sup>th</sup> November 2015 was allowed by the court on 15<sup>th</sup> December 2016 and became legally entitled to all that money collected from the estate of the deceased held in account number [particulars withheld] at NIC Bank Limited in the joint names of Nyaguthie Njuguna & Co. Advocates and Maina Rogoi & Co Advocates.

18. The Administratrix alleged that counsel for the objectors refused to release the said sums of money stating that the delivered ruling did not order so, and the objectors also refused to give vacant possession to the suit property herein. The Administratrix averred that she will suffer irreparably if the orders sought are not granted and asserts that this application has been brought timeously.

19. The application is supported by the Affidavit of Rosalia Wairimu Kagimbi dated 20<sup>th</sup> January 2017, in which she contends that the Objectors have not preferred any appeal from the said ruling neither has the ruling been stayed. That the Objector needs the money to prepare for her daughter's wedding ceremony in the U.S.A and also pay the legal fee in this matter. Further that she would suffer irreparably if the respondents were allowed to prevent her from enjoying the fruits of litigation.

20. In a Replying Affidavit dated 10<sup>th</sup> February 2017 sworn by Fidelis Wanjiru Kimani the Respondent submitted that the application was premature, misguided, threadbare, incompetent, bad in law, unwarranted, blatantly fatal, not merited, an abuse of the court process and the same ought to be dismissed with costs. Further that the said application contained blatant lies, untruths and misrepresentations and was only meant to prejudice the court against them.

21. The Objector avers that in the year 2010 the deceased returned to Kenya from the USA and he and the Objector began a relationship. The deceased informed her that his marriage to the Petitioner had irretrievably broken down and that they were estranged. He moved in with her and her children in her rented house in Githurai in February, 2010.

22. The deceased donated the subject parcel of land No.3485/10 Kahawa Sukari which was bare and without any developments thereon, for purposes of putting up their home. The Objector contributed her resources and finances towards construction of the home, while the deceased returned to settle all the issues in USA, to enable him relocate back to Kenya.

23. Prior to leaving for the USA in May 2010, the deceased visited her mother at her home severally and informed her that the Respondent was now his wife and he would formalize their union upon his return from the USA. By September 2010 she had completed the construction of the house while the deceased was in the USA. She moved in with her two children. The deceased returned to Kenya in September, 2012 and they resumed cohabitation in the subject property.

24. Upon the deceased's return in September 2012 the Objector stopped doing business and the deceased assumed responsibility for the household including the financial needs of the family, paying school fees and medical care for the children. He had taken in the children as his own and they were dependent on him for guidance, emotional, financial, social and psychological needs. The Objector and the deceased attempted to have a child of their own and until his death they had not given up on siring a child together.

25. The Objector averred that on or around 25<sup>th</sup> December 2012 the deceased introduced her to his parents at Kagea in Githurai and on or around 14<sup>th</sup> February 2013 the two of them jointly incorporated a family business known as Unikwise Agencies Co. Limited.

26. That on or around 11<sup>th</sup> January 2014 they formalized their union under Kikuyu customary law but were not issued with a marriage certificate because the forms for registration of customary marriage and the Registrars rules on customary law marriage were yet to be formulated. The deceased introduced her as his wife to all and sundry everywhere they went and the society knew them as such. That her marriage was formalized before the coming into force of the marriage Act 2014 and therefore it was a valid subsisting marriage under customary law as contemplated in **Section 98(1)** of the **Marriage Act 2014**.

27. The Objector submitted that the validity of her customary law marriage was not an issue to be determined after the death of the deceased and the court ought to confine itself to her right and that of the co-objector's to inherit the estate of the deceased. That at all times during their life the deceased never disclosed that he was married to the Administratrix in a Christian marriage. He only informed her that they were married under Kikuyu customary law and that there was no impediment to their marriage since he had separated from the Administratrix in the USA.

28. The Objector averred that she is a wife for purposes of the **Law of Succession Act** for the inheritance of the deceased's estate as contemplated in **Section 3(5), 29 and 40** of the said Act. Further that the Constitution of Kenya protects her against discrimination and protects her proprietary rights. She asserted that the Administratrix, could not claim to be entitled to all that money collected from the estate of the deceased more particularly the monies held in joint account of both advocates for the parties since the court did not declare her as such.

29. The Objector argued that the Court had not issued a certificate of confirmation of grant distributing the monies held in the said account. That the procedure for distribution and confirmation of the said money is provided for in law and can not be by way of the present application for Review. That allowing the application for release of the monies would be tantamount to distributing the estate of the deceased through the back door.

30. The Objector contended that the Objection proceedings she had filed had not yet been heard and determined. That in the year 2014 the Administratrix petitioned for temporary grant of Letters of Administration and on or around 28<sup>th</sup> October, 2014 a summons application dated 22<sup>nd</sup> October, 2014 was filed in which she sought orders against the Administratrix restraining her from forcefully evicting her from the subject property which is her matrimonial home.

31. That on 21<sup>st</sup> September 2015 directions were given for her two applications to be heard simultaneously and be dispensed with by way of oral evidence. On 24<sup>th</sup> September 2015, her advocate proceeded on maternity leave and the Administratrix through her advocates on 24<sup>th</sup> November 2015 filed an application to discharge the interim orders issued to her and that was the application whose ruling was now the subject of the appeal and the application for stay pending appeal.

32. The Objector was aggrieved by the courts finding of delay on her part, yet at every stage this was a very active file and the delay prior to the application for discharge was excusable and not inordinate as to cause discharge of the interim orders.

33. The Objector submitted that the confirmed grant that was purportedly issued in the Limuru file did not have the monies held in NIC Bank in the list of assets of the deceased and the court did not have power to release the monies to the Administratrix.

34. The Objector contended that the discharge of the interim orders did not in any way amount to hearing and determination of the main issue and that the summons for revocation of grant was yet to be heard by way of viva voce evidence to determine conclusively the rights of the Objectors as dependants of the deceased. That a prima facie finding that is subject of appeal could not be considered successful and conclusive.

35. The Objector argued that the court has a duty to protect the deceased's properties subject to distribution from wasting and intermeddling. She urged that the appeal raised triable issues and has high chances of success and should the application for eviction succeed the Objector would be rendered destitute. She would thus suffer substantial loss and should she finally succeed, damages would not be an adequate remedy since the Administratrix would have sold all the properties and disappeared to USA.

### **Analysis and findings:**

36. I have considered the two applications the responses thereto, and submissions by both counsels. The determination of the Objector/Applicants' application for stay orders will determine whether the court will allow the Administratrixes application for review of the orders of 15<sup>th</sup> December 2016 or not.

37. The conditions for granting of stay of execution pending appeal are well settled. An order for stay is a discretionary remedy. The discretion is however, circumscribed by the conditions set out under **Order 42, Rule 6** of the **Civil Procedure Rules**. These are that the application should be made without undue delay; should show that substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court.

38. The Court will not issue any stay orders unless the two grounds set out in **sub-rules (a) and (b) of Order 42 Rule 6(2)** are satisfied. **Rule 6(2)** provides that:

**“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 orders which the Applicant seeks to stay execution thereof were made on 15<sup>th</sup> December, 2016 while the instant application seeking stay was filed on 20<sup>th</sup> December, 2016, 5 days after delivery of the said orders. In the circumstances, this court is satisfied that the application was made timeously and therefore has met the first limb of **Order 42 Rule 6** of the **Civil Procedure Rules**.

39. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

40. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The

Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent. In that regard what is at stake in this cause is that if the stay herein is not granted the Administratrix would be at liberty to proclaim and attach the Objector's movable property, occupy or transfer the matrimonial property in Kahawa Sukari, or deny the Objector the rent collected from the Ruiru property.

41. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in **James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR**.

*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 [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:*

*“...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.”*

42. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. See the decision of Mwera J (as he then was) in **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. – See the decision of Musinga J (as he then was) in the case of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**.

43. It is not in dispute that the suit premises is indeed the Objector's matrimonial home and that the 1<sup>st</sup> Objector contributed towards building the subject property. In my view, the Objectors will suffer substantial loss if the eviction orders are enforced, whether or not they are illegally holding over the suit premises.

44. The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a family matter, the court can grant stay of execution of its orders dated 15<sup>th</sup> December 2016 without demanding that the Objector must furnish the Court with security for the due performance of the orders.

45. In view of the foregoing, this court finds that the application dated 20<sup>th</sup> December, 2016 for stay of execution pending appeal is merited and is therefore allowed. The stay will operate for 45 days to allow the Objector to file for further orders in the Court of Appeal. In the premise, the application of the Administratrix seeking review of the orders of the court to allow her access to the funds in the rent collection account held in the joint names of the Advocates on record and also seeking eviction orders against the Objector is ordered to remain in abeyance pending further orders in the appeal.

Orders accordingly.

**SIGNED DATED and DELIVERED** in open court this **15<sup>th</sup> day of June 2017.**

**L. A. ACHODE**

**JUDGE**