



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 400 OF 1993**

**IN THE MATTER OF THE ESTATE OF WAWERU NJOROGE GATHUNGU (DECEASED)**

**NJENGA GETHAI.....APPLICANT**

**-VERSUS-**

**MARY WANJIRU CHEGE.....1<sup>ST</sup> RESPONDENT**

**RUTH NYAMBURA CHEGE.....2<sup>ND</sup> RESPONDENT**

**JACKSON Z. NDUNGU KIARIE.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Applicant herein brought the Chamber Summons dated 13<sup>th</sup> March 2014 under Rules 49 and 73 of the Probate & Administration Rules made under the Law of Succession Act, Cap 160. He seeks the orders set out hereunder:

**(i) that the Honourable court be pleased to suspend the Grant herein pending the hearing and determination of the appeal against the ruling of this Honourable Court delivered on 7<sup>th</sup> March 2014; and**

**(ii) that the costs of this application be provided for.**

The application is supported by the affidavit of the Applicant sworn on 13<sup>th</sup> March 2013 and his Further Affidavit sworn on 13<sup>th</sup> March 2014 and 7<sup>th</sup> April 2014 respectively. It is opposed by the Replying Affidavit and the Further Replying Affidavit sworn by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 27<sup>th</sup> March 2014 and 9<sup>th</sup> June 2014 respectively.

The ruling against which the Applicant seeks to appeal, concerns an application for review of the judgment of D.M. Rimita, J delivered on 19<sup>th</sup> January 2000. The Applicant wanted a review of this judgment on the grounds that there was an error apparent on the face of the record and that there was sufficient cause to review the ruling in the interest of justice. In its ruling made on 7<sup>th</sup> March 2014, the court found that the Applicant had not shown sufficient cause to warrant the review of the judgment of the court. The Application was dismissed with costs.

In the present application, the Applicant seeks to suspend the Grant of Letters of Administration issued in

this cause pending the hearing and determination of the appeal filed in the Court Of Appeal.

The application was argued before the court on 19<sup>th</sup> June 2014. Counsel for the Applicant made his arguments in three parts based on the conditions for grant of stay of execution as stated in the case **Re the Estate of Zakayo Kipkoech Kirui (Deceased) [2014] eKLR**. The court in that case relied on the provisions of **Order 42** of the **Civil Procedure Rules** in determining whether to grant the stay of execution sought.

Firstly Counsel argued that the Applicant herein stands to suffer substantial damage if the orders sought are not granted. He was apprehensive that the Respondents will evict him from this property on which he has resided, first with his parents and after their death with his wife and six children. He further contended that if the Grant is not suspended the property will be subdivided among the other beneficiaries who in turn will be at liberty to sell their portions.

Citing the provisions of Section 93 of the Law of Succession Act, Cap 160, Counsel submitted that a transfer to a third party by an administrator of the estate is safeguarded and remains valid even after the grant is revoked or reviewed. For this reason he argued that if the grant is not suspended, his appeal will be rendered nugatory should he succeed.

Counsel further submitted that the application has been filed without unreasonable delay and that the Applicant is willing to provide for security for costs if the court deems it necessary.

On his part, Counsel for the Respondents relied on the documents filed in opposition to the application by the Respondents. He argued that the intended appeal is inappropriate and has no chances of succeeding. The Applicant, had waited for ten years after judgment was delivered to apply for its review. As no justification was given for this delay, the application was rightly dismissed on this reason and for the further reason that the Applicant had not shown an error apparent on the face of the record.

In rebuttal to the Applicant's contention that he resides on the suit parcel of land, it was submitted that the Applicant has instead leased it to third parties. He therefore would not suffer any loss. That the Applicant's claim is for inclusion as a beneficiary to the Estate of the deceased. Thus his claim is only for a portion of the 22 acres of land. In the circumstances, it would only be just for the court to give protection orders of 4.4 acres, which would be the portion he would be entitled to on the presumption that the appeal were to succeed and further presumption were he to be added to the list of beneficiaries.

Further suspension of the grant should be conditioned on the Applicant depositing Counsel's costs taxed costs of Kshs. 294,000/=.

#### **ISSUES FOR DETERMINATION:**

The issues for determination is whether the Applicant has demonstrated sufficient reasons to warrant the suspension of the Grant of Letters of Administration issued herein pending the hearing and determination of the appeal; and whether the Applicant has an arguable appeal.

#### **ANALYSIS:**

The Applicant had filed an application for review of a ruling of the court which ruling is dated the 19th January, 2000. This application was dated the 8th December, 2010 and filed into court on the same date.

The Applicant grounded his application for review on an error apparent on the face of the record.

The Hon. Lady Justice Wendoh heard the application and dismissed it. In her ruling delivered on the 7th March, 2014 dismissing the application the Honourable Judge in the penultimate paragraph of her ruling based the dismissal on undue delay and indolence and I quote;

- **".....This notwithstanding, he waited for nearly five years. I find him to have been indolent in**

**lodging the instant application and therefore disintitiled himself of the exercise of this court's discretion to review the order even if it had been merited....."**

The poser is has the Applicant demonstrated sufficient reasons to warrant the orders sought. In answer to this issue I shall limit myself to the application that is currently before me.

This court states that the principles for a grant of stay pending appeal are well settled. One of the principles being that the order sought is discretionary. The others are the applicant must satisfy the court that he will suffer substantial loss; that the application was brought without unreasonable delay; lastly the applicant must provide for security for due performance.

The Applicant proceeded to file a Notice of Appeal to the Court of Appeal against the Honourable Judge's ruling. It is noteworthy to note that this notice was filed expeditiously and in a timely manner. Likewise, the same can be said of the instance application. Indeed in this instance the application is found to have been brought without unreasonable delay. Principle one has been complied with.

This court will not dwell at length on the issue of the likelihood of the Applicant suffering substantial loss because land is an emotive issue and if the property is distributed he stands to lose his inheritance as he was not considered in the judgment. The loss of one's inheritance is a substantial loss by any manner of speaking. The second principle is found to have been satisfied.

On the last principle, I have taken into consideration the conciliatory submissions made by the Respondents in that in their submissions they state that in the event the court is inclined to grant the application it should be limited and should not extend to the whole parcel of land and the applicant must provide security.

This court in exercising its discretion must do so judicially and the concern this court has is that the Applicant may be using the appeal process to delay justice. The matter is very very old having been filed in 1993 and is yet to be completed. The Respondents must be permitted to access the resources for their lives to move forward. It is therefore incumbent upon this court to balance the interests of the Applicant with those of the Respondents and to not only do justice but be seen to do justice. Refer to the case of **Re: Estate of the Late Zakayo Kipkoech Kirui (supra)**.

**DETERMINATION:**

Therefore, in exercising its discretion and in an attempt to balance the interests of both parties. I will allow the application upon the following conditions;

There shall be a stay of the execution of the Grant pending hearing and determination of the appeal limited to and over the portion of the property measuring 4.4 acres. The remainder of the Estate to be released and distributed amongst those found to be legitimate beneficiaries.

The Applicant shall pay to the Respondents Advocates the sum of Kshs.100,000/= taxed/assessed costs within fifteen (15) days from the date hereof.

The Applicant to tender into court within fifteen (15) days of the date hereof an additional security for costs in the sum of Kshs.200,000/=.

**CONCLUSION**

This application is found to have merit and is hereby allowed upon the aforementioned terms.

The Respondents shall have costs of this application.

Orders accordingly.

**Dated, Signed, and Delivered at Nakuru this 13th day of November, 2014.**

**A. MSHILA**

**JUDGE**