



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ogol v Umara (Civil Appeal 39 of 2023) [2024] KEHC 2941 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 39 OF 2023
RPV WENDOH, J
MARCH 19, 2024**

BETWEEN

PAMELA ATIENO OGOL APPELLANT

AND

SUSAN ADHIAMBO UMARA RESPONDENT

RULING

1. This ruling is in respect to Pamela Atieno Ogol’s (the applicant) Notice of Motion dated 12/6/2023. The applicant is seeking:-
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the appeal filed herein an order be and is hereby issued stopping the respondent (Administrator herein) from any further administration of the Estate of Eliud Onyango Obunga (Deceased) including making any withdrawal of funds among others, pension proceeds, which are part of the Estate of the Deceased;
 - d. Costs be in the cause.
2. The application is based on the grounds found in the body of the the supporting affidavit of the applicant. The applicant deposed that the appeal herein relates to her application for revocation of grant filed in the lower court and dated 8/2/2023; that the applicant lodged the application on her own behalf and her son with the deceased, Hilary Otieno Onyango seeking revocation of the said grant on the premise that she is the 1st wife of the deceased and she was left out of the succession process; that by a ruling delivered on 19/5/2023, this court dismissed the said application with costs to the respondent against uncontroverted evidence.
3. It was further deposed that during the delivery of the aforementioned ruling, the applicant’s Counsel was not present; that the estate of the deceased is mainly composed of money in bank accounts and



pension proceeds which may be misappropriated by the respondent; that the trial court ignored the affidavits sworn by the applicant's son and the deceased's brother Tom Mboya; that the appeal raises triable issues with high chances of success; that unless the order for stay of execution is not granted, the applicant stands to suffer substantial loss as the respondent will proceed with administration of the deceased's estate during the pendency of the appeal.

4. The application was opposed. Susan Adhiambo Umara (the respondent) filed a replying affidavit dated 24/9/2023. The Respondent deposed that the applicant is seeking stay of execution to deliberately frustrate her from administering the estate; that the applicant can be described as a former girlfriend of the deceased during his lifetime who only came to reap benefits and pension meant for the respondent; that in his lifetime, the deceased swore an affidavit affirming that the respondent was his only wife; that the evidence the applicant wants to rely on is a funeral programme which was manufactured during the burial so that the applicant can masquerade as a widow of the deceased; that the applicant has been brought in by one of her brother in laws so that they can benefit; that in order to grant the stay of execution, the applicant has to deposit security for costs equivalent to lower court costs to be assessed and drawn at Kshs. 350,000/=.
5. Both parties filed their respective submissions which I have duly considered. The main issue for determination is whether the applicant has satisfied the principles for grant of stay of execution.
6. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* provides for stay pending appeal. The Rules provides that a court should consider the following principles before granting stay pending appeal: the applicant shall suffer substantial loss if stay is not granted, the application has been filed without unreasonable delay, the applicant is willing to furnish security for due performance and the applicant has an arguable appeal.
7. The Court of Appeal in *Edith Gichungu Koine v Stephen Njagi Thoitithi* (2014) eKLR Odek JA rendered himself as thus:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
8. The impugned ruling and order which the applicant seeks to challenge was delivered on 19/5/2023. The instant application seeking stay was filed on 12/6/2023 a period of approximately 24 days since the ruling of the trial court. The applicant deposed that her Counsel was not aware of the ruling hence the delay. I have considered the trial court record. The trial court first gave a ruling date on 6/4/2023. The ruling was rescheduled for 20/4/2023.
9. The ruling was not delivered on 20/4/2023 but it was eventually delivered a month later on 19/5/2023. It is not clear what transpired in the one month before the ruling date was issued. The trial court record is silent on whether or not the new ruling date was given in the presence of both Counsel. Owing to that missing information in the trial court's record, I will give the applicant's Counsel a benefit of doubt that he was not aware of the ruling date. It is my finding that the application has been filed without unreasonable delay and the delay has been explained.
10. The applicant urged that the estate of the deceased is mainly composed of pension proceeds, other terminal dues and if stay is not issued, the respondent will proceed to utilise the proceeds to her detriment and the deceased's son. The amended certificate of confirmation of grant dated 30/7/2021 confirms that deceased's estate comprises of death gratuity of a Police Officer, Dependant and Widow Pension, Harambee Sacco deposits and funds in Absa Bank Account No. xxxx will devolve in whole



share to the respondent. The respondent has not told this court whether she will be able to refund the money in the event the appeal succeeds. I find that the applicant will suffer substantial loss if the respondent continues to withdraw money and/or receive benefits in the various financial schemes which hold the deceased's money to the detriment of the applicant

11. On the furnishing of security, the applicant has not offered any security for stay pending appeal. The respondent has urged that this court compels the applicant to deposit in court Kshs, 350,000/= being the assessed costs. An order for security of costs is discretionary. The discretion is to be exercised reasonably, judicially and making reference to the circumstances. This was the finding in *Jayesh Hasmukh Shah v Navin Haria & another* (2015) eKLR the court further held that in exercising its discretion on provision of security for costs, the court has to consider the following:-

“...absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; inability to pay costs; the general financial standing or wellness of the Plaintiff; the *bona fides* of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant.”

12. This appeal concerns both the applicant and the respondent claiming to be widows of the deceased. I take this to be an emotive family issue. I am persuaded by the findings in *Jayesh Hasmukh Shah (supra)* that the court should weigh the circumstances at hand before making orders on security for costs. I do not think it will be wise in the circumstances to compel the applicant to make a deposit for security of costs. Since the respondent has not also intimated that she will be capable of refunding any monies used if stay is not granted, I am of the view that the applicant should also not be compelled to deposit any money as security.
13. On whether the appeal is arguable, I have considered the Memorandum of appeal dated 12/6/2023. It raises 10 grounds of appeal, the main thereof being that the trial court erred in failing to apply the provisions of Section 76 and Section 3 (5) of the *Law of Succession Act*. The applicant also faulted the trial court for failing to find that together with Hilary Otieno Onyango they are beneficiaries of the deceased's estate as the wife and son respectively to the deceased. The applicant claims that she was married to the deceased in the year 1986 and the respondent claims that she was married to the deceased in the year 2006. A gloss over the record of appeal shows that there was a funeral programme which acknowledged the two alleged wives and there are alleged minutes of a family meeting held on 2/7/2020 which discussed the issue. I am of the view that these are matters worth interrogating. In my view, the appeal is arguable.
14. I find merit in the application dated 12/6/2023. Since the applicant has already filed a record of appeal, the following orders do issue:-
 - a. There be Stay of execution of the Ruling and Orders delivered on 19/5/2023 in Succession Cause No. E022 of 2021 be and are hereby granted unconditionally pending hearing and determination of the appeal.
 - b. The applicant do serve the Records of Appeal within thirty (30) days hereof.
 - c. For avoidance of doubt, the Respondent (Administrator herein) is stopped from any further administration of the Estate of Eliud Onyango Obunga (Deceased) including making any withdrawal of funds among others pension proceeds, which are part of the Estate of the Deceased, pending the hearing and determination of this appeal.
 - d. Mention before the Deputy Registrar on 29/ 4/ 2024 to confirm compliance.
 - e. Costs of the application to abide the appeal.



DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF MARCH, 2024.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

No appearance for the Applicant.

No appearance for the Respondent.

Emma & Phelix Court Assistants.

