



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 232 OF 2000

IN THE MATTER OF THE ESTATE OF KOMU MUTHIGANI ALIAS SAMSON KOMU MUTHIGANI (DECEASED)

MILKA WAMBUI KOMU.....APPLICANT

VERSUS

CATHERINE WANJIRU KOMU.....RESPONDENT

RULING

Brief facts

1. This application dated 28th May 2021 brought under Rule 49 and 73 of the Probate and Administration Rules seeks for orders for stay of the suit pending hearing and determination of the appeal.
2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 21st June 2021.

The Applicant's Case

3. It is the applicant's case that Grant of letters of Administration intestate was made in her favour on 20th May 2019 in the estate of the deceased herein.
4. The applicant contends that the deceased died on 18th April 1999 and was survived by Priscilla Nyambura Komu (now deceased) and herself. As such, the objector/respondent was not the wife of the deceased and neither were her children beneficiaries of the deceased's estate. The applicant is therefore of the view that at least two children, namely, Loise Mukami Komu, Antony Mwangi Komu and James Muriuki Komu be subjected to a DNA test with the remains of the deceased or his close relatives. The court declined the application for DNA testing and the applicant has lodged an appeal and has applied for typed proceedings to enable her appeal. She therefore seeks to stay the hearing of the suit to enable her lodge her appeal because if the suit is not stayed, her appeal will be rendered nugatory.

The Respondent's Case

5. It is the respondent's case that she is a beneficiary of the deceased's estate. On 26th July 2016, this Honourable court revoked the grant issued to the late Priscilla Nyambura Komu. Further, on 26th June 2019 the court dismissed the applicant's application dated 10th April 2019 which was seeking to have the applicant replace her mother as the administrator. On 12th July 2019 the respondent applied for confirmation of grant and thereafter on 16th July 2019 the applicant made a similar application for confirmation of grant.

It is the respondent's case that the applicant is seeking stay of proceedings from the application dated 12th July 2019.

6. The respondent states that the instant application is bad in law, frivolous and a gross abuse of the court process. The applicant lacks locus standi to file the instant application as she has not sought leave to file an appeal against the orders of Justice Matheka as required by law and she was not properly substituted in place of her mother. Additionally, the applicant is not entitled to the orders she seeks as she is wasting the suit property by cutting and removing all the mature eucalyptus trees on the suit property. The respondents also contends that she has been informed that the applicant has been involved with unknown persons intending to sell part of the suit property. As such, the respondent prays that the application for stay be dismissed and the court proceed to confirm the grant as there is a danger that the suit property will not be available by the time the final orders are made.

7. Parties hereby agreed to dispose of this application by way of written submissions but only the applicant filed hers.

The Applicant's Submissions

8. The applicant reiterates what she has averred in her affidavit and further submits that pursuant to a ruling delivered by this court on 26th June 2018, she was made the administratrix in the instant estate. Whereas the court declined to make the respondent a joint administrator.

9. The applicant contends that her appeal has high chances of success because the respondent is yet to establish her position with regard to the deceased and that her children are the biological children of the deceased. The applicant relies on **Eugene Cotran's "Casebook on Kenya Customary Law"** and the case of **Gituanja vs Gituanja [1983] KLR 575** cited in the case of **In Re Estate of Karia Getao Gicheru (Deceased) [2021] eKLR** and submits that the respondent ought to prove that she is a wife. She further submits that to prove that the children are biological children of the deceased, the children ought to undergo DNA testing and she relies on the case of **E.W.G. vs J.M.N & Another [2017] eKLR** to support her contention.

10. The applicant submits that the respondent has made false allegations against her as she has failed to show proof by documentary evidence and as such, the respondent must be put to strict proof. The applicant further states that the ruling was delivered on 26th June 2019 and she filed a Notice to Appeal within 14 days of the ruling and applied for typed proceedings which are still pending. Thus the applicant states that she did not need leave to appeal as she had an automatic right of appeal.

11. The applicant prays that the court grant her stay of the suit pending the hearing and determination of the appeal and relies on the case of **Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others (2013) eKLR** to support her contention.

Issues for determination

12. After careful analysis, the main issue for determination is whether the court ought to grant stay of proceedings pending the hearing and determination of the appeal.

The Law

Whether the applicant has met the prerequisite for grant of stay of proceedings pending the hearing and determination of the appeal.

13. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by **Ringera J in Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000:-**

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to

order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

14. Similarly the threshold for stay of proceedings has been illuminated in the passages in Halsbury’s Law of England, 4th Edition, Vol. 37 page 330 and 332 that:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

15. The court in an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR the court observed that:-

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

16. Pursuant to this court’s ruling dated 26th June 2019, grant of letters of administration were issued to the applicant and she was further directed to file and serve summons for confirmation of grant within 30 days from then. The court also declined to grant the respondent as co-administrator of the estate herein because the court found that she was yet to establish her position with regard to the deceased. Having established that, the question then begs as to whether the applicant has satisfied the conditions set out to warrant her been granted stay of the suit pending appeal. The applicant seeks to appeal the decision of the court that declined to subject the children of the respondent to DNA testing. The court reasoned that since the respondent relied on section 29 of the Law of Succession Act, DNA testing was not necessary. It would not be prudent to grant stay of the suit pending the appeal. I think that the inverse would serve the best interests of both parties and that is for the applicant to apply for summons of confirmation of grant and then during confirmation proceedings both parties can ventilate their case. Without going to the merits of the appeal, since the respondent is seeking for her children to inherit from the deceased’s estate as beneficiaries under Section 29 of the Law of Succession Act, it is not necessary for the biological aspect of the children to be established. In that regard, it would not serve the interests of justice to stall the cause herein which I have noted was instituted in 2000 for the children to be subjected to a DNA test. It would actually be in the interest of justice to dispose of this suit judiciously and expeditiously, which would be through confirmation of grant whereby all parties can ventilate their case. In that regard, I hold the opinion that the application for stay of the suit pending appeal lacks merit and ought to be dismissed. I further opine that the applicant do file and serve summons for confirmation of grant within 30 days from today’s date.

17. The children of a deceased could be either biological or adopted. In that case, it would not be necessary to subject the children of the respondent to undergo DNA. If such orders were to be granted in this case given its facts, the children concerned would be subjected to unnecessary trauma. However, I do not wish to pre-empt this appeal but I am of the view that since distribution of property is yet to be done, staying of the suit pending DNA of the children would be slowing down the wheels of justice for no justifiable cause. The court in hearing the summons for confirmation of grant or the protest for that matter will hear both parties on distribution and determine who the beneficiaries of the deceased’s estate are.

18. As quoted from **Halsbury**, staying of proceedings is a grave matter and such orders ought to be made only where they serve the interests of justice. In this case, the applicant still has an open door of justice in the proceedings for confirmation of grant or for protest.

19. It is my considered view that the applicant has not demonstrated that the orders sought are deserved given the facts of this application.

20. I find no merit in this application and dismiss it accordingly with no order as to costs.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 14TH DAY OF OCTOBER 2021

F. MUCHEMI

JUDGE

Ruling delivered through video link this 14th day of OCTOBER 2021



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