



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**PROBATE & ADMINISTRATION CAUSE**

**MISC. APPLICATION NO. 01 OF 2021**

**IN THE MATTER OF THE ESTATE OF THE LATE MARIA WANJIRU KARANJA (DECEASED)**

**-AND-**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL**

**OUT OF TIME AND STAY OF EXECUTION PENDING APPEAL**

**MIRIAM WACUKA MUNYUA.....ADMINISTRATOR/APPLICANT**

**-VERSUS-**

**PETER NJOROGI KIBACHIO.....CREDITOR/RESPONDENT**

**-AND-**

**GEORGE M WACUKA.....1<sup>ST</sup> INT P/APPLICANT**

**GEORGE M KARANJA.....2<sup>ND</sup> INT P/APPLICANT**

**RULING**

1. The application dated 28<sup>th</sup> June, 2021 seeks orders:

**i. Spent....**

**ii. That this Honorable Court be pleased to grant stay of execution of the ruling of the Honorable Magistrate Hon. C. Obulutsa (CM) in Chief Magistrate's Succession Cause No. 29 of 2019 dated 29<sup>th</sup> April, 2021 and the Certificate of confirmation of grant issued on even date and more particularly any sub-division of land title No. Nyandarua/Sabugo/3247 pending the hearing and determination of this application inter-parties.**

**iii. That this Honorable Court be pleased to grant leave to the Applicant to appeal out of time against the Ruling of the**

**Honorable Magistrate Hon. C. Obulutsa (CM) in Chief Magistrate's Succession Cause No. 29 of 2019 dated 29<sup>th</sup> April, 2021.**

**iv. That this Honorable Court be pleased to order stay of execution of the ruling of the Honorable Magistrate Hon. C. Obulutsa (CM) in Chief Magistrate's Succession Cause No. 29 of 2019 dated the 29<sup>th</sup> April, 2021 and the certificate of confirmation of grant issued on even date and more particularly any sub-division of land title No. Nyandarua/Sabugo/3247 pending the hearing and determination of the intended appeal.**

**v. That the costs of this application abide the outcome of the intended appeal.**

2. It anchored on provisions of *Section 45, 47, 82(b) Laws of Succession Act Cap 160 and Rules 49 & 73 P&A Rules 1980.*

3. It is supported by affidavit of **Miriam Wacuka Munyua** sworn on 28<sup>th</sup> June, 2021.

4. On the face of the application are grounds.

5. The impugned ruling was delivered without notice to the Applicant thus delay in filing the appeal.

6. The intended appeal has high chance of success as the court ordered enforcement of an agreement of 1993 where there was no Land Board Consent to validate the sale deal.

7. The Applicant apprehends that the execution will be levied before appeal is heard and thus will suffer irreparably. The application is opposed and a replying affidavit has been filed by **Peter Njoroge Kabachio**.

8. It is averred that ruling was delivered on 29<sup>th</sup> April, 2021 as schedule which all parties were aware but advocate and Applicant deliberately failed to attend court.

9. Execution was done pursuant to impugned ruling and a ¼ acre was excised from suit land on 28<sup>th</sup> June, 2021 with knowledge of Applicant thus lateness in filing appeal has not been explained.

10. There is no arguable appeal neither are grounds for stay of execution pending appeal established to warrant grant of stay of execution.

11. The Applicant is administrator thus ¼ acre excised can only be transferred on Applicant signing relevant papers but Respondent seeks to take possession and use the ¼ acre in issue.

12. The court directed parties to canvas application via written submissions which they filed and exchanged.

#### **APPLICANT'S SUBMISSIONS**

13. From the court proceedings, it is clear no activity was taking place in the court file since the 29<sup>th</sup> April, 2021 until close to the end of the month of June. For instance, applicant letter dated 16<sup>th</sup> June, 2021 could not even be assessed until 22<sup>nd</sup> June, 2021 because the court file was not available.

14. It is not even unclear how the Respondent herein was able to obtain a copy of the ruling and certificate of grant without a formal application to the court as none is available.

15. Further, the fact that even the Respondent herein commenced the process of executing the said ruling from the 28<sup>th</sup> June, 2021 as per the mutations attached as Annexure PNK 1, which was two months later, confirms that the file only re-appeared almost two months later and that is when activities on the file started being seen.

16. The Respondent's denial of these facts is only motivated by the fact that he was the beneficiary of this lapse and is therefore in bad faith.

17. The Applicant herein has demonstrated there was sufficient cause why the appeal was not lodged in time and grant leave to appeal out of time.

18. Among the grounds for appeal is that the Respondent's sale agreement which was allegedly entered into in the year 1993 had already become statute barred by the time the Respondent approached the court in the year 2019 and this was a pertinent issue which the trial court refused to apply his mind to.

19. The Respondent himself does not dispute this fact. Further, the issue on whether the sale agreement was authentic and whether it conferred proprietary rights upon the Respondent are such weighty issues that cannot be properly determined in a succession cause much less within a notice of motion.

20. The question on whether the Respondent was in occupation of the suit property all this time would have required to determine through an originating summons as a case of adverse possession.

21. As courts have correctly held, the jurisdiction of the succession court is only to the extent of identifying the real beneficiaries and dependants of the estate and the assets of the deceased and ensures fair distribution thereof.

22. Where issues of ownership and declaration of rights arise, then such disputes cannot be properly determined by a succession court.

23. Reliance is sought in case of *In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR*

24. Obviously, the Respondent herein was not claiming as a beneficiary of the estate but as a purchaser for bonafide value. Thus his claim clearly falls into a third party claim as against the estate. Such disputes thus ought to have been brought before the Environment and Land Court and not to a succession court.

25. All these issues were properly raised before the trial court but it chose to close its ears and eyes to justice. The Applicant herein therefore is forced to litigate here issues before the superior court in her quest for justice. This court ought to protect her right to appeal in line with the right to a fair hearing and access to justice as enshrined under Article 48 and 50 of the Constitution.

26. Applicant cites *Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR:*

**Nicholas Kiptoo case (supra)**

27. The Applicant herein stands to lose irreparably if the Respondent is allowed to proceed, sub-divide the suit parcel and transfer it to himself where of he may proceed to dispose of and the substratum of the appeal will have been lost and the appeal would be rendered nugatory.

28. The Applicants will have unjustly lost the only parcel of land they have and their legitimate inheritance to someone who waited for over 30 years when the deceased has already passed on to come and frustrate them. The Applicant is even willing to surrender the original title deed to court as security pending the hearing and determination of the intended appeal.

29. It is therefore in the interest of justice and fairness that this Honorable Court does extend the time within which the Applicants should appeal against the ruling of 29<sup>th</sup> April, 2021 and further stay any execution of the ruling pending the hearing of the appeal.

**RESPONDENT'S SUBMISSIONS:**

30. The court duly indicated in the presence of the counsels for all litigants herein that the ruling was to be delivered on 22<sup>nd</sup> April,

2021 but on the date it was not ready. The ruling though delivered in the absence of the parties on 29<sup>th</sup> April, 2021. It is not the duty of the court to follow litigants and remind them to follow up on their own matters.

31. From the timelines, the Applicant has only come to court after execution of the certificate of grant issued on 29<sup>th</sup> April, 2021. In fact, the only reason that she has to come to court was based on the fact that her potato crop on a portion of the property she utilizes was damaged by the surveyor while he was surveying the land and she expected to be compensated.

32. No explanation has been given as to why since the 22<sup>nd</sup> April, 2021 to 16<sup>th</sup> June, 2021, the Applicant never sought to know the position of the matter. They were only jolted back to the reality when execution commenced. The Respondent is desirous in utilizing his portion of ¼ acres of land. Again, the Applicant has never utilized the said ¼ acres of land thus no prejudice will be occasioned to the Applicants. However, the Respondent continues to be denied his right to enjoyment and utilization of his private property.

33. With that in mind, leave to extend time to appeal out of time is one that is discretionary, but the court is required to put into consideration the delay occasioned in making such an application and the prejudice to be suffered by the parties.

34. Following case cited County Government of Mombasa v Kooba Kenya [2019] eKLR, t. Karny Zaharya & Another v Shalom Levi C. Appl. No. 80 of 2018, Karny Zaharya & Another v Shalom Levi C. Appl. No. 80 of 2018, Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015, Abdul Azizi Ngoma v Mungai Mathayo [1976] Kenya LR 61, 62.

35. The Respondent having established that he stands to be prejudiced and the Applicant having failed to explain delay and giving sufficient cause why leave should be granted, it is submitted that the prayers is bereft of merit and ought to be disallowed.

36. The Applicant has not demonstrated that she will suffer any substantial loss being that she has never occupied nor utilized the portion of ¼ acres belonging to the Respondent. In fact, the sole purpose as seen from her conduct is to sell the said portion in order to deprive the Respondent his portion legally acquired.

37. The delay as discussed has not been sufficiently or duly explained and as such the same is inordinate. The Applicant has also not provided any form of security as is a condition for stay is stipulated under **Order 42 Rule 69(b)**. Thus on the said prayed for stay of execution, the same lacks merit and stands as an afterthought to deprive the Respondents the fruits of his merited judgment.

38. The respondent cites the cases of Re Estate of George Gikundi – (Deceased) [2019] Eklr, Re Estate of Jacob Mulili alias Jacob Mulili (Deceased) [2019] eKLR

39. The Petitioner admitted in Court that the ¼ acres sold to the Applicant was still vacant and no one was using it. The Respondent confirmed that the ¼ acre remains his property although he was transferred to Molo and his house was demolished while he was away in Molo. The fact that the children of the deceased are not using the ¼ acre is a clear admission of the fact that they are aware that the same was sold to the Applicant.

40. In the event that the Court is inclined to allow the said Notice of Motion dated 28<sup>th</sup> June, 2021 Respondent be allowed to utilize his ¼ acres of land on the suit parcel and further that he Applicant be compelled to deposit the title deed of L.R. No. Nyandarua/Sabugo/3247 in court pending the hearing and determination of the intended appeal.

## **DETERMINATION**

41. The issues herein are whether applicant has established justification for delay in lodging appeal" If above in affirmative is stay of execution of lower court order pending appeal merited" And what is the order as to costs"

**42. Section 79G of the Civil Procedure Act provides:**

**"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been**

**requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

43. The applicant’s request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time. The supreme court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others [2017] eKLR* while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR* the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

44. The applicant justify delay in lodging appeal on premises that, the ruling impugned was delivered without notice on 29th April, 2021 and until close to the end of the month of June there were no activities in the file as same was not available. For instance, applicant letter dated 16th June, 2021 could not even be assessed until 22nd June, 2021 because the court file was not available. The court has perused trial court file and confirms same facts of inactivity in the file.

45. However, in unclear circumstances the Respondent apparently was able to obtain a copy of the ruling and certificate of grant without a formal application to the court as none is available.

46. Further, the notes that the Respondent commenced the process of executing the said ruling from the 28th June, 2021 as per the mutations attached as Annexure PNK 1, which was two months later, confirms that the file only re-appeared almost two months later and that is when activities on the file started being seen.

47. Thus the court is persuaded that the Applicant has demonstrated there was sufficient cause why the appeal was not lodged in time and thus grants leave to appeal out of time.

On the issue of stay of execution *Order 42 Rule 6(2) of the Civil Procedure Rules* provides:

**“(2) 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.”**

**35. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417** the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. On stay of execution pending appeal, the court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

48. Applicant herein stands to lose irreparably if the Respondent is allowed to proceed, sub-divide the suit parcel and transfer it to himself where of he may proceed to dispose of and the substratum of the appeal will have been lost and the appeal would be rendered nugatory.

49. The Applicants will may unjustly lose the parcel of land subject herein. The claimant apparently waited for over 30 years from demise of the deceased just to come just to come claiming the part of the deceased estate. The court noes that, the Applicant is even willing to surrender the original title deed to court as security pending the hearing and determination of the intended appeal.

50. Thus the court finds merit on application for stay and thus the final orders are;

- i. The applicant is granted leave to file appeal within 14 days and in default application will stand dismissed.**
- ii. Upon filing the appeal, there will be a stay of execution of the lower court order /ruling challenged until appeal is heard and determined.**
- iii. The applicant to deposit title in issue in court as security until appeal is determined.**
- iv. costs in the main cause.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

.....

**CHARLES KARIUKI**

**JUDGE**



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