



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN NAIROBI

IN THE MATTER OF THE ESTATE OF ANDREW KISA SAIKWA (DECEASED)

SUCCESSION CAUSE 599 OF 1986

RULING

INTRODUCTION:

The Court delivered judgment on 5th June 2018 whereupon Counsel for Moses Saikwa one of the beneficiaries sought stay of execution and the Court sought formal application be filed and served. It was heard on 20th September 2018 *inter partes* hence the instant Ruling.

PLEADINGS:

Counsel for Moses Saikwa Mr. Isindu filed the Skeleton Arguments on 18th September 2018 as follows;

1.0 This matter involves the inheritance rights of the family of Andrew Kisa Saikwa (the Deceased).

2.0 In their pursuit for justice, some of the beneficiaries of the estate of the Deceased, like the Applicant herein, find themselves so disadvantaged and tossed about as third parties negotiate and strike compromises to subvert justice as has been shown by the Applicant herein. In their weakness, they find themselves helpless and hopeless as they are threatened and intimidated and their rights compromised or set aside. The conspiracies, fraud, illegalities, irregularities, collusion, orchestrated by the interested party herein have been, obviously monumental and are evident on the court record as demonstrated by:-

2.1 Draft Memorandum of Appeal

2.2 Replying Affidavit sworn on 26th May 2015 and filed on 27th May 2015

2.3 Skeleton Arguments dated 15th November 2017 filed in court on 15th November 2017

2.4 Replying Affidavit sworn on 26th May 2015 and filed on 27th May 2015

2.5 Further Affidavit sworn on 16th July 2015 and filed on 17th July 2015

2.6 Replying Affidavit sworn on 21st October 2015 and filed on 22nd October 2015

3.0 The Fundamental question that remains unanswered and which it is hoped the Court of Appeal will answer is: Can a Court of Law and Justice countenance and enforce FRAUD and ILLEGALITIES against the interests of lawful beneficiaries of an estate as is being pursued by the Interested party?

4.0 The said 'Judgment' has set aside the rights of the lawful beneficiaries and subjected the same to the convenience of Vomorono Limited, the facts and the law notwithstanding as demonstrated in the Memorandum of Appeal. It is for the reasons set out in 1.0, 2.0, 3.0 and 4.0 above, that the Applicant has lodged an Appeal to the Court of Appeal against the "judgment"/Ruling of the court dated 5th June 2018. A draft of the Memorandum of Appeal is annexed on the said Supporting Affidavit and marked MKS 1.

5.0 The Applicant's Summons dated 5th July 2018 is based on the several self-explanatory Grounds on the face thereof and is supported by the Affidavit sworn by the Applicant on 5th July 2018. It seeks orders for Stay of the proceedings and execution of the orders made on 5th June 2018 pending the hearing and determination of the Appeal.

6.0 Under **Order 42 Rule 6 of the Civil Procedure Rules**, the duty of the Applicant on an application for stay of proceedings and execution pending appeal is to demonstrate sufficient cause why stay should be granted and must satisfy the following conditions:-

7.1 Substantial loss may result to the Applicant unless the order for stay is made.

7.2 The application has been made without unreasonable delay.

7.3 Furnish such security as the Court may order for the due performance of such decree/order as may ultimately be binding on the Applicant.

REFER to **HCC No. 311 OF 1996 – John Geoffrey Nganga vs. Richard Otieno Kwach**

Sufficient Cause

As elaborately stated in paragraph 4 (a-g) of the Applicant's Supporting Affidavit sworn on 5th July 2018, the Applicant is aggrieved by the Ruling of the Court dated 5th June 2018 and has accordingly lodged an Appeal to the Court of Appeal which Appeal has overwhelming chances of success, hence the same would be rendered nugatory unless the orders of stay as prayed are granted. A cursory perusal of the draft Memorandum of Appeal shows, *inter alia*, that:-

- i) The Court by its 'Judgment'/Ruling dated 5th June 2018, having properly found that the interested party's application for review was unmeritorious (hence dismissed it) could not in law properly justify the very acts/grounds the interested party relied on to make the said Application.
- ii) The orders made on 9th May 2014 by Justice Musyoka herein and 23rd June 2017 by Lady Justice Gitumbi in ELC 183 of 2015 having not been set aside/reviewed leave Vomorono Limited non-suited and without recourse herein, hence the further orders made on 5th June 2018 justifying Vomorono's impugned activities/conduct while conferring benefits to it against the innocent beneficiaries cannot be supported in law whatsoever and only serve to cause further confusion and hardship in the estate.
- iii) The Contempt of Court Act, 2016, which only came into effect on 13th January 2017 (many months after the filing of the Applicant's Notice of Motion dated 29th May 2016) could not be applied by the Court to hold that the said application was time-barred.
- iv) The Applicant's Notice of Motion dated 24th May 2017 (*filed in ELC 183 of 2015*) relating to obvious acts of contempt committed by Vomorono Limited between April and May 2017 could not be time-barred under the Contempt of Court Act, 2016 as the application was filed immediately the acts were committed.
- v) See the other nine (9) self-explanatory Grounds of Appeal on annexed "MKS1" on the Applicant's Supporting Affidavit sworn on 5th July 2018.

Accordingly, the Applicant is exercising his undoubted constitutional/legal rights of Appeal in pursuit of justice in the circumstances that he finds himself in herein. It is in the interest of justice therefore that this Court grants a stay of Proceedings and Execution to pave way for the Applicant, who is clearly aggrieved by the Ruling/Orders made herein on 5th June 2018.

Substantial Loss

9.1 The Court has made its orders on 5th June 2018 directing the Applicant to undertake certain acts and the Applicant is aggrieved thereby for reasons stated in his draft Memorandum of Appeal and the Supporting Affidavit aforesaid. Unless the said orders and proceedings herein are stayed, the Applicant may be cited for contempt of court if he does not comply therewith, hence the necessity of the orders sought in the present application.

9.2 As explained, the subject property belongs to the estate to which the Applicant is entitled, as of right in law, being his inheritance. Such rights cannot be compromised by the obvious fraudulent, collusive and unlawful activities by the Interested Party and *John Mtay Saikwa (a conspirator, whom the court has vilified and dropped as Executor but justified the former, who is clearly a co-conspirator)*. The Applicant, as beneficiary has a superior right over the suit property than the Interested Party, who has no business before this Court, this being a Succession matter. [SEE paragraph 23 & 24 of Justice Musyoka's reasoning in the *Ruling in Succession Cause No. 2623 of 2013; Estate of Helena Wangechi (Deceased)*, where he held that third parties cannot properly litigate their claims in probate/succession proceedings. A copy of the said Ruling is attached to the Applicant's Submission filed in court on 29th February 2016 herein].

9.3 The suit property belongs to the estate. John Mtay Saikwa held it just as a Trustee for the beneficiaries hence he could not deal with it contrary to the interests of the beneficiaries and the law. The Law on Trusts and Law of Succession Act apply. A Trustee is obligated to act within the law and diligently in the best interests of, and to account to the beneficiaries.

9.4 If the property is irregularly transferred to 3rd parties as had been done to the Interested Party before the Court nullified the transfer/title by the order dated 9th May 2014 herein, the Applicant and the other beneficiaries will forever lose their beneficial interests/inheritance pursuant to the questionable circumstances and intrigues that have been happening herein.

9.5 The Interested Party and John Mtay Saikwa having clearly conspired and engaged in obvious fraudulent, irregular and unlawful acts (*as demonstrated in the Affidavits/Submissions on the Court record herein*) cannot benefit from such illegalities and fraud under the watch of the Court, which has duty under the Constitution/law to do justice and protect the innocent and not vice versa. A Court of law and justice cannot legitimise fraud, illegalities, conspiracies, collusion or irregularities, which the Application took time to carefully enumerate with specific

details in his various Affidavits and Submissions (listed above) in response to the Interested Party's Notice of Motion dated 11th May 2015 and the several false, self-incriminating Affidavits in support thereof.

9.6 Thus clearly, the Applicant, as demonstrated in his Supporting Affidavit, (*together with the estate and other beneficiaries*) stand to suffer substantial loss in terms of their inheritance, which has been dealt with irregularly and is likely to compromise their beneficial interests/shares for they were not party to the irregular and illegal sale nor have they benefited from the proceeds thereof.

Mr Langat & Mr Lagat filed on 17th July 2018 the Interested party's Grounds of Opposition under **Order 51 rule 14(1)c Civil Procedure Rules, 2010** on the following grounds:-

1. The Applicant has not made full and frank disclosure of material facts and/or information to assist the Court in arriving at the truth.
2. There is no negative/positive order that is appealable or even capable of being stayed, rather the application is argumentative and bereft of substance or legs to stand on; it only suffers one fatal blow of dismissal.
3. The trial court rightly declared that Vomorono Limited was not a party to the proceedings that led to the Orders made on 9th May, 2014 hence the Applicant is stopped from pleading the doctrine of *lis pendens* which he had pleaded during trial but failed to prove.
4. The Applicant, as much as he is a lone ranger, has miserably failed to satisfy the established conditions of stay more specifically security of title, substantial loss as required under Order 42 rule 6 of Civil Procedure Rules.
5. The Interested Party stands to suffer irreparably economically, if the stay order(s) are granted.
6. The granting of the Stay of Execution or any adverse Order in the absence of satisfaction of the conditions of stay would be contrary to the law on public policy, and it will amount to allowing the Applicant to have second bite at the cherry.
7. The application in *casu* seeks prayers that are bound to misinterpret the doctrine of *lis pendens*, and the doctrine of *bona fide* purchaser for value without notice on the scope and meaning of who is "a *bona fide* purchaser."

The Executor filed his Grounds of Opposition under Order 51 Rule 14(1) (c) of the Civil Procedure Rules, 2010 based on the following grounds:-

1. There are no orders presently existing capable of being stayed.
2. The Applicant has not shown that he will suffer substantial loss unless the Orders he seeks are granted.
3. The Applicant has not provided a security for the due performance of such decree and order that may ultimately be binding on him as required by the Rules. The application is therefore totally defective.
4. The Applicant's application is strongly prejudicial to the Executor/Respondent and will delay and prejudice the quick expeditious and just determination of this matter.
5. The granting of the Stay of Execution or any adverse order in the absence of satisfaction of the conditions of stay would be contrary to the law on public policy, and it will amount to allowing the Applicant to have a second bite at the cherry.
6. That application is defective in form and substance.

ORAL SUBMISSIONS

MR. ISINDU FOR MOSES SAIKWA:

He stated as follows:

- 1) The application is of 5th July 2018 seeking stay of execution and stay of proceedings which have been filed in this court and there is a Notice of Appeal of filed on 25th July 2018.
- 2) There is a draft Memorandum of Appeal and is annexed to the same affidavit. The applicant relies on the affidavit and on the grounds of the application and further in the skeleton arguments filed in court on 18th September 2018.
- 3) We are relying on **Nbi High Court Civil Case No. 311 of 1996 John Geoffrey Nganga vs Richard Otieno Kwach**
- 4) He states that they have complied with Order 42 of Civil Procedure Rules. We have addressed all the requirements under Order 42 rule 6 application
- 5) John Mitey is said to have received Kshs. 300,000,000 as purchase price and he did not comply with Court order in the judgment

that these monies be deposited in the Court. He has not given any explanation of the lack of compliance, yet he argues that this application will delay this matter. He has not rendered accounts.

6) As regards the interested party's grounds, the same do not address the issue of stay of execution of this matter. There is annexed a copy of title / search that is marked "SKM 7" on the affidavit of Cyrus Kibet Simatwo and filed this morning on behalf of interested party. That search is a previous one and they have deliberately and omitted to annex the current search on what is clearly indicated that this order was nullified by the court order of Hon. J. Musyoka of 9th May 2014 and Justice Gitumbi on 23rd June 2017 made a finding of fact that John Mitei Saikwa was fraudulent regarding the title and matter in court and set aside the court order that the order that the ELC court set aside.

7) The title of Vomorono Ltd was nullified in 9th May 2014 and the court order has never been set aside, appealed against or even by this court's judgment and not by J. Gitumbi. To that extent, they have not appealed against the order, they cannot come to court and purport that they have an interest and hence they will suffer no prejudice if the stay is granted. The applicant has the opportunity to ventilate his appeal in the interest of justice.

8) With these arguments the Applicant has made out a case for stay of execution as a court of law and of justice would want to facilitate and provide justice to the highest level without impediment. This matter relates to the estate of the deceased person and there are 5 beneficiaries and it has proceeded to cause pain and inconvenience to some of the beneficiaries. They have now subjected us to unnecessary cost and this by the Executor and 3rd party and it is blatant and obvious and it cannot be condoned. I want to state the matter now off the record.

9) I have been threatened to abandon the application and my life is in danger. My client Moses Saikwa has been threatened and he reported the matter to the Police. I was called anonymously and informed that if I do not leave this matter I will be killed and the anonymous caller cited Silas Simatwo of Vomorono and Deputy President of Kenya. I am threatened and my client as well Esther Saikwa as well has been intimidated. It is a matter that the interested party wants to have its way at whatever the cost. I am hardly intimidated I am a born again Christian. I rest my application and the stay of execution be granted and so that the matter may be heard on its merits on appeal.

MR. MUTAI FOR EXECUTOR:

He stated as follows;

He opposed the application of stay of execution and filed Grounds of Objection on 30th August 2018. The list for whether or not the Court should grant stay is **Order 42 Rule (2) Civil Procedure Rules 2010** has not been met and the natural condition is that the application fails.

The substantial loss, I urge the court that Counsel's assertion that the title deed to Vomorono Ltd was invalidated by orders by Hon. J. Musyoka I wish to state as follows;

1) If then the title deed is in the name of the Executor John Saikwa what substantial loss would the beneficiaries suffer? The land is in the hands of the Executor and it is there for the parties and there is no substantial loss.

2) The authority of **John Nganga vs Richard Kwach Hayanga**, J said in effect, there is not an automatic right to stay of execution every time an application for stay is made. At page 5, the learned Judge rejected the application for stay due to the monetary element.

3) The applicant has not satisfied the 3rd limb of the test to give security, for due performance of the decree for the entire subject matter is substantial and the greater risk arising is ,what if the Applicant takes the parties on a wild goose chase and fails and what security will the parties have to protect them from the mischief? Like all litigation, there is no guarantee what the outcome of the case will be.

4) This matter has been pending in the High Court for 32 years. What the Applicant proposes to do is to delay this matter for a month to get more time and it would go against the Constitutional injunction to handle the matter in an expeditious manner as envisaged in **Article 159 Constitution of Kenya 2010 and Section 1A 1B of Civil Procedure Rules, 2010**. The effect is that the court should dismiss the application as there is non-compliance and due to lack of security as the subject matter demands.

I wish to address the matter raised by Applicant through Counsel off record. I wish to state that the threats alleged have been raised in Court for the first time; that he wishes to spoil the advocates' names and I have never been to his office. If the threats are true then he ought to reduce the complaint in writing and serve relevant authorities and the Court; so that any person who is adversely mentioned has an opportunity to address the allegation and respond and it is wrong to drag in people's names who are not in court and spoil their name without the opportunity to defend themselves. I am of the view that the instant claim is to draw the court's sympathy by poisoning the court's mind with regard to the application.

MR. LANGAT FOR INTERESTED PARTY

He stated as follows;

1) On behalf of interested party he opposed the application for stay of execution based on Grounds of Opposition of 16th July 2018

and Affidavit of 20th September 2018. The interested party; Vomorono Ltd complied with the court order of this court of 5th June 2018; to disclose the purchase price of the property and it is not possible to depart from these grounds. The application by Moses Saikwa of 5th July 2018 is what is contemplated by Section 1A 1B & Section 3A and 3B advocates/parties are to assist the court in arriving at just and fair decisions of the court.

2) We complied with the court order any other issue raised by Moses Saikwa is amounting to appeal in the court and asking the court to sit on its own appeal and I urge the court to reject the invitation to sit on its own appeal. The skeleton arguments include issues on what the court gave a determination on and is being invited to reconsider the issues of fraud, illegality and irregularities which this court dealt with. Litigation must come to an end and avoid re-litigating the matter again.

3) The issue of fraud illegality, the Applicants did not prove. The entire application does not meet requirements of **Order 42 Civil Procedure Rules, 2010**. No supporting grounds have been laid down. They have not complied with court's orders of 5th June 2018. The prayers they seek fall under the ambit of **Rule 5 2(b) Civil Procedure Rules** and the application should have been made in the Court of Appeal. The application does not comply with the requirements.

4) The suit property was charged before and since the purchase price was paid, the company has been paying Kshs. 60,000/- every month when the title that was charged was withdrawn. The vendors/sellers were paid Kshs. 300,000,000/- for the estate and ought to give security. The title deed was nullified when the interested party was not a party to the proceedings and the affidavit I have filed shows that Kshs. 300,000,000/- was paid and it was paid to the estate through the Executor and their lawyer Chege & Co. Advocates and we cannot deposit the funds in Court; again and they have not denied this. I urge this court to dismiss the application. We are asking the court to take a date for compliance of Court orders of 5th June 2018 as directions were to be given when the parties comply with deposit of funds in Court.

5) On the matter off record; I associate myself with submissions by Counsel for the Executor, the matter was raised from the Bar and the specific persons ought to be given chance to reply.

MR. LANGAT FOR INTERESTED PARTY

He stated as follows;

1) The allegations are not in our application. Arguments are brought before the court and the court is called upon to determine based on evidence presented and the court will deal with the matter. He has not written anything down, no OB Number has been produced to show that the compliant was made to the Police and investigations commence. This is an allegation. Personally I have not threatened counsel and client.

MR. ISINDU FOR MOSES SAIKWA IN REPLY

1) We have appeared in court many times 22 years down the line. I do not speak things for fun or attention. The court is beyond being cajoled. The allegation that we have not complied with **Section 1A 1B & 3A & 3B Civil Procedure Rules 2010** all of which is about advocates as officers of the Court are to assist Courts to do substantial justice. From 2012, the documents that I have filed shows this. I have nothing but assist Court to do justice and in the matter I have complied with Civil Procedure Rules 2010. The skeleton arguments I have explained all elements under Order 42 and demonstrated how the application is merited. The prime property is still available and there can never be any better security for both the estate and interested party if it is preserved.

DETERMINATION

The Applicant sought stay of proceedings and stay of execution pending appeal following delivery of the judgment.

Order 42 Rule 6(1) & (2) provides;

“No appeal or second appeal shall operate as a stay of execution or proceedings under the decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree and order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.”

No order for stay shall be made subrule (1) unless;

a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and the application has been made without undue 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.

JUDGMENT

The judgment of 5th June 2018 in a nutshell determined that; the application for review of Hon Justice W. Musyoka of 9th May 2014 that

granted following orders;

That the sale of L.R.No 209/8558 by the Executor John Saikwa and/or Esther Chepkemoi Saikwa was nullified and the title was to revert to the Executor pending further Orders of the Court;

That the Executor with the other parties shall within 45 days of the date of the order agree on the distribution of L.R. No 209/8558, in default of which the Court shall make orders regarding distribution of the said asset was dismissed.

The application failed to meet the criteria set out in Section 80 CPA & Order 45 of CPR 2010.

The parties signed and filed Consent on 27th October 2014 that the beneficiaries agreed to sell L.R. No 209/8558, the Executor was authorized to execute Agreement for Sale and other documents in default the Deputy Registrar to sign the documents, the beneficiaries to give consent and monies be deposited in a joint account.

The Consent compromised the order of 9th May 2014 and subsequent applications filed and the beneficiaries agreed to share the suit property L.R. No 209/8558 through sale and sharing proceeds.

The sale had taken with the interested 3rd Party Vomorono Ltd who paid Ksh 300,000,000/- to the Executor through his then advocate.

By virtue of the Consent the sale conducted in 2013 and nullified in 2014 was now validated. No party sought the Consent to be set aside on the basis of illegality, mistake or duress

The Executor did not comply with the statutory duties of an Executor under Law of Succession Act Cap 160 and this Court removed him as Executor, replaced him with Moses Saikwa. He has still not rendered accounts as required by law and ordered in this judgment.

The Parties were to deposit the amount /purchase price proceeds in Court by 5th July 2018 when the Court would issue further orders. The proceeds have not been deposited in court to date or accounted for. This Court is *functus officio* with regard to the Judgment and cannot comment, vary, amend or justify any issue as there is no application for review, Suffice is to outline the gist of the judgment as is. The reconsideration of issues and evidence lies with the Court of Appeal.

SUBSTANCIAL LOSS/APEAL RENDERED NUGATORY

The Applicant states that he will suffer substantial loss as he and other beneficiaries are entitled to their beneficial interest in the suit property L.R. No 209/8558 which belongs to the estate of Andrew Saikwa (deceased) and he has not received any part of the proceeds from the sale to date. The Applicant is of the view that the suit property was irregularly transferred to the Party as the Court nullified the sale on 9th May 2014. The Executor John Mtay Saikwa conspired and engaged in fraud irregular and unlawful act.

In the case of **Elena D. Korir vs Kenyatta University Justice Nzioki wa Makau relied on Halal & Anor vs Thornton & Turpin Ltd (Court of Appeal Gicheru Chesoni Cockar JJA)** held as follows;

“The High Court ‘s discretion to order stay of execution of it order or decree is fettered by 3 conditions; Sufficient Cause, Substantial loss would ensue from refusal of stay, the applicant must furnish security, the application must be made without unreasonable delay.”

In Masisi Mwita vs Damaris Wanjiku Njeri [2016]eKLR Justice Mativo stated as follows;

“It is trite law that the failure by the Court to make an order for security for due performance amounts to a misdirection which entitles the Appellate Court to interfere with the exercise of the discretion in granting stay. ...The offer for security must come from the Applicant as a price for stay.”

In the instant case, a sale of the suit property L.R. No 209/8558 occurred, Ksh 300,000,000 was paid by 3rd Party Vomorono Ltd to John Saikwa Executor and his then lawyers Messrs. S.M.Chege & Co Advocates- Clients Account Prime Bank Account Number 300003569. This fact is not controverted. Since the basis of the appeal is that the sale was vitiated by fraud, irregularities and illegalities and ought to be rescinded, it is expected that the suit property L.R. No 209/8558 is preserved just as the Ksh 300,000,000/- is confirmed as available and is also preserved. So that when the appeal is heard and determined both the Appellant will have the suit property at his disposal and at the same time the Ksh 300,000,000/- will be available to be refunded if the appeal is successful. That is why this Court ordered in its judgment of 5th June 2018 that the purchase price proceeds of Ksh 300,000,000/- be deposited in Court so that the same maybe distributed to the beneficiaries of the estate.

This is the elephant in the room, the whereabouts of Ksh 300,000,000/= The 3rd Party filed affidavit on 20th September 2018 and confirmed payment of the Purchase price was paid in full to the Executor Mr John Saikwa and his then Advocates. John Saikwa the Executor has remained strangely silent and not confirmed or denied this fact nor his former lawyers whose account the 3rd Party confirms deposited the funds. The only other disclosure is that Ksh 50,000,000/= was paid to one of the beneficiaries Dorcas Munabi who swore the attached affidavit that she received the share of proceeds of sale.

It is not clear to this Court what the substance of stay of execution entails. If on appeal this Court's orders are nullified, then the Purchase

price shall be refunded to the 3rd Party and the title documents nullified and withdrawn in exchange for title documents in the Appellants name. Simultaneously, there shall be a refund of Ksh 300,000,000/- whose whereabouts at the moment is unknown and the funds unaccounted for contrary to Court order of 5th June 2018. Therefore whereas the 3rd Party is deprived to enjoy fruits of the judgment and there is possibility of the appeal being successful or not as the Appellant seeks preservation of the suit property L.R. No 209/8558 to be preserved, since it is not denied that the Respondent 3rd Party paid Ksh 300,000,000/- the same should be confirmed to be available in case of a refund. So substantial loss is to both parties and if the suit property and the funds are not available the appeal maybe rendered nugatory.

SECURITY

In the absence from the Applicant of proposal of security of due performance as condition precedent to the stay of execution then both Appellant and Respondent 3rd Party are exposed and are likely to suffer substantial loss.

To ensure that the appeal is not rendered nugatory due to substantial loss by both parties, then the parties ought to comply with orders of this Court in the judgment of 5th June 2018; to deposit the purchase price proceeds Ksh 300,000,000/- in Court and then the Court shall order preservation of the suit property L.R. No 209/8558 pending appeal.

SUFFICIENT CAUSE /ARGUABLE APPEAL

This Court cannot reopen the matter that culminated to the judgment of 5th June 2018. Suffice is to state that each party is entitled to exercise their legal right of appeal of a decision.

In **Butt vs Rent Restriction Tribunal [1982] KLR 417** Madan Porter & Miller JJA gave guidance on how a Court should exercise discretion as follows;

- a) The power of the Court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***
- b) 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 the appeal Court reverse the judge's discretion.***
- c) 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.***
- d) A Court in exercising its discretion whether to grant [or] refuse an application for stay will consider special circumstances of the case and its 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.***
- e) The Court in exercising its power under Order XLI Rule 4(2) (b) of 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.***

Following the above guidelines, this Court will not curtail the Appellant's right of appeal, but the stay of execution application is not granted due to special circumstances; and overwhelming hindrance these are that the appeal will not be rendered nugatory by not preserving the suit property because, the Respondent 3rd Party has already paid Ksh 300,000,000/- which the Court ordered be deposited by the parties in Court. The said orders Judgment of 5th June 2018 have not been complied with and no explanation has been forthcoming.

To ask the Court to grant stay of execution and preserve the suit property without compliance of Court orders or any explanation or comment vitiates grant of stay of execution. Whereas each party has a right of appeal, to seek stay of execution and stay of proceedings without any disclosure of Ksh 300,000,000/=also vitiates an arguable appeal.

STAY OF PROCEEDINGS

This Court granted certain orders that is deposit in Court of sale proceeds and completion of contract of sale.

None of the parties complied save for the 3rd Party who filed affidavit to confirm payment of purchase price of the suit property.

The parties did not move the Court on mention date 5th July, 2018 to confirm compliance or any response or circumstances with regard to the Court orders.

Instead, the appellant/Applicant sought stay of proceedings.

This curtails the Court's effort to pursue the payments alleged to be deposited in Court for beneficiaries to take their share.

In the case of **Global Tours & Travels Ltd WC NO 43 OF 200;**

“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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice or order a stay of proceedings and if it is, on what terms it should be granted.....”

I have considered the pros and cons of staying proceedings pending appeal *vis a vis* expeditious disposal of the matter the merits of the appeal and find that the Appellant is desirous to exercise his right of appeal and has notified this Court. To continue with proceedings is to conduct parallel proceedings with the Appellate Court, which proceedings will culminate to orders that maybe rendered unenforceable if contrary to the outcome of the Appeal. It is prudent to halt the current proceedings to facilitate the appeal. The application is granted. Therefore this court cannot pursue the compliance of court orders of judgment of 5th June 2018 and the allegation that the Applicant’s family and counsel are under threat.

DISPOSITION

- 1. The stay of execution pending appeal is not granted as there Court orders of 5th June 2018 pending compliance.**
- 2. The stay of proceedings is granted pending appeal**
- 3. Each party to bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 11TH OCTOBER 2018.

M.W.MUIGAI

JUDGE FAMILY COURT

IN THE PRESENCE OF;

Mr. Mutai for the Executor

Mr. Isindu for Applicant

Mr. Langat for the 3rd Party / Interested Party

Mr. Lagat for the 3rd Party/Interested Party

MR. ISINDU

I am applying to appeal against the court’s orders of today.

COURT

The leave to appeal the order is granted.

M. W. MUIGAI

JUDGE FAMILY COURT