



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 94 OF 2016**

**(CORAM: WAMAE T. CHERERE-J)**

**IN THE MATTER OF ESTATE OF MWAJA MÍBARI ALIAS MWAJA NDATHO (DECEASED)**

**BETWEEN**

**GIKUNDA MWAJA.....PROTESTOR/RESPONDENT**

**AND**

**PETER MWEBIA MWAJA.....PETITIONER/APPLICANT**

**RULING**

**Background**

1. On 12<sup>th</sup> August, 2021, this court allowed the Protest and **ordered THAT:**

1) **The Certificate of Confirmation of Grant issued on 23<sup>rd</sup> July, 2014 distributing LR.NO. NKUENE/NGONYI/635 to Peter Mwebi Mwaja 1 ½ acres, John Gikunda Mwaja 1 acre and Muthuri Mwaja 1 acre, be and is amended in the following terms:**

**(a) LR.NO. NKUENE/NGONYI/635 is hereby distributed to Gikunda Mwaja and Muthuri Mwaja in equal shares**

**(b) The Land Registrar on whose jurisdiction LR.NO. NKUENE/NGONYI/635 is situated is hereby directed to cancel certificates of title for LR.NO. NKUENE/NGONYI/1739, 1740 and 1741 all registered in the name of the Petitioner/Respondent and to effect the transfer of LR.NO. NKUENE/NGONYI/635 to Gikunda Mwaja and Muthuri Mwaja in equal shares**

**(c) For avoidance of doubt, LR. NO. NKUMARI/ABOGETA/ MITUNGUU/238 shall remain as distributed in the Certificate of Confirmation of Grant issued on 23<sup>rd</sup> July, 2014**

**(d) Each party shall meet its own costs**

2. Dissatisfied with the court ruling, the Petitioner/Applicant by summons dated 20<sup>th</sup> September, 2021, seeks a stay of the ruling in respect of **LR.NO. NKUENE/NGONYI/635** pending the hearing and determination of the intended appeal.

3. The summons is supported by an affidavit sworn by the Applicant on 20th September, 2021 in which he mainly avers that one John Muriithi M'Itonga to whom he had sold **LR.NO. NKUENE/NGONYI/635** is at the verge of being evicted.

4. The Respondent avers that he should not be denied his rightful inheritance on account of John Muriithi M'Itonga who is a stranger to the estate.

**Analysis and Determination**

5. I have considered the application in the light of the affidavits on record and submissions on behalf of both parties and the issue for determination is whether an order of stay of execution of the impugned judgment ought to be granted

6. Order 42 (6) 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

b. That the application has been made without unreasonable delay; and

c. 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.

7. There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

8. Similarly, in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

9. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us. ....So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

10. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution and the party seeking stay bears a specific burden regarding proof of substantial loss. (See Rhoda Mukuma v John Abuoga [1988] eKLR).

11. The party who is alleged to be likely to suffer substantial loss is a stranger to these proceedings and the loss alleged by the Applicant has therefore not been demonstrated to the satisfaction of the court or at all.

12. From the foregoing analysis therefore, the summons dated 20<sup>th</sup> September, 2021 is found to have no merit and it is disallowed with costs to the Respondent.

**DELIVERED IN MERU THIS 24TH DAY OF FEBRUARY 2022**

**WAMAE. T. CHERERE**

**JUDGE**

**APPEARANCES**

**COURT ASSISTANT - MORRIS KINOTI**

**FOR RESPONDENT /PROTESTOR - MS. KAUNYANGI FOR KAUMBI & CO. ADVOCATES**

**FOR PETITIONER/APPLICANT - MR. MUTHOMI FOR JOHN MUTHOMI & CO. ADVOCATES**