



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Maria Loruma (Deceased) (Succession Appeal
01 of 2021) [2022] KEHC 11856 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION APPEAL 01 OF 2021
CM KARIUKI, J
MAY 26, 2022**

BETWEEN

CHARLES EBEIYO ERIYA APPELLANT

AND

JACINTA WANGARI GITHEKI RESPONDENT

RULING

1. By an application dated June 28, 2021, the Applicant seeks orders for a stay of a Ruling and/or orders of April 29, 2021 in Nyahururu CM Succ 20/2019.
2. The same is supported by the affidavit of Charles Ebenyo Eriya sworn on June 28, 2021 and annexures thereto.
3. The court has not seen any replying affidavit or submissions by the respondent. However, the applicant has filed submissions.

Appellant/Applicant Submissions:

4. The appellant/applicant submits that via Succession Cause in Nyahururu CM Succ No 20 of 2019 for his deceased mother's estate; he was issued with a grant on May 8, 2019. The same has never been revoked, nor is it a subject for revocation before any court.
5. The appellant filed a summons for confirmation of grant, and the respondent herein filed a protest claiming a purchaser's interest. Before the protest could be heard, she filed an application dated May 21, 2019, seeking orders for an injunction restraining the appellant from interfering with her quiet possession on Parcel No 533, one of the properties belonging to the deceased.
6. The appellant opposed the application, and by a ruling delivered in the absence of the parties on April 20, 2021, the application was allowed prompting the filing of the instant appeal.



7. He submits that under section 79 of the [Law of Succession Act](#) cap 160, all the property of the deceased shall vest on the Executor or Administrator to whom representation has been granted as personal representative.
8. One of the duties of a personal representative, as provided under section 83, is to get in all free property of the deceased.
9. Section 45 of the Act criminalizes the taking into possession, disposing of, or otherwise intermeddling with the free property of a deceased person.
10. The Appellant contested the fact of the respondent's possession on Parcel No. 533, and in appreciating this fact, the learned trial Magistrate, in the last page of his ruling, stated whether she is in possession of the plot are issues of fact that would require a full hearing.
11. The court nevertheless proceeded to grant an injunction in favor of the applicant who was required to prove possession through verbal evidence amongst other facts that were hotly contested as against an Administrator who is legally authorized to enter into any property registered to the deceased and which property vests in him as an Administrator.
12. He fears that, it is likely that the subject matter may be wasted, as he had, around March 2021, planted maize, beans, and potato crops on parcel No L R No Laikipia/Marmanet/ EXT 533, which he was expecting to harvest in July and September 2021. In May 2021, the Respondent trespassed into the land and threatened the Applicant's employees with harm and eviction.
13. On June 21, 2021, her son Githeki acting under instructions, destroyed the maize, beans, and potato crops on the suit land by cutting them, and which matter was reported at Marmanet Police Station. Photographs have been attached as proof of the damage, which has not been denied by the Respondent.
14. It's worth noting that although the Respondent claims to be a purchaser for value, no sale agreement has been annexed in support of purchase which offends the provisions of section 3(3) of the [Law of Contract Act](#). No consent from the Land Control Board has been annexed.
15. Her claim of possession was not supported by any evidence, including photographs of developments or affidavits from neighbors. If the injunction remains, she is free to deal with land as she deems fit, including leasing out or alienating or putting it to waste. He cites the case of [Musa Kipkoror Arap Baringila v Mansoor Nadlal](#) [2006] eKLR, where the Court of Appeal held as follows:

“In this regard, therefore, it is in the best interest of justice that the estate of the deceased be preserved pending the determination of the intended appeal. It is obvious that the intended appeal, if successful, would be rendered nugatory if the property is disposed of, wasted, or depleted before the determination of the intended appeal.”
16. The application dated May 21, 2019 was to come up for ruling on December 3, 2020, but the same was not delivered. The same was thereafter delivered on April 29, 2021, and Applicant was not served with notice; thus discovered later that the ruling had been delivered in the respondent's favor after she entered the land to evict the appellant in May 2021.
17. An appeal was filed on May 26, 2021. The appellant's crops were later destroyed on June 21, 2021, and the application for stay was filed on June 28, 2021.
18. The delay is not inordinate, and any delay occasioned is sufficiently explained.



Issues ,Analysis and Determination

19. After going through the record, affidavits, and submissions,I find the issues are whether the conditions set out for stay pending appeal are satisfied and the costs.
20. An application is for a stay of application pending appeal; thus, the conditions to be satisfied are set out under Order 42 Rule 6 of the Civil Procedure Rules.
21. In the case of Re Estate of the Late Kaburachi Peter (Deceased) [2021] eKLR, the court stated the conditions as follows:
 - i. That substantial loss may result to the Applicant unless the order is mzsX ade;
 - ii. That the application has been made without unreasonable delay; and
 - iii. That the Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
22. The uncontroverted averments are that the appellant/applicant herein filed a Succession Cause being Nyahururu CM Succ No. 20 of 2019 for his deceased mother's estate. A grant was issued to him on May 8, 2019, and the same has never been revoked, nor is it a subject for revocation before any court.
23. The Appellant filed a summons for confirmation of grant, and the respondent filed a protest claiming a purchaser's interest. However, before the protest court could hear the same, she filed an application dated May 21, 2019, seeking an injunction restraining the Appellant from interfering with her quiet possession on Parcel No. 533, one of the properties belonging to the deceased.
24. The Appellant opposed the application, and by a court ruling delivered in the absence of the parties on April 20, 2021, the application was allowed prompting the filing of the instant appeal.
25. Under section 79 of the Law of Succession Act cap 160, all the property of the deceased shall vest on the Executor or Administrator who obtains grants of representation as personal representative.
26. One of the duties of a personal representative, as provided under section 83, is to get in all free property of the deceased.
27. Section 45 of the Act criminalizes the taking into possession, disposing of, or otherwise intermeddling with a deceased person's property.
28. It's worth noting that although the respondent claims to be a purchaser for value, but no sale agreement is on record in support of purchase which offends the provisions of section 3(3) of the Law of Contract Act. In addition, no consent from the Land Control Board has been shown to the court.
29. Her claim of possession of suit property is not supported by any evidence, such as photographs of developments or affidavits from neighbors.
30. In the absence of any challenge to the Applicant's averments and deponed evidence, the court finds that the orders sought are justified, and thus the application is granted as prayed.

DATED AND SIGNED AT NYAHURURU THIS 26TH DAY OF MAY, 2022.

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CHARLES KARIUKI
JUDGE

