



**In re Estate of ST –Deceased (Civil Appeal 60 of 2022)
[2022] KEHC 13206 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 60 OF 2022
EM MURIITHI, J
SEPTEMBER 29, 2022**

BETWEEN

DK APPELLANT

AND

EMI RESPONDENT

RULING

1. By a Notice of Motion dated 23/5/2022 seeking two principal orders that:-
 - a. Pending hearing and determination of the applicant’s appeal herein, the Honourable Court be pleased to stay execution of the orders and Ruling o Hon. M.A Odhiambo, RM delivered on 13th May 2022 in Meru C.M Succession Cause No. 289 of 2018 and or any other actions(s) and or proceedings incidental thereto.
 - b. The Honourable Court, pending hearing and determination of High Court (Meru) Civil Appeal No. 60 of 2022 be pleased to grant an order of inhibition our parcel No. L.R. No. Kiirua/Ruiru/5242 to inhibit any form of transactions thereof including registration thereof including registration (s), transfers(s), charges and any other form of transactions whatsoever over the said land
2. A Grant of Registration was made to the Appellant who claimed to be the only child of the deceased, Stephen Thurania, on 15.5.2016. Thereafter, the Respondent said to be the deceased’s nephew obtain a Grant to the same Estate on 9.10.2019. The Respondent then sought Revocation of the Grant to the Appellant by Summons dated 12.12.2019 and the trial court gave judgment which is the subject of the appeal herein on 13/5/2022.
3. By its Judgment, the trial Court found the appellant to be a stranger to the Estate and pursuant to section 66 of the *Law of Succession Act* gave the letters of Administration to the Estate of the deceased to his father on the basis of the scheme of priority set out in that section, and revoked the two previous



Grants to the Appellant and the Respondent and distribute the estate asset to the deceased's father in whole, as follows:-

Insert

4. I have considered the affidavits filed by the parties in this application together with the submissions of their respective counsel on their respective contentions.
5. The appellant asserts her right of appeal and entitlement to inherit the estate of her father as child of the deceased did not produce any DNA report to prove the facts as he was bound to do on the principle that he who alleges must prove.
6. On the other hand the Respondent objected to his being sued contending that he had no interest in the estate of the deceased and this Grant having been revoked by the court and the Grant and Estate of the deceased being distributed to the deceased's father, the latter was the proper respondent in the case.
7. To be sure, as the successful application in the summons for revocation in the trial court the judgment whereof the subject of this appeal, the respondent is a proper party in this application and in the appeal. The success of the appeal would reverse the orders obtained by the Respondent in the trial court upon his summons to the appellant.
8. As a person affected by the order of the trial court, the deceased's father should have been joined in the appeal but as provided under Order 1 Rule 9 of the *Civil Procedure Rules* "No suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights of the parties before it."
9. Although he was with a party in the suit before the trial court, the deceased's father to whom the grant was eventually made by judgment of the trial court appealed from a person "interested in the result of the appeal". Within the meaning of order 42 Rule 22 of the *Civil Procedures* and he may be joined to the appeal before hearing thereof.

Substantial loss

10. On the test of Order 42 Rule 6 of the *Civil Procedure Rules*, there cannot be doubt that there is substantial loss to be occasioned the appellant if stay is not granted the judgment of the court distribute the Estate of the deceased to the deceased's in whole, and he could immediately register the parcel of land in his name and dispose it as he wishes. The appellant, if successful in her appeal, would then have lost her inheritance. See *Butt v. Rent Restriction Tribunal* [1982] KLR 417.
11. I have perused the Judgment of the court and the Memorandum of Appeal dated 18/5/2022. There is an arguable case as to whether the trial court properly revoked the grant to the appellant on the basis that she was not a child of the deceased. It would appear that the court considered the lack of proof of marriage of the appellant's mother as indicative of fact that she was not a child of the deceased and therefore a "stranger to the Estate."
12. There is a question whether the right of a child to inherit the estate of her parent depends on proof of marriage of her parents, or it only requires that the child was a child of the deceased irrespective of any marital status of the mother to the father. See section 3 (3) (5) of the *Law of Succession Act*. It is the mother who requires proof of marriage if she is to inherit her deceased husband.
13. As regard the child in relations to a male person as in this case section 3(2) of the *Law of Succession Act* appears to require evidence that the deceased had "express recognized or infact accepted as a child of



his own or for whom he has voluntarily assumed permanent responsibility “it may be easy to show that where the mother of the child is married to the deceased.

14. How about a child who is shown by DNA testing to be the child of a male person deceased who was not married to the child’s as urged?
15. There is also the question of proof by an applicant for revocation of Grant on the ground that and holder is not a child of deceased. Should not such an applicant establish the fact of non-paternity or lay a basis in evidence for the shifting of the burden of proof to the respondent to show by DNA or otherwise that she is a child of the deceased. Should the trial court have ordered a DNA test?
16. I think that the Memorandum of Appeal has demonstrated serious issues to be put to the appellate court to warrant the grant of a stay of execution. The appeal has an undoubted arguable case.
17. On security under order 42 Rule 6 (2) of the *Civil Procedure Rules*, it is security for the due performance of the decree in the event that the appeal is unsuccessful. Each case depends on its own circumstances and where the due performance of the decree does not depend on the applicant, the court would not require security. It is not a security for costs of the appeal which need be given in the event the appeal is unsuccessful. Each case depends on its own circumstances and where the due performance of the decree does not depend on the applicant, the court would not require security. It is not a security for costs of the appeal which need be given in the event the appeal is unsuccessful and the performance of the decree of the trail court depends on a person other than the applicant the court may not order a security for the due performance of such decree or order”.
18. If the appeal in this case is not successful all that will happen is that the decree of the court making Grant of letters of letters of Administration the deceased father and distributing the entire estate to him shall be affected. The applicant has no control over that process and no security is called for in the circumstances.
19. There was no contest that the application for stay of execution was made without undue delay, as prescribed under Order 42 rule 6(1) of the *Civil Procedure Rules* as the Judgment was delivered on 13/5/2022 and the application for stay of execution on 23/5/2022.

Orders

20. Accordingly, for the reasons set out, the court makes order for preservation of status quo pending appeal on the principle of *Wilson v. Church (No.2)* [1879] 12 Ch.D 454.
21. In terms of Order 42 rule 22 of the *Civil Procedure Rules*, the Administrator shall be served with the Appeal.
22. The Notice of Motion dated 23/5/2022 is granted in terms of prayers (4), (5) and (6) thereof.
23. Costs of the application to abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 29th DAY OF SEPTEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Ndubi Ondubi & Associates, Advocates for the Appellant



M/S G. M. Wanjohi, Mutuma & CO. Advocates for the Respondent.

