



**In re Estate of M'ibutu M'imaita (Deceased) (Succession Cause
2 of 2019) [2022] KEHC 16608 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 2 OF 2019
TW CHERERE, J
DECEMBER 21, 2022
IN THE MATTER OF THE ESTATE OF M'IBUTU M'IMAITA(DECEASED)**

BETWEEN

STEPHEN KIMONYE IBUTU PETITIONER

AND

JAPHETH GUANTAI IBUTU 1ST RESPONDENT

ISMAIL KABURU M'IBUTU 2ND RESPONDENT

ERASTUS MURIUKI IBUTU 3RD RESPONDENT

RULING

1. By a certificate of confirmation of grant dated July 23, 2019, deceased's estate in LR Abothuguchi/githongo/476 was distributed in equal shares to Japheth Guantai Ibutu, Stephen Kimonye Ibutu and Ismail Kaburu M'Ibutu.
2. Subsequently, the estate subdivided equally into LR Nos Abothuguchi/githongo/4639, 4640 and 4641 registered in the name of Japheth Guantai Ibutu, Ismail Kaburu M'Ibutu and Stephen Kimonye Ibutu respectively.
3. By an application dated July 21, 2020, Japheth Guantai Ibutu sought an order that the Stephen Kimonye Ibutu does vacate land parcel No Abothuguchi/githongo/4639 and occupy his land parcel No Abothuguchi/githongo/4641, and in default he be forcefully evicted.
4. By a ruling dated October 15, 2021, Otieno J issued the following orders:
 1. I therefore find that the petitioner is in unlawful and tortious occupation of Abothuguchi/githongo/4639



2. Being in such unlawful occupation, I direct that he moves out peacefully and gives vacant possession thereof to the registered owner within 60 days from today
3. For avoidance of doubt, if he shall not have vacated by the December 16, 2021, he shall be forcefully evicted by a court bailiff in the presence of the area officer commanding the local police station who shall ensure that public order is maintained.
5. By summons dated October 27, 2021, petitioner seeks an order for stay of execution of the order dated October 15, 2021 and all consequential orders pending the hearing and determination of an intended appeal. The summons is based on the ground on its face and on the petitioner's affidavit sworn on October 27, 2021.
6. Respondents on November 22, 2021 filed a notice of preliminary objection of even date on and argued that the application is *sub judice* to the application dated October 27, 2021 and that the court is *functus officio*. dated November 22, 2021.

Analysis and determination

7. I have considered the summons in the light of the affidavit on record and annexures thereto, the preliminary objection and submissions filed on behalf of the parties and the issue for determination is whether the petitioner has met the threshold for grant of the order of stay of execution
8. An applicant who seeks an order of stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), namely:
 - (a) 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) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR* and *Beatrice Ndunguri Mwai & Another V Sicily Wawira Titus & Another [2020] eKLR*)
9. In *Butt vs Rent Restriction Tribunal [1979]*, the Court of Appeal stated that discretion whether or not to grant an order of stay pending appeal ought to be exercised in a manner that would not cause injustice to any party.
10. In the instant case, the applicant challenges eviction from land parcel No Abothuguchi/githongo/4639 that is registered in the name of Japheth Guantai Ibutu.
11. It is on record that land parcel No Abothuguchi/githongo/4641 was distributed to the petitioner but he has insisted on occupying both land parcel No Abothuguchi/githongo/4639 and 4641.
12. It is trite that substantial loss in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution.
13. Petitioner to who was distributed land parcel No Abothuguchi/githongo/4641 has not demonstrated that his eviction from land parcel No Abothuguchi/githongo/4639 will occasion him any loss substantial. On the contrary, his continued occupation of land parcel No Abothuguchi/githongo/4639 continues to not only annoy but also cause substantial loss to Japheth Guantai Ibutu.
14. From the foregoing analysis therefore, the summons dated October 27, 2021 is considered and found to have no merit and it is dismissed with costs to the 1st respondent.



DATED AT MERU THIS ST DAY OF DECEMBER 2022

WAMAE T'W CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Petitioner - Mr Kaimenyi for Kithinji Thuranira & Co Advocates

For Respondents - Mrs Mutegi for Mutegi Mugambi & Co Advocates

