



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.66 OF 2020**

**IN THE MATTER OF THE ESTATE OF ANDREW M'KWARIA Alias ANDREW M'IKWARIA-DECEASED**

**PETER MUTEMBEI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JUSTER KARIANKI.....2<sup>ND</sup> APPELLANT/APPLICANT**

**JULIUS GITUMA M'KWARIA.....3<sup>RD</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**NICHOLAS KIRUJA M'KWARIA..... RESPONDENT**

**RULING**

1. The court is called upon to determine two applications each filed by either party. The first application is a notice of motion brought under certificate of urgency dated 17.08.2020 pursuant to **Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3, 3A of the Civil Procedure Act, Section 47 & 50 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules, Article 40 & 159(2) of the Constitution** and other enabling provisions of the law. It seeks an order for stay of execution of the decision of the lower court pending the determination of the appeal

2. The second application is by the respondent also brought under certificate of urgency dated 26.08.2020 pursuant to **Order 45 Rule 1 & 2, Order 22 Rule 52, Order 51 Rule 1, Section 63(e) of the Civil Procedure Rules, Sections 27, 1A, 1B, 3 and 3A of the Civil Procedure Act** together with all other enabling provisions of the law. The application seeks orders that the court reviews its orders of 17.08.2020 and that the appellant applicant be restrained from occupying more than 3 acres of the estate land.

3. In the first application, the applicants/appellants in seeking stay of execution of the trial court's judgement and decree in Nkubu PMSUCC No.4 of 2017 pending hearing and determination of this appeal, contends that the court delivered its decision vide a judgement dated 06.08.2020 and subsequently issued a certificate of confirmation of grant which decision aggrieved him leading to the current appeal against the entire decision as disclosed in the memorandum of appeal. They contend that they have lived and carried out extensive developments on the suit properties by erecting permanent buildings thereon and that pursuant to the decision appealed against the respondent has threatened to evict them from the suit properties and destroy their houses. For that reason, a contention is taken that unless the orders sought are granted, appeal, said to be well grounded with high chances of success shall be rendered nugatory and that no prejudice will be occasioned on the respondent if the orders sought are granted and the current status quo maintained. There is then an averment that the application is made in outmost good faith without delay and in the interest of justice, fairness and equity hence it should be allowed as prayed.

4. The application was opposed by the replying affidavit of Nicholas Kiruja M'Kwaria, the respondent herein, sworn on 26.08.2020. The respondent asserts that the deceased herein was his father and was survived by 13 beneficiaries and left two parcels of land being **L.R ABOTHUGUCHI/GITIE/7** measuring six acres and **LR ABOTHUGUCHI/IGANE/120** measuring some eight acres. That prior to his demise, the deceased had directed that his sister and his step mother be given 1 acre and 2 acres respectively out of **LR ABOTHUGUCHI/IGANE/120** and that the remaining 6 acres thereon be shared equally among the 4 sons including the respondent and his 3 brothers. That in the succession cause, the five (5) of his married sisters declined any share of the deceased estate as they have settled elsewhere. That **L.R ABOTHUGUCHI/GITIE/7** measuring 6 acres but more valuable in terms of climate and soil than **L.R ABOTHUGUCHI/IGANE/120** acres was shared equally among the 4 sons with each getting 1<sup>1/2</sup> acres. The respondent takes the stand that the application is calculated to advance mischief and entrench selfishness on the part of the applicants. It is averred that the intentions of the applicants are to use the deceased prime land exclusively in perpetuity to the exclusion of the other siblings.

5. The second application, as said before, is by the respondent, and was also brought under certificate of urgency dated 26.08.2020 pursuant to **Order 45 Rule 1 & 2, Order 22 Rule 52, Order 51 Rule 1, Section 63(e) of the Civil Procedure Rules, Sections 27, 1A, 1B, 3 and 3A of the Civil Procedure Act** together with all other enabling provisions of the law.

6. In it, the respondent, Nicholas Kiruja M'Kwaria, seeks review, variation, vacation and/or setting aside of the court orders of 17.08.2020

and further that the appellants be ordered not to occupy more than 3 acres of **L.R ABOTHUGUCHI/GITIE/7** pending the determination of the appeal.

7. The application is premised on grounds set out in the body of the application and echoed in supporting affidavit of Nicholas Kiruja M’Kwaria, the respondent herein, sworn on 26.08.2020 which sums up to be that the ex parte orders issued on 17.08.2020 are draconian with the effect of perpetuating exclusive occupation of **L.R ABOTHUGUCHI/GITIE/7** by the applicants to the detriment of the respondent. That the 1<sup>st</sup> and 2<sup>nd</sup> applicants are children of the respondent’s brother namely Fredrick Kimathi, now deceased but the 3<sup>rd</sup> applicant has fraudulently caused the 1<sup>st</sup> and 2<sup>nd</sup> applicants to acquire ID Cards bearing his name in order to solely occupy **L.R ABOTHUGUCHI/GITIE/7**. It was the deponent’s assertion that no prejudice will be occasioned to the applicants if the orders sought are granted.

8. The applicants/Appellants filed a replying affidavit sworn by Julius Gituma M’Kwaria, the 3<sup>rd</sup> applicant herein, on 27.10.2020 reiterating the averments in his supporting affidavit and in opposition to the second application whose gist was that there would be no prejudice if the second application is dismissed so that the status quo is preserved pending the end of the litigation in this appeal.

9. The file was placed before the court on the 01.10.2020 then directions were given to the effect that the two applications be heard together and by way of written submissions whose timelines were given. On the basis of such directions the appellants filed two sets of submissions on the 20.10.2020 while the respondents had filed theirs on the 16.10.2020.

10. For the applicants, submissions were made to the effect that their application had met the threshold as stipulated under order 42 (6) for grant of stay and that the application together with the memorandum of appeal had been filed timeously and without inordinate delay. On the other hand, the appellant’s advance the view that the respondent’s application should be dismissed as it does not meet the threshold for grant of review orders under Order 45 Rule 2 because the respondent had failed to demonstrate material evidence or mistake apparent on the face of the record to warrant the grant of the orders sought. Reliance was then placed on the decision in **Mugar v Kunga (1988) KLR** to support their position that where the dispute involves land, the court should move towards maintaining the status quo pending determination of the dispute.

11. The respondent made submission that the appellants’ application should be struck out as it does not meet the threshold for grant of the orders sought for reasons that the averments of impending eviction and the likely sale of the suit properties by the respondent were farfetched and intended to defeat the purpose of Section 40(1) of the Law of Succession Act.

12. He urged this court to allow his application dated 26.08.2020 and vacate/vary the interim orders of stay. The respondent relied on **Re Estate of Michael Warui Gicharu (Deceased)(2019)eKLR, Re Estate of Elizabeth Kamene Nding’a (Deceased)(2019)eKLR, Re Estate of George Ragui Karanja(Deceased)(2020) eKLR and R. v Vice Chancellor Moi University & 3 others Ex parte Benjamin J Gikenyi Magare(2018)eKLR** to support their position on when to grant or refuse stay and review and what conditions to be imposed when stay is granted.

13. From perusal of the two applications, a determination of one either way affects the other in equal measure. If, for example, the court grants stay, the prayer for review or setting aside turns superfluous and that regarding what portion of the suit land should or should not be occupied by the appellants becomes due as a consideration by way of what terms stay should be. On the flip side, if the stay is declined the respondents’ application becomes moot. On such appreciation, even though the court had directed that the two applications be heard together, I will consider the respondents’ application as an opposition to that by the appellant and come up with one decision.

14. The record shows that the deceased herein left two assets namely **Abothuguchi/Igane/120** measuring 8 acres and **Abothuguchi/Gitie/7** measuring 6 acres. It is not disputed that the 3<sup>rd</sup> applicant and the respondent are brothers just like it is agreed that the 1<sup>st</sup> and 2<sup>nd</sup> applicants are grandchildren of the deceased by virtue of being the sons of a third son to the deceased, who is also dead.

15. Every application for stay pending appeal invokes the discretionary powers of the court designed to preserve the subject of litigation<sup>[1]</sup>. That discretion must be exercised judiciously and upon the known and crystallised principles. **Order 42 Rule 6 of the Civil Procedure Rules, 2010** empowers a court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are well settled since the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** which set the principles to be applied. In that decision the court held that:

**a) The power of the court to grant or refuse an application for a 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 that 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) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and 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.**

16. Those general guidelines would be varied on case to case basis and may not always be applied in every case. Like in the present case, all the parties are related to the deceased and their right may actually rank *pari passu*. The overwhelming consideration must thus be whether there is a compelling reason to refuse stay, permit the enforcement of the certificate of confirmation and the attendant eviction while this appeal pends. To my mind such reason exists not. To the contrary I consider the relationship between the parties, being kinship, to demand

that, the current status quo regarding residence and livelihood activities on the estate property be maintained pending outcome of the appeal. I see no prejudice visiting the respondent by stay being granted albeit on terms that the appeal be fast tracked. The flip side being denial of stay would have the effect that the certificate of confirmation be materialized with the inevitable disruption of the position on the ground. Such disruption may include strained relationship and loss of property that may not be reversible. I have in mind possibilities of a beneficiary taking over a portion of the land and felling any trees and crops being thereon only for the appeal to succeed subsequently. Such must be avoided by way of preserving the substratum of the appeal.

17. On arguability of the appeal, the question of whether or not the married sister did relinquish their entitlement cannot pass as frivolous. If not frivolous, there is no justice in allowing the parties to meet costs in subdivision and transmission when the decision may just be set aside on appeal.

18. I have said so enough to demonstrate that there is need and justification to grant stay. I do grant stay but on conditions that, the appellants shall within 60 days from today file and serve a record of appeal together with submissions. Upon service on the respondents, they shall, within 21 days from the day of service, file and serve own submissions to enable the appeal be mentioned on the 17.6.2021. Time shall be of essence and in case of default the stay granted shall stand discharged.

19. Having granted stay, I consider there being no wisdom in seeking to upset the same orders I have just granted. I consider the respondents' application to have met the fate of failure. It stands dismissed.

20. On costs, I am persuaded that kinship needs to be promoted and therefore each party shall bear own costs.

**Dated, signed and delivered at Meru, online, this 19th day of March, 2021**

**Patrick J O Otieno**

**Judge**

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[\[1\] re Estate of Beth Wago Kimani \(Deceased\) \[2020\] eKLR](#)