



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. E036 OF 2020

IN THE MATTER OF THE ESTATE OF KAMOTHO NJORO (DECEASED)

MARY NG'ENDO GITAU.....1ST APPELLANT

ESTHER WANGARI KARIUKI.....2ND APPELLANT

MARY NG'ENDO KARIUKI.....3RD APPELLANT

VS.

PETER GATONYE MUNGAI.....1ST RESPONDENT

MARY WANGARI MBURU.....2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of this appeal,

the ruling of Senior Principal Magistrate Kikuyu delivered 17th December, 2020

Succession Cause No. 18 of 2008)

RULING

1. Before me is a summons dated 22nd December, 2020. It is for an order of stay pending the hearing and determination of this appeal, of the ruling of Senior Principal Magistrate Kikuyu delivered 17th December, 2020 Succession Cause No. 18 of 2008. What has aggrieved the appellants in that afore-stated Ruling is the order of distribution of the estate of **Kamotho Njoro** deceased, the order that one of the estate's property be sold and the sale proceed be shared equally amongst the beneficiaries, that the property so ordered to be sold is the residence of all the three appellants, that the said property ordered to be sold has sentimental value to the appellants and that the learned magistrate's ruling distributed the piece of land to a stranger to the estate namely, *Jane Njambi Kabucho*. The appellant argued that if stay of execution is not granted the appellants will be prejudiced.

2. The deceased whose estate is the subject of this appeal died in 1973 and as it is often the case the original beneficiaries have all passed away. The appellant's contention is that the grandchildren of the deceased applied to be substituted as administrators of the estate and then proceed to apply for confirmation of grant without the knowledge or consent of other beneficiaries. Appellant therefore filed a summons for revocation of grant which that Kikuyu Magistrates court ruled on and is now the subject of this appeal.

3. The respondents relied on the replying affidavit of *Peter Gatonye Mungai*. He deponed that all the appellants were recognised in the Kikuyu Court Succession as beneficiaries. That the property ordered to be sold is approximately 0.25 of an acre. That because that property is too small to be shared amongst the beneficiaries the Kikuyu Court, by its ruling, ordered it to be sold and its sale proceeds be shared amongst the beneficiaries. The respondent further deponed that the appellants have enjoyed the sole use of that property to be sold and that they have also built premises thereof which they are renting at their own benefit. Further, it was deponed that the appellants are cutting down trees on that property and selling those trees for their sole benefits.

ANALYSIS

4. Very frequently when succession matters are allowed to drag for too long, as this succession has done, the deceased having died in 1973, then the more convoluted the estate becomes. This estate is no exception to succession that have delayed in being concluded. It is now characterised by accusations and counter accusations amongst the beneficiaries.

5. There are very unique considerations when the court is called upon to consider a stay of execution application pending appeal in a succession matter. This is because to refuse to stay, as in this case, may lead to the property of the estate being transferred even to innocent parties. This could possibly lead to some beneficiaries suffering injustice. Therein lies the possibility of some beneficiaries in this estate suffering substantial loss. I am also very conscious of the allegations of the respondent that the appellants are solely benefiting from one property and the trees that are growing therein to the exclusion of the other beneficiaries. That state of affairs cannot be allowed to persist for much longer.

6. It is with the above in mind that I will grant a conditional stay of execution. The appellants will be obligated to move to speed to prepare for the hearing of this appeal.

DISPOSITION

7. Doing the best I can in balancing the interest of all parties, I make the following orders:-

(a) A stay is hereby granted of the order and ruling delivered on 17th December, 2020 and of **Senior Principal Magistrate, Kikuyu in Succession Cause NO. 18 of 2008** on condition that the appellants will deposit into this Court security of Kshs.200,000/= within 30 days from this date hereof. In default the stay hereof will be vacated.

(b) The costs of the application dated 22nd December, 2020 shall abide with the outcome of this appeal.

(c) The appellants will enjoin **Jane Njambi Kabucho** as a respondent in this appeal.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 22ND DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

C/A

Appellant:.....

For the Appellant.....

For the Respondent.....

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE