



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 113 OF 2019

JAMES MAINA KIHARA.....APPELLANT

VERSUS

BERNADETTE NJERI WIAREGI.....RESPONDENT

RULING

1. Notice of Motion application dated 16th December, 2019 is filed by James Maina Kihara (James). By that application James seeks to restrain **Bernadette Njeri Wairegi (Njeri)** from executing the orders of Thika Chief Magistrate Succession Cause No. 509 of 2016 made on 2nd July, 2019. By that order Thika Court annulled the confirmed grant issued to James.

2. James seeks stay of the Thika Court order on the grounds that he was not given an opportunity to adduce viva voce evidence before the annulment of the grant; that the annulment was done in bad faith; that in annulling the grant the learned Magistrate included a stranger to the estate of deceased and that property of the deceased situated in Marsabit had been sold, after the confirmation of grant, to another party.

3. The application was opposed by Njeri through her affidavit sworn on 5th February, 2020. In that affidavit Njeri deponed that parties were granted by consent, leave to file written submissions to the application for revocation of grant and all parties did file those submissions. That the grant was annulled because James had omitted the estate's property in Marsabit and a beneficiary in the succession cause. That however the annulment order had been registered against the title of the estate's property and the irregular transfer of the same has been cancelled by the Land Registrar.

ANALYSIS AND DETERMINATION

4. Stay of execution pending determination of an appeal is considered under Order 42 Rule 6 of the Civil Procedure Rules. That Rule was considered in the case **VICTORY CONSTRUCTION VS. BM (a minor suing through next of friend one PMM) (2019) eKLR** that:-

“The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:-

“No order for stay of execution shall be made under sub-rule (1) unless:-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

In VISHRAM RAVJI HALAI VS. THORNTON & TURPIN Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that:-

“Whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.”

5. James needed to establish sufficient cause, showing he would suffer substantial loss and to furnish security. James did not establish any of the above conditions. His application was premised on the allegation that he would suffer substantial loss because the subject property had been sold to a third party. The basis of James' application did not meet the threshold of substantial loss for the reason that if indeed any one would suffer loss it was not James but rather the third party who purchased the land. But even then Njeri has shown that the title of that third party was nullified by the land registrar and the title reverted back to the estate of the deceased. In the case of *H.E. VS. S.M. (2020) eKLR* the court discussed substantial loss which is useful to consider as follows:-

“As to what substantial loss is, it was observed in *JAMES WANGALWA & ANOTHER VS. AGNES NALIAKA CHESETO [2012] eKLR that:-*

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

6. The application before me is without doubt, unmerited. All that the Thika Court did was to annul a confirmed grant. James will have ample time to prove that he did not omit a property of the estate and will also have opportunity to prove that he did not fail to include one of the deceased's children in the succession cause.

7. It follows that the application dated 16th December, 2019 is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 19TH DAY OF APRIL, 2021

MARY KASANGO

JUDGE

Coram:

C/A : Kevin

For the Appellant.....Ms. Nyabisi

For the Respondent.....Mr. Njoroge H/B Ms. Wangari

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE