



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. E019 OF 2020**

**PATRICK KUMBITI.....APPELLANT/APPLICANT**

**VERSUS**

**FRANCIS MURIATI M’KIRICHIU.....1ST RESPONDENT**

**JOSEPH MURIATI MUKINDIA.....2ND RESPONDENT**

**RULING**

1. The Application before the Court is one for stay of execution of the lower Court’s Judgment in Tigania PM Succession Cause No. 66B of 2019. In the Judgment, the Court found that there is in existence an oral will. The Appellant, who is a nephew to the deceased claims that there is no such oral will and that the deceased estate is intestate. He also claims that the Court left some property undistributed.

**Appellant’s Case**

**The Application**

2. The Appellant’s application is supported by the grounds on the face of it as well as by his supporting affidavit sworn on 16<sup>th</sup> November 2020. He states that he filed the Petition in the lower Court and that the deceased who had no wife or children was his uncle; That he got temporary letters of grant and was in the process of confirmation of grant when the Respondents filed an abjection and cross-petition for grant, claiming that the deceased left an oral will; That there was no oral will that the deceased left and that the deceased died intestate; That the Magistrate did not make a full determination of the estate; That the Respondents are total strangers to the estate of the deceased; That he is the only heir of the deceased; That he is currently in occupation and use of LR. AKITHI III/328 and AKITHI III/1801 and he is doing farming thereon; That the Respondents intend to enter into the land and damage his crops and chase him away; That the Respondents intend to get Judgment and acquire a signed confirmation of grant and implement the same; That he is likely to lose the deceased estate if his application is dismissed; That he stand to suffer irreparable loss as the deceased property is likely to be taken by total strangers claiming to rely on an oral will.

**Appellant’s Submissions**

3. The Appellant filed his submissions dated 29<sup>th</sup> January 2021. He submits that his appeal raises weighty issues for determination; That the deceased did not leave behind any oral will and that the Respondents and their witnesses gave contradictory evidence as to the existence of an oral will; That the Respondents are not related to the deceased in any way; That the lower Court did not make a full determination of the dispute and left part of the estate hanging; That if the orders sought are not granted pending the hearing and determination of the appeal, the same will be rendered nugatory as the Respondent will have the grant implemented; That he has been actual occupation of the land parcels and hence stands to be evicted; That he stands to suffer irreparable loss if the grant is confirmed and implemented as it may pass to other parties through sale, That the Respondents will not suffer any harm as the will have their day in the hearing of the appeal.

**Respondents’ Case**

**1<sup>st</sup> Respondent’s Replying Affidavit**

4. The 1<sup>st</sup> Respondent opposed the application by his replying affidavit sworn on 5<sup>th</sup> January 2021. He states the Applicant filed the succession case through the back door because he is not a beneficiary of the estate as alleged; That the deceased had no wife or children but he died testate to him; That the Applicant field the succession cause using fake documents; That the Applicant was living in Timau and he had no access to the deceased who he was living with; That the deceased made an oral will before him and the members of the clan in the absence of the Applicant; That the That the deceased is his uncle and the Appellant is his cousin; That he is the next of kin with all the

documents required; That the Appellant never utilized the land at any given time; That the suit land AKITHI 111/1801 and AKITHI 111/328 belongs to him and that the Appellant lives at Timau up to date.

### **1<sup>st</sup> Respondent's Submissions**

5. The 1<sup>st</sup> Respondent filed submissions dated 12<sup>th</sup> February 2021. He submits that the Magistrate was right in his declaration of the matter; That the Appellant is not a relative to the deceased who died testate and that the Appellant was not part of the estate. That the Appellant lost his case and should not be given the orders sought as judgment is already in favour of himself, the 1<sup>st</sup> Respondent; That the Appellant is asking the Court to stop the Respondent from enjoying the fruits of his Judgment and therefore, sufficient material must be placed before the Court for that prejudice to be visited upon the Respondent.

### **2<sup>nd</sup> Respondent's Replying Affidavit**

6. The 2<sup>nd</sup> Respondent opposed the application through his replying affidavit sworn on 22<sup>nd</sup> December 2020. He states that he is entitled to the fruits of his Judgment and that the Applicant has not proved how he stands to suffer substantial loss. That the Applicant has not adduced any evidence to confirm that he is in occupation of the land parcels and/or that he has planted any crops thereon and that it is him, the 2<sup>nd</sup> Respondent who has been in occupation; That it is the Applicant who has previously acted fraudulently to the detriment of the estate and the Court revoked the temporary grant of letter of administration and inhibited the land; That he is not in the process of having a confirmation of grant signed as alleged as he has only applied for a temporary grant to enable him manage and preserve the estate of the deceased; That in the event the Appellant is successful in his appeal, the land will still be there and will revert to him and he therefore does not stand to suffer irreparably; That there has been inordinate delay in filing this application; That the Appellant has not offered any security.

### **2<sup>nd</sup> Respondent's Submissions**

7. The 2<sup>nd</sup> Respondent filed submissions dated 3<sup>rd</sup> February 2021. He submits that the Applicant has failed to demonstrate what substantial loss he is likely to suffer if the order for stay of execution is not granted. He submits that the Applicant's claim that he is in occupation of the land is disputed and that it is the Respondent who is in occupation. He submits that the arguments that the land may be sold is merely speculative and courts will not grant orders on the basis of speculation. He urges that in view of the fact that the succession cause is still pending before the lower Court, the Applicant has failed to discharge the burden of proof. He relies on the cases of *Kenya Shell Limited vs Benjamin Karuga Kigibu & Another (1982-1988)* KAR 108.

8. He further submits that the Applicant has failed to show that he is prepared to comply with any conditions as to security that may be ordered by the Court for the performance of the Judgment/Decree of the Court. He submits that the question of whether or not the Applicant has an arguable appeal is not up for consideration before the Court as it is not one of those grounds found in order 42 of the Civil Procedure Rules.

### **Issues for Determination**

9. The two main issues for determination in the instant application are: -

**i. Whether to stay implementation of the Judgment of Hon P. M. Wechuli in Succession Cause No. 66B of 2019 pending the hearing and determination of the appeal herein.**

### **Determination**

10. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a. substantial loss will result to applicant if stay is not granted; and
- b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
- c. the application has been brought without unreasonable delay.

### **Arguable Appeal**

11. Arguability of appeal as a condition for under Rule 5 (2) (b) of the Court of Appeal Rules and not under the Civil Procedure Rules. This Court however has a duty to ensure that any such intended Appeals are indeed arguable and not frivolous. An arguable appeal does not mean one that must eventually succeed and it is not for this Court to go into the merits of the claim at this stage. See the case of **Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)**. The Applicant intends to appeal against the Judgment of the Chief Magistrates' Court finding that the deceased died testate. This is an issue that will require an analysis of evidence to determine whether there was a will whether oral or written. The Applicant attached his Memorandum of Appeal dated 5<sup>th</sup> March 2021 in his supporting affidavit which proves his averments. This is indeed an arguable appeal.

### **Substantial Loss**

12. The Applicant claims that unless stay orders are granted his appeal will be rendered nugatory as the Respondent will have the grant implemented and the property may pass to other parties through sale. He also claims that he has been in actual occupation of the land parcels and hence stands to be evicted. The question of who is in occupation is one that is contested as both the Applicant and the Respondents claim to be in possession. The Respondent claims that even if the Applicant is successful, the land will still be available for retransfer. This Court is not convinced that this would be the most efficacious course to take bearing in mind the bureaucracies and lengthy and costly processes that often become of land transfers. It would be better to wait for a final determination on the rightful heirs as opposed to allowing the parties to deal with the property whilst a dispute is pending. While it is true that parties are entitled to enjoy the fruits of their Judgment, this Court being a Court of Justice has a duty to ensure that the ends of justice are met, which include allowing for appeals to be heard whilst the subject matter is protected.

### **Security**

13. On security, the Respondent claims that no security has been offered. The Court is however mindful that the matter does not involve a money decree but it concerns a succession dispute. Of course there is some financial value to be attached to the deceased estate, but at the moment, what is of concern is on what assets form part of the estate and to who the said assets should be distributed to.

14. As the determination of the court shall be effected by an order set out in a confirmed grant of the Letters of administration which does not depend for its execution on the goodwill of the applicant, there is no need for security **“for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”** in terms of Order 42 rule of the Civil Procedure Rules. Indeed, Order 42 on appeals is not one of the provisions of the Civil Procedure Rules which are expressly applied to succession proceedings under Rule 63 of the Probate and Administration Rules.

### **Undue Delay**

15. Judgment herein was delivered on 3<sup>rd</sup> November 2020 and the instant application was made on 17<sup>th</sup> November 2020, fourteen (14) days later. This is not an unreasonable delay.

### **ORDERS**

16. Accordingly, for the reasons set out above, this Court makes the following orders: -

**i. An order for stay of execution of the Judgment delivered on 3<sup>rd</sup> November 2020 by Hon P. M. Wechuli in Tigania PM Succ. Cause No. 66B of 2019 is hereby issued pending the hearing and determination of the intended Appeal.**

**ii. There shall be no order as to costs.**

**DATED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF JUNE, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**M/S Ayub K. Anampiu & Co. Advocates for the Applicant**

**Francis Muriati M'Kirichu, the 1<sup>st</sup> Respondent in person**

**M/S Murango Mwenda & Co. Advocates for the 2<sup>nd</sup> Respondent.**