



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

SUCCESSION CAUSE NO.286 OF 2007

IN THE MATTER OF THE ESTATE OF SOLOMON M'ITUMBIRI

M'MUNYUA Alias M'ITUMBIRI M'MUNYUA (DECEASED)

GEOFFREY MURITHI M'ITUMBIRI.....PETITIONER/APPLICANT

VERSUS

CATHERINE KIENDE MBAYA.....ADMINISTRATOR/RESPONDENT

Ruling

1. Even though there are two pending applications in this file that seek determination, the truth of the matter is that both amount to just one application. I deem it so because, the latter application merely sought inhibition order against dealings over L R NO KIIRUA /RUIRI/3198 and an order for fast tracking of the ruling in the application dated 18/12/2019. When the latter application was filed, orders were given granting inhibition to which extent nothing of substance pends to be determined in that application.
2. The summons under certificate of urgency dated 18th December 2019, brought under Section 47 of the Law of Succession Act and Rules 59 & 73 of the Probate and Administration Rules and all enabling provisions of the law, the applicant seeks inter alia;
 - i) Spent
 - ii) Stay of execution of the court orders of 19/7/2019 and 29/5/2019 and all further and consequential proceedings in this matter pending hearing and determination of the intended appeal against the orders of 21/5/2018
 - iii) In the alternative and without prejudice to prayer 3 above, setting aside and/or variation off the orders of 19/7/2019 and 29/5/2019 and any further consequential proceedings flowing therefrom.
3. The application is premised on the grounds on the face of the application and supporting affidavit of the applicant, sworn on 18/12/2019 in which it is contended that the applicant was the registered proprietor of L.R No. NTIMA/IGOKI/1896, which was subsequently amalgamated with L.R No. NTIMA/IGOKI/2531 to yield L.R No. NTIMA/IGOKI/8395. He laments that Denis Kinyua Kanyamu, the purchaser of L.R KIIRUA/RUIRI/4977 ought to have been heard, before the grant was confirmed. He depones that Resilient Investment Ltd, who acquired PLOT 3B MAKUTANO jointly owned by the deceased and Makathimo M'Itwerandu, ought to have been enjoined to these proceedings. He contends that he was not afforded an opportunity to protest the confirmation of grant, because he was not served by the respondent.
4. He intimates his dissatisfaction with the impugned orders and although he was granted leave to appeal, the record of appeal is yet to be filed. In his view, the appeal, which is arguable, will be rendered nugatory and otiose if the impugned orders are implemented.
5. The respondent, Catherine Kiende has opposed the application through her replying affidavit sworn on 26th February 2020. In which she avers that the summons for confirmation of grant was allowed after the applicant refused to attend court, despite having been duly served. She then admits that L.R No. NTIMA/IGOKI/1896 was bequeathed to the applicant by the deceased whereas she got L.R No. KIIRUA/RUIRI/3198. She beseeches the court to dismiss the application for being misleading, an abuse of the process of the court and unmeritorious.
6. Following court's directions on 18/2/2020 that the application be canvassed by way of written submissions, the same were respectively filed on 8/10/2020 and 30/7/2020. The applicant maintains that he has satisfied the conditions for grant of the orders of stay and cites the case of **Butt v Rent Restriction Tribunal (1982) KLR 417** in support of that position.
7. On her part, the respondent urges the court not to aid the applicant, who has been indolent, as he filed the application with unreasonable

delay. She blames the applicant for considerably delaying the conclusion of this matter by filing endless applications. She contends that the applicant had filed a similar application dated 20/12/2016 citing non-service of court process. She avers that the application ought to be dismissed, as no substantial loss had been demonstrated by the applicant. According to her, the impugned orders were regular and should not be set aside. She cited the case of **Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oedal (2004) eKLR** to buttress her submissions.

8. The only issues for consideration and determination are whether the prayer for stay of execution pending appeal should issue and if the disclosed orders of the court given on 29/5/2019 and 19/7/2019 should be set aside. Of course there would be the collateral but deeply germane question of whether the court can give the two orders of setting aside and stay pending appeal in the same breath and at the same time. In my opinion and appreciation of the objects and efficacy of an order for setting aside is that if I granted same there would be no order to be challenged on appeal. Accordingly, I will only consider the request for stay pending appeal if the prayer for setting aside fails. With that appreciation, this determination must start with the prayer for setting aside. While both parties assert that the court gave orders on the 19/07/2019, I have perused the file and established that after the orders of 29/05/2019, the next time the matter was in court was on the 30.9.2019 when an application dated 24/09/2019 was certified urgent and set for hearing on the 12/11/2019. on that day no substantive orders were issued but the court did say and order thus: -

“In the meantime, the grant to be implemented. No one should stop the surveyors from doing their work”

9. It is to me clear that there were no orders made on the 19/07/2019 but there are orders of 19/07/2019 which were then followed by those of 29/05/2019. That confusion by the applicant notwithstanding, I will proceed to determine whether or not the orders of 19/07/2019 and sought to be furthered by those of 29/05/2019 are due for setting aside. Every prayer for setting aside invokes the discretionary powers of the court, which of course must be exercised judiciously, and aimed at meeting the end of justice so that where a decision of the court has been made on the basis of a slip, excusable mistake or inadvertence, with no designed to overreach, obstruct or delay justice, the court would lean back and set aside so that the party in such justifiable cause gets the chance to be heard. That discretionary power being targeted at meeting the ends of justice is never intended to reward indolence or a litigant out to obstruct, delay of frustrate the course of justice. In **Shah Vs Mbugo (1967) E.A. 166** the court of Appeal held that:

“This discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice... However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.

10. I have looked at the impugned orders sought to be set aside. It should not be lost sight of the fact that the applicant dated 29.04.2019 had sought and procured the consolidation of the resultant subdivisions of **NTIMA/IGOKI/2531** into 8422, 8423, 8424, 8425, 8426 & 8427 and **NTIMA/IGOKI 3198**, into 4977 & 4978, back to the original parcel numbers. Therefore, the orders of 19/5/2018 as well as those of 29.05.2019 were purely facilitative purposed to have the amended certificate of grant implemented. Thereafter, the applicant refused and neglected to execute the necessary documents to ensure the orders of 19/7/2018 were effected and implemented thus calling upon the court to once again issue the orders of 29/5/2019.

11. Having perused the entire record, I have not found any sufficient reason to set aside or vary the orders of 19/7/2018 and 29/5/2019. I hasten to add that the court became frustrated by conduct of the parties which it termed intended to circumvent its orders by circumlocution. That is revealed in the record of proceedings of 18/12/2019 when it said: -

“the application dated 18/12/2019 is not certified urgent. Nevertheless, as parties to introduce confusion in these proceedings through all manner of circumlocution, I direct that all substantive counsel and parties to appear in court on 18.02.2020 to evaluate the state of things in the matter”

12. It is apparent that the parties here did appear to judge Gikonyo, as they appear to me now, to be obstructive to the conclusion of this matter. That must be discouraged and parties reminded as the judge did on the 18/02/2020, when the record reveal that Mr Ndichu conceded to the judge that litigation ought to come to an end. I see the current application as part of the scheme to further delay the implementation of the certificate of confirmation of grant. I see through that scheme and say it must now stop. I find no merit on the request to set aside and decline the same.

13. On stay pending appeal, Order 42 Rule 6 of the Civil Procedure Rules, 2010, sets the thresholds and empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The prerequisite conditions to be met before stay is granted are provided by the Rule 6 (2) to be that; the application be made promptly, the applicant satisfies the court that he stands to suffer substantial loss unless stay is granted and that security for the due performance of the decree as may be binding upon the applicant at the conclusion of the matter is provided. Here I would have ought rightly, and *suo sponte*, declined the application for I consider that there exists no right of appeal, but I note that leave was granted and a notice of appeal filed on the 4/6/2018. But even then, there is no evidence that a record of appeal was ever filed nor served pursuant to Rule 82 of the Court of Appeal Rules. Up to that extent, I doubt if there is indeed a pending appeal taking into account the provisions of Rule 83 of the Court of Appeal Rules, but, that is a question for the Court of Appeal

14. The cornerstone consideration in all applications like the one before me has always been whether substantial loss will be suffered. See Adah Nyabok v Uganda Holding Properties Limited (2012) eKLR. It is not enough to merely put forward sheer assertions of substantial loss, but there must be empirical or documentary evidence in support thereof.

15. Here the intended appeal is premised on the allegation that the applicant was neither served with court process nor afforded an opportunity to protest the confirmation of grant. I have looked at the record and noted that the summons for confirmation of grant was

properly served on the applicant's advocate and an affidavit of service duly filed on 21/11/2016. The court on 23/11/2016 rendered itself thus: -

“the petitioner was served but chose not to attend court for reasons known to him. I note the conduct of parties herein which has been subject of observation of the court on 15/8/16. Accordingly, I allow the application dated 20/6/16 so that administration of the estate could be completed as per law.”

16. I find that the question of service was determined by Gikonyo j, without any challenge by way of appeal or review and is not available to be opened by the current application and is not an arguable point to be taken on appeal.

17. The competing interests herein are the applicant's undoubted right to appeal against the said orders and the respondent's right to enjoy the fruits of the judgment obtained after 9 exhausting years of litigation.

18. The contention by the applicant that he was condemned unheard is manifestly unfounded and misleading. The record reveals that the applicant was granted leave to appeal on 6/6/2018, and he has confirmed in his supporting affidavit that, the record of appeal has never been filed to date. There is evidently no arguable point to be escalated to the court of appeal.

19. The issue of joint ownership of Plot 3B MAKUTANO was extensively dealt with by the court. In its reserved ruling of 18/4/2016, the court stated at page 10 as follows:

“The law is now cast. I will apply it on the facts of this case. Did the petitioner conceal Plot 3B Makutano from these proceedings? From the record, it would appear that the said plot was owned by the deceased and one Makathimo M'Itwerandu. The plot was later transferred to Resilient Investment Limited as evidenced by minutes of the Town Planning, Works and Housing Committee held on 30th October 2012 and annexed in the petitioner's replying affidavit and marked “GM5” where it was stated as follows in the last paragraph:-MIN.TPWH/3163/2012:APPLICATIONS APPERTAINING TO ESTABLISH MARKET CENTRES

Application 1036 by M'Itumbiri M'Munyua and Makathimo M'Itwerandu to transfer the ownership of plot No. Kinoru 3B to Resilient Investment Limited be approved.

But there has been no record produced to show that the ownership of the said plot was joint-ownership. It could be ownership in common. I should also state that there is nothing to show the entire plot passed to the said Makathimo M'Itwerandu upon the death of the deceased as by law required of joint ownership. In fact, the transfer of the plot that was done through the minutes shows that the application was- by M'Itumbiri M'Munyua and Makathimo M'Itwerandu to transfer the ownership of plot No.Kinoru 3B to Resilient Investment Limited.

M'Itumbiri M'Munyua is the deceased. From the record, he died on 18th February 2001 and the above transfer or proceedings to transfer the plot was done on 30th October 2012. That is problematic. All these issues create a very dark cloud upon the entire transaction and dealing in the said plot which would require extrinsic evidence to unravel. At this stage, therefore, it would be premature to categorize plot 3B as a joint ownership. For now, that part which was owned by the deceased will be treated as part of the estate property until this cause is determined.”

20. The applicant in his replying affidavit filed on 7/5/2015 listed **NTIMA/IGOKI/2531, KIIRUA/RUIRI/3198** and **Plot 3B Makutano** as assets of the deceased. Both the applicant and the respondent concur that NTIMA/IGOKI/1896 was bequeathed to the applicant by the deceased. The applicant's irritable audacity to then claim that NTIMA/IGOKI/1896 was amalgamated with NTIMA/IGOKI/2531 is vividly misconceived and designed to mislead.

21. On the need to be prompt in bringing the application, I note that the application was filed on 18/12/2019 yet the impugned orders were issued on 19/7/2018 and 29/5/2019. That length of delay, in my view cannot be said to be reasonable, considering that no justifiable explanation has been offered for the same.

22. The inevitable conclusion is that the applicant has failed to satisfactorily demonstrate that he will suffer substantially if the orders of stay pending appeal are not granted.

23. For the foregoing reasons, I find that the application lacks merit and it is hereby dismissed with costs.

DATED SIGNED AND DELIVERED AT MERU THIS 2ND AUGUST 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Ndichu for the applicant/Petitioner

No appearance for Maitai Rimita for the interested parties.

Miss Otieno for respondent

PATRICK J.O OTIENO

JUDGE