



IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO 279 OF 2013

(CORAM: CHERERE-J)

IN THE MATTER OF THE ESTATE OF THE MUKINDIA MWIREBUA(DECEASED)

BETWEEN

JOHN NTEERE MWARANIA.....PETITIONER/1ST RESPONDENT

AND

SUSAN MARETE.....OBJECTOR/2ND RESPONDENT

TABITHA KATHURE MUKINDIA.....3RD RESPONDENT

AND

IN THE MATTER OF AN APPLICATION BY KARURU MUKINDIA.....APPLICANT

RULING

1. Deceased's estate was distributed by way of a ruling dated 24th September 2020. More particularly, **KARURU MUKINDIA (the Applicant)** was dissatisfied with the distribution of one of the assets being **Ntima/Ntakira/ 483** which was distributed as follows:

Francis Kamathi 1 acre

John Nteere 1 acre

Simon Murithi 1 acre

Isabella Gacheri – 0.32 acres

Karuru Mukindia 0.50 acres

Purity Makandi 1 acre

Tabitha Kathure Mukindia 0.50 acre

2. Applicant's chamber summons dated 22nd October, 2020 seeking a review of the distribution of the aforementioned assets was considered and disallowed by an order dated 22nd April, 2021.

3. Aggrieved by the order of dismissal, Applicant has again moved the court by way of a chamber summons dated and filed on 02nd June, 2021 seeking the orders THAT:

1. The Applicant be granted leave to appeal the ruling and order of this Honourable Court dated 22nd April, 2021 dismissing the Applicant's application dated 22nd October, 2020.

2. This Honourable Court do issue an order of stay of execution and/or implementation of the resultant Certificate of Confirmation of Grant pending the hearing and determination of the intended appeal

3. Costs be in the cause

4. The summons is based on the ground among that:

1. Applicant intends to appeal this court's ruling dated 22nd April, 2021

2. Appeal against the impugned order only lies with leave of this court

3. The impugned distribution discriminates against her

4. The asset in question may change hands

5. The motion is supported by an affidavit sworn by Applicant's on 02nd June, 2021 in which they reiterate the grounds on the face of the application. Applicant in addition avers that she's deceased's widow entitled to a distinct or at least an equal share with the other beneficiaries. Annexed to the affidavit is among other annexures a draft notice of appeal.

6. The 3rd Respondent opposed the summons by her replying affidavit sworn on 21st June, 2021 March, 2021 and accuses the Applicant of intending to disinherit her.

Analysis and Determination

7. I have considered the summons in the light of the affidavit on record and annexures thereto and submissions for the Applicant and I have deduced the issues for determination as follows:

1. Whether leave to appeal ought to be granted

2. Whether the Applicant has met the threshold for grant of the order of stay of execution

1. Whether leave to appeal ought to be granted

8. I have considered the holding by the Court of Appeal in **Rhoda Wairimu Karanja & Another V Mary Wangui Karanja & Another [2014] eKLR** where it upheld the decision of the High Court that the right to appeal to the Court of Appeal, in succession matters, lies with leave. The same court in the case of **Mugah v Kunga (1988) KLR** stated that the practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort.

9. Article 50 (1) of the Constitution underscores the right to be heard and provides that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

10. As this is a succession matter involving land, I am persuaded that the interest of justice would be better served if the Applicant is granted leave to appeal and the same is hence granted.

2. Whether the Applicant has met the threshold for grant of the order of stay of execution

11. An applicant who seeks an order of stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), namely:

(a) that substantial loss may result to the applicant unless the order is made,

(b) that the application has been made without unreasonable delay, and

(c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR and Beatrice Ndunguri Mwai & Another V Sicily Wawira Titus & Another [2020] eKLR)

12. In **Butt vs. Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal stated that discretion whether or not to grant an order of stay pending appeal ought to be exercised in a manner that would not prevent the appeal, if successful from being nugatory.

13. In the instant case, the Applicant's complaint is that 0.5 acres of **Ntima/Ntakira/ 483** initially distributed to her was subsequently distributed to her daughter, the 3rd Respondent.

14. It is worthy to note that the 0.5 acres is the only portion that was distributed to the 3rd Respondent and any finding to the contrary will no doubt disinherit her.

15. It is trite that substantial loss in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution. The Applicant has not demonstrated that the distribution of deceased's estate as ordered by the court will occasion her any loss, substantial or otherwise in the event that the orders sought are not granted.

16. To the contrary, the orders sought will as asserted by the 3rd Respondent and which I agree with, prejudice the 3rd Respondent by denying her the benefit of her father's estate.

17. From the foregoing analysis therefore, the summons dated and filed on 02nd June, 2021 is found to have no merit.

18. Nevertheless, in order to preserve the subject matter, it is hereby ordered that 3rd Respondent shall take possession of the asset distributed to her but shall neither offer for sale, sell, dispose off, transfer, charge or deal with it in any adverse manner until the intended appeal is heard and determined.

19. In the event that no appeal is filed within 30 days from today's date, the orders at paragraph 18 above shall unless extended automatically lapse.

20. Costs shall abide the outcome of the appeal.

DATED AT MERU THIS 30TH DAY OF SEPTEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicant – Ms. Masamba for M/s. Mithiga & Kariuki Advocates

For Respondents- N/A