



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC.SUCCESSION CAUSE NO.2 OF 2017

IN THE MATTER OF THE ESTATE OF MARY WANGUI KANOTHA (DECEASED)

A N D –

ZAWERIA WANJIRU KANOTHA.....PETITIONER/APPLICANT

- V E R S U S -

JOSEPH GITONGA KANOTHA.....OBJECTOR/RESPONDENT

R U L I N G

Before me is the application dated 24/7/2019 in which the appellant Zaweria Wanjiru Kanotha, the petitioner/applicant seeks the following orders against the objector/respondent:

1.

2. ..spent

3. *That the court be pleased to stay execution of the decree and judgment of this court, delivered on 11/7/2019 together with all consequential orders pending the hearing and determination of the applicant's appeal;*

4. *Costs of the application be in the cause.*

The application is brought under Order 42 Rule 6 and order 51 Rule.1 of the Civil Procedure Rules. The application is premised on grounds found on the face of the application and the affidavit of the applicant sworn on 24/7/2019. The applicant is aggrieved by this court's decision ordering that the beneficiaries of the deceased share the deceased's estate equally. The applicant has lodged an appeal. The applicant contends that some of the beneficiaries had long sold their portions of land and have no land. The petitioner is apprehensive that unless the decree is stayed, the said beneficiaries are likely to cause chaos and anarchy in a bid to enforce the decree; that if stay is not granted then the appeal will be rendered nugatory; that the applicant has an arguable appeal which has good chances of success and is willing to abide by any conditions that the court may grant; that it is in the interest of justice that the application should be granted.

In opposing the application, Mr. Chege, the respondent's counsel relied on the Replying Affidavit sworn by the respondent on 6/9/2019. The gist of the objection is that the application is an abuse of the court process in that it is brought under the wrong provisions of the law, that is Order 42 R.6 and 51 Rule Civil Procedure Rules and Sections 1A, 3 & 3A of Civil Procedure Act; that no provisions of the Law of Succession Act were cited; that Rule.63 of the Probate and Administration Rules sets out what provisions of the Civil Procedure Act and Rules are applicable to succession matters and the provisions of law that have been cited are not included Mr. Chege argued that the Law of Succession Act is a self-contained statute and one cannot rely on any other Act.

Counsel also argued that the requirements for grant of an order of stay were not met; that the applicant has not demonstrated that if stay is not granted, she will suffer substantial loss; that the applicant should have been brought without delay but this application was filed 2 weeks after the ruling was read and lastly, the applicant has not provided any security and how the intended court order will be rendered nugatory; that the court in its decision found that all the deceased's beneficiaries were entitled to equal shares of the estate and if the applicant fears the disruption of purchases who are on the land, his view is that their status on the land is illegal as the land was sold before grant was issued. Counsel urged the court to distribute the estate physically on the ground in terms of the judgment so that all the beneficiaries can benefit but that no titles should be issued till the appeal is heard and determined; that it is unfair to lock out all the beneficiaries generally as the determination of the appeal is awaited; that so far, the appeal has not been filed though the 60 days allowed by the Rules have lapsed and granting a blank order of stay is prejudicial to the other beneficiaries of the estate.

I have given due consideration to the application. I do agree with Mr. Chege's submissions that the Law of Succession Act is a self-contained Statute and any application should be brought within the provisions of that Act. Rules 63 of the Probate and Administration specifically sets out the provisions of the Civil Procedure Act and Rules that may be invoked in Succession matters. Clearly, order 42 Rule 6 and Order 50 Rule 1, Civil Procedure Rules and Section 1A 2 & 3A Civil Procedure Act are not some of the provisions that can be invoked under R.63 of the Probate and Administration Rules.

The jurisdiction of this court to entertain any application is provided under Section 47 of the Laws of Succession Act. It provides that the High Court will have jurisdiction to entertain any application and determine any dispute under the Act. Under Rule 73 of the Probate and Administration Rules, the court is clothed with jurisdiction to ensure that the ends of justice are met. These are the provisions that the appellants should have invoked. However though the provisions were not invoked, the principles for grant of stay are similar to those contained in Order 42 Civil Procedure Rules. If the court were to decline the application because the court's jurisdiction was not properly invoked, the court would merely strike out the application on a technicality and the applicant may bring a similar application. It means that there would be a delay in this court considering the application. By dint of Article 159 of the Constitution which enjoins this court to administer justice without undue technicalities, this court will exercise its discretion and consider the merits of the application.

The court rendered its judgment that is the subject of challenge on 11/7/2019. This application was filed on 24/7/2019 about 13 days later. In my considered view, the application was filed without unreasonable delay.

The court's judgment is that the deceased's beneficiaries should share the deceased's estate equally. If an order of stay is granted, it means that the applicant will continue to be in exclusive possession and in use of the land to the exclusion of the others.

It is unknown when the appeal will be determined, if at all one will be filed, the said order would be prejudicial to the other beneficiaries.

So far, no security has been offered by the applicant. If the appeal is unsuccessful, then the other beneficiaries stand to lose. For the above reasons, I am persuaded to agree with Mr. Chege's suggestion that the subdivision of the suit land do proceed as ordered by the court so that each beneficiary takes possession of their portion for use save that the issuance of titles will be stayed till the appeal is heard and determined.

The applicant had filed a notice of appeal on 17/7/2019. So far, no appeal has been filed. 60 days have lapsed. By filing the notice of appeal, it demonstrates the applicant's keenness to challenge the decision. The court will therefore grant the following orders:

- (1) That there will be no stay of the subdivision of the estate;*
- (2) That the issuance of titles will be stayed pending the filing and hearing of the appeal;*
- (3) In the meantime, each beneficiary to continue using their portion pending hearing and determination of the appeal;*
- (4) That the appeal be filed and served within 30 days thereof, in default the order of stay will lapse automatically.*

Dated, Signed and Delivered at NYAHURURU this 27th day of February, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ndegwa for respondent – present

Otieno for applicant – absent

Eric – Court Assistant