



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 43 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE MACHARIA NGARI...(DECEASED)

JUDY WAMUYU MACHARIA.....APPELLANT

V E R S U S

ROSE WANJIKU MURAGE.....1ST RESPONDENT

SIMON MAINA KARANI.....2ND RESPONDENT

JOSEPH MBEU MUNENE.....3RD RESPONDENT

CHARLES WACHIRA KABUITU.....4TH RESPONDENT

PETERSON MUREITHI GACHAGUA.....5TH RESPONDENT

JOHN MUTHII KAMINA.....6TH RESPONDENT

FULL GOSPEL CHURCHES OF KENYA.....7TH RESPONDENT

THOMAS NJOROGE WACHIRA.....8TH RESPONDENT

RULING

1. The application pending before me is the one dated 28/5/2019 where the appellant Judy Wamuyu Macharia is seeking an order that there be stay of further proceedings in this case as well as the stay of the orders issued on 3/7/2018 pending the application and the appeal filed herein. It also seeks orders that the status quo regarding the suit land, parcel No. Mwerua/Gitaku/100 be maintained pending the hearing of this application and the appeal.

2. The application is based on the grounds that Judgment in Kerugoya C.M.C Succ Cause No. 445/2016 was delivered on 3/7/2018 and awarded the estate to purchasers and the appellant though some of the beneficiaries of the deceased had not sold land and were left without an inheritance. The appellant was dissatisfied with the judgment and filed a Memorandum of Appeal. She fears that the respondents will execute the Judgment before the appeal is heard and determined. The appeal maybe rendered nugatory if proceedings continue in the lower court as the estate could be distributed when the appeal is still pending. That it is in the interests of justice that proceedings in the lower court be stayed. The respondents are not

likely to suffer any prejudice. The applicant is ready to provide security as maybe ordered by the court.

3. The application is supported by the affidavit of the applicant where she has reiterated the above grounds.

4. The respondents opposed the application. The 2nd respondent Simon Maina Karani filed an affidavit sworn on 19/6/19 and deposes that the application is incompetent and bad in law. That he has at all material times been in possession of his share of the estate and has extensively developed it and the only change would be him get a title deed. That the appellant is not likely to suffer any loss and the appeal will not be rendered nugatory. He prays that the appeal be dismissed as it is frivolous and vexatious.

5. The 3rd respondent Joseph Mbeu Munene has sworn a replying affidavit filed in court on 19/6/19. He deposes that the appeal is incompetent and bad in law as it has been brought under wrong provisions of the law. That the applicant participated in the purchase of the land and promised to issue them with title deeds. She is not likely to suffer irreparable loss. These among other averments.

6. The applicant swore a further affidavit and stated that the application is brought under Order 42 Rule 6 Civil Procedure Rules and other provisions were cited through an oversight.

7. Grounds of opposition were filed by Wangechi Munene Advocate on behalf of the 1st respondent. Her contention is that the application is frivolous, vexatious and an abuse of court process, misconceived and bad in law. The 1st respondent also filed a replying affidavit sworn on unknown date as it is undated. The affidavit relates to issues to do with the appeal and not the application.

8. The application was disposed off by way of written submissions. I have considered the application. The issue which arises for determination is stay of proceedings and execution.

Stay of Execution:

The applicant in her further affidavit clarified that she has filed the application under **Order 42 Rule 6 Civil Procedure Rules** which is the provision dealing with stay of execution. **Order 42 Rule 6(1)(2)(a) & (b)** provides:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.”

A party seeking stay of proceedings must prove that –

a) Substantial loss may occur if stay is not ordered,

b) Security as may be ordered by the court.

c) The application has been made without unreasonable delay.

9. Substantial loss is the main consideration. The **Court of Appeal** in **James Wangalwa & Another –v- Agnes Naliaka Cheseto (2012) eKLR** emphasized the centrality of substantial loss and stated that:-

“the issue of substantial loss is the cornerstone of both jurisdictions. The substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. The applicant has submitted that she is likely to be evicted from the suit land should the grant be registered. The respondent while deponing That they are purchasers have stated that they want to obtain title deeds. This is a succession matter and the applicant has raised two substantial issues –

a) That the judgment of the trial Magistrate allocated land to persons who were not beneficiaries,

b) The validity of the sale agreements. If stay is not ordered, the respondents are likely to obtain title and once they get title deeds they can deal with the land as they wish including passing the title to 3rd parties.

11. The applicant has deponed this at Para -7- of her supporting affidavit. In case this happens the applicant is likely to suffer substantial loss and the appeal maybe rendered nugatory. The court exercises discretion to order stay of execution to ensure that the status quo is preserved pending the hearing and determination of the appeal. I find that the applicant has proved that she is likely to suffer substantial loss and there is an issue of validity of the agreements which this court has to determine before the judgment can be executed. The appeal has also raised substantial issues under the Law of Succession Act. The appeal cannot be said to be vexatious and an abuse of court process. The Law of Succession Act provides for appeal as of right by an aggrieved party from the decisions of the Magistrate courts. **Section 50(1)** provides:-

“An appeal shall lie to the High court in respect of any order or decree made by Resident Magistrate in respect of any estate and the decision of the High court thereon shall be final.”

12. This is the only opportunity available to the appellant to appeal as of right. In view of the issues I have pointed out and considering that the appellant has proved that she is likely to suffer substantial loss, I will exercise discretion in her favour.

13. The respondents are not likely to suffer any prejudice, it is in the interest of justice that the appeal be heard and determined before the Judgment is executed.

14. The applicant has offered to provide security. It is sufficient for her to depon that she is ready to provide security as it is the court which determines the kind of security.

15. On the issue of delay, the Judgment of the Lower Court was delivered on 3/7/2018. The applicant filed an application before the trial court on 27/7/2018 but the application was declined on 13/5/2019. This application was filed on 29/5/2019. I find that the appellant was vigilant and moved with speed to seek orders of stay. I find that the delay was not inordinate.

16. On the issue that the application was brought under wrong provisions, I find that it was a procedural technicality which does not bar this court from determining the issue in dispute. The law is now a buzz with provisions expressing the need for court to determine disputes without undue regard to procedural technicalities. These are from the **Constitution Article 159(2)(b)** overriding objectives under **Section 1A & 1B of the Civil Procedure Act** also known as oxygen in the legal fraternity as they breath life in situations which would have otherwise seen death owing to procedural technicalities. There are also wealth of authorities from this court and the Court of Appeal which lean on doing substantive justice other than giving undue regard to procedural technicalities.

17. For the reasons stated, I find that the application meets the threshold for the grant of the orders sought. The application has merits.

18. I order that:-

1) There be stay of execution of the Judgment by the trial Magistrate dated 3/7/2018 pending the hearing and determination of this appeal.

2) There be stay of further proceedings in Kerugoya C.M Succ Cause No. 445/2016 pending the hearing and determination of this appeal.

3) The parties to maintain status quo regarding Land Parcel No. Mwerua/Gitaku/100 pending the hearing and determination of this appeal.

4) Costs to the applicant.

Dated at Kerugoya this 27th Day of February 2020.

L. W. GITARI

JUDGE