



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. SUCCESSION NO. 78'B' OF 2013

IN THE MATTER OF THE ESTATE OF GACHOKI RUOYA.....DCD

SUSAN MABUTI MITAMBO.....APPLICANT

V E R S U S

BERNARD KABATA MURAGE.....1ST RESPONDENT

JAMES CHIGITI MURAGE.....2ND RESPONDENT

KINGANGI MURAGE.....3RD RESPONDENT

MURAGE IRANDU.....4TH RESPONDENT

RULING

1. This is the ruling in Notice of Motion dated 3/1/2019 seeking orders of stay of execution of the Judgment of this court dated 5/12/2018.

The applicant also seeks an order that they be granted leave to appeal the judgment and the notice of appeal dated 10/12/2018 be deemed as properly filed. They also seek and order that pending the hearing and determination of this application, a temporary order of stay of execution of the judgment herein be issued to restrain the petitioner from evicting the respondents from the suit premises namely Kabare/Ngiroche/107.

2. The application is based on the grounds that the Plaintiff (sic) has filed Notice of Appeal. The respondents have annexed a draft Memorandum of Appeal demonstrating that he has an arguable appeal with good chances of success. That execution of the Judgment will cause the appellant irreparable loss and the appeal be rendered nugatory.

3. The application is supported by the affidavit of Bernard Kabata Murage sworn on 3/1/2019.

4. The respondent Susan Mabuti Mutamboro opposed the application and filed a Replying Affidavit. She avers that the applicants have denied her the right to use the land for a long time and should not be allowed to continue any further. That the land was registered and ceased to be ancestral land and the applicants have no claim under the customary law. That the appeal has slim chances of success if any. That she has the right to deal with her deceased father's estate as provided under **Section 25 of Registration of Land Act (sic)**.

5. The respondent had also filed grounds of opposition dated 31/1/2019 and contends that the application is frivolous and vexatious and an abuse of court process, is misconceived, has no merits. That it is intended to keep the sole beneficiary of the estate from utilizing her father's estate.

6. The parties agreed to dispose of the application by way of written submissions.

7. For the applicants it is submitted that **Section 48 (sic) of the Constitution** states that the State shall ensure access to justice for all persons and therefore the court should not impend the applicants quest for justice. They have relied on the case of **Megary J in Erinfeld, Properties Limited –v- Chesire CC (1974) 211 Er 488 @ Page 454**.

8. That the respondents have filed an appeal Civil Appeal No. 24/2019. They have enumerated the issues which they wish the Court of Appeal to determine.

9. They have also stated that **Order 42 rule 6 of the Civil Procedure** requires that a party demonstrates –

- **Substantial loss may result.**
- **The application has been made without unreasonable delay.**
- **Security has been given.**

They urge the court to allow the application so as to preserve the suit property and that the appeal is not rendered nugatory.

10. For the petitioner respondent it is submitted that there was in-ordinate delay in filing the application. The applicants have not demonstrated that they are likely to suffer substantial loss. It is also submitted that the appeal is frivolous and whimsical in substance and is not arguable and will not be rendered nugatory if stay sought is not granted.

11. I have considered the application and the submissions. The Judgment which the respondents wish to appeal was issued in regard to an application for Revocation Grant. That grant was confirmed on 14/6/1999 in the Senior Resident Magistrate's Court at Kerugoya. **Section 50(1) of the Law of Succession Act.** Provides-

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

12. Simply stated, no appeal lies to the Court Appeal on a Judgment of the High Court arising from the Resident Magistrate's Court.

13. There is no right of Appeal to the Court of Appeal and I believe that is the reason why respondents are seeking leave to appeal. The Court of Appeal has made it clear that it has jurisdiction to hear and determine appeals from the High Court in succession matters. The Court of Appeal in the case of **Francis Gachoki Murage –v- Juliana Waindi Kinyua & Another C.A No. 139/2009** stated as follows:-

“We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal an aggrieved party wishing to appeal is enjoined to seek leave.

Granting leave is within the discretion of a Judge. That the order is capable of execution as a decree of the court thus following the dicta in the case of Mukangu –v- Kibwana (1996 – 1998) 1 E. A 168 the appellant can be said to have an automatic right of appeal. ---- Article 164(1) of the Constitution the Court of Appeal has jurisdiction to hear appeals from the High Court.”

14. The court has discretion to grant leave to appeal to the Court of Appeal.

15. The respondents have annexed what they call intended Memorandum of Appeal and they State that there was no evidence to support the allegation of fraud, that the court did not apply **Section 33 of the Laws of Succession Act.**

16. Mr. Kariithi for the petitioner submits that the father of the respondents had lied on oath to obtain the grant. He further submits that there is no dispute that the petitioner is the sole rightful beneficiary of the estate of the deceased. The Memorandum has not raised weighty legal issues in view of the apparent evidence that the grant was obtained fraudulently by the making of false statement on oath. I also note that **Section 33 of the Act** which the appellant is seeking to rely on does not apply to these proceedings. However, having considered that the Court of Appeal has jurisdiction to hear appeals from this court, I should exercise discretion and grant the applicant leave to appeal.

Stay of Execution:

As rightly stated, **Order 42 rule -6- Civil Procedure Rules** provides for the conditions that a party has to satisfy the court in order for the court to order stay of execution.

A party must prove that he is likely to suffer substantial loss, the application was filed without unreasonable delay and security as the court may order.

17. In this case the consideration is whether the judgment if the court is executable. The Court of Appeal in the case of **Attorney General – v- James Hoseah Gitau Mwara (2014) eKLR** the Court of Appeal remarked that, ***“in order for a court to exercise its discretion to grant stay, it must itself ask the question whether there is anything capable of being stayed in the ruling.”***

18. The question to pose, is what execution is likely to be carried out and that needs to be stayed. Mr. Kariithi for the petitioner the applicants have not demonstrated any evidence of the intention to sell the suit property on the part of the respondent and are merely relying on unwarranted suspicions.

19. Counsel for the applicants, Ms. Otieno that the suit property is ancestral land and that they will suffer substantial and emotional loss if they have to move out of the property. There is no prove that they will suffer substantial loss and there is no threat of the land being disposed off. Furthermore, the petitioner has submitted that after the land was registered in the name of the deceased it ceased to be ancestral land, the deceased became the absolute proprietor of the land. Their claim that the land was ancestral land is without basis.

20. I have considered the application for stay I find that there is nothing capable of being stayed. Having ordered the grant to be revoked a stay of execution is not available. The Judgment of this court is that the applicants were not beneficiaries entitled to the estate. There was no order in the Judgment that is capable of being executed. I therefore decline to order stay of execution.

21. Lastly, I should consider whether there was inordinate delay in filing the application. The judgment was delivered on 5/12/2018 and this application was filed on 4/1/2019 and is dated 3/1/2019. The counsel for the petitioner has submitted that what is unreasonable delay is a question of fact and has cited the case of **Jaber Mohsen Ali & Another –v- Priscillah Boit & Another E &L 200/2012 (2014) eKLR** where the court held that a delay of 14 days was inordinate as the applicant had been given 14 days' notice to vacate.

22. Of course delay is a question of fact which will be determined depending on the circumstances of the case. The delay by the respondents has not been explained. The delay of nearly one month was no doubt inordinate.

In Conclusion

- 1) I order that the applicant are granted leave to file the appeal in the Court of Appeal.
- 2) The appeal be filed within 30 days.
- 3) I decline to grant the order for stay of execution.
- 4) Each party to bear its own costs.

Dated at Kerugoya this 25th day of February 2020.

L. W. GITARI

JUDGE