



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 15 OF 2018

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO.202 OF 1996)

IN THE MATTER OF THE ESTATE OF THE LATE ISHMAEL MUCHIRI NKINYANGI (DECEASED)

AND

FRANCIS NJERU MUCHIRI.....ADMINISTRATOR

VERSUS

MERCY KAMBURA MUCHIRI.....RESPONDENT

R U L I N G

1. Before me are two applications one made by **FRANCIS NJERU MUCHIRI** dated 17th November 2019 and the other dated 4th December 2019 made by **MERCY KAMBURA MUCHIRI**. This court entertained the two applications simultaneously because a finding in any of the application would affect the other application. This court will begin with the former application.

2. In the application dated 27th November 2019, Francis Njeru Muchiri is seeking the following reliefs namely;

i) Spent

ii) That pending the hearing of the instant application inter-partes this honourable court be pleased to issue stay orders, staying the execution of this honourable court orders issued on 13th November 2019 and all consequential orders thereto and particularly on execution of the confirmed grant issued in respect of the deceased's estate L.R. Mwimbi/Murugi/253 and/or its resultant subdivision thereof.

iii) That pending the hearing and determination of the instant application, this honourable court be pleased to issue stay orders, staying execution of this honourable court orders issued on 13th November 2019 and all consequential orders thereto and particularly on execution of the confirmed grant issued in respect of the deceased's estate L.R No. Mwimbi/Murugi/253 and/or its resultant subdivision (if any).

iv) That this honourable court be pleased to grant leave for the applicant to appeal against the ruling delivered on 13th November 2019 and all consequential orders issued prior thereto.

v) That pending the filing of the intended appeal to Court of Appeal by the applicant, this Honourable court be pleased to issue inhibition orders inhibiting all dealings on the deceased estate L.R. Mwimbi/Murugi/253 and/or any of its subdivisions thereof (if any).

vi) Costs.

3. The grounds upon which the applicant has sought for the above reliefs are listed as follows namely:

a) That the applicant is greatly aggrieved by the ruling of this court delivered on 13th November 2019 and is seeking the opinion of the appellate court.

b) There is no automatic right of appeal from the decisions of the High Court to the Court of Appeal on probate matters and hence leave is necessary before the appeal is filed.

c) That the Applicant has an arguable appeal and it is in the interest of justice that the Applicant be granted leave by this honourable court to appeal against the decision of 13th November 2019 and all consequential orders.

d) That the Respondent stands to suffer no loss and/or damage if the orders sought are granted.

e) That the Applicant undertakes to expeditiously prosecute the intended appeal and not to prejudice the Respondent.

f) That unless the orders sought are granted the Applicant stands to suffer irreparable loss and damage.

4. The Applicant has supported his prayers with a Supporting Affidavit sworn on 27th November 2019. The Applicant in that affidavit has reiterated the above grounds adding that the effect of the ruling of this court made on 13th November 2019 is that he is in danger of losing his only home and developments erected on the deceased's estate L.R Mwimbi/Murugi/253.

5. The Applicant contends that this court did not deal with his prayer (4) of his application dated 15th April 2019 when delivering its ruling on 13th November 2019.

6. The Applicant avers that the District Surveyor "***simply rubber stamped***" what the private surveyor had done on the ground allegedly in collusion with the Respondent. He alleges that the District Surveyor was not independent but influenced not to factor in occupation of each beneficiary and their respective developments.

7. The Applicant contends that his chances of appeal are high and should therefore be granted leave.

8. He opines that conservatory orders sought would preserve the substratum of the intended appeal and that unless stay is granted his appeal will be rendered nugatory.

9. The Respondent, Mercy Kambura, has opposed this application vide a Replying Affidavit sworn on 15th January 2020. She contends that the Applicant is bent at delaying the implementation of the confirmed grant and that she has suffered prejudice enough as she is unable to access her share of the estate granted to her contending that the cause has been pending for 24 years and any further delay is unfair to her. She avers that the Applicant has not demonstrated the nature of the appeal to enable this court determine if it merits a grant of stay. She argues that the decision made on issues raised by the Applicant was resolved by surveyors report.

10. On the latter application dated 4th December 2019 Mercy Kambura seeks the lifting of inhibition registered against dealings in L.R Mwimbi/Murugi/235 on the grounds that the grant having been confirmed and all beneficiaries knowing their respective shares, the inhibition has been overtaken by events. She has also accused the Respondent (Francis Njeru Muchiri) for curtailing the surveyor's work and refusing to sign transmission documents.

The Respondent in his Replying Affidavit sworn on 16th January 2020 has opposed the application on grounds that the application dated 4th December 2019 seeks to circumvent his prayers sought in the above former application dated 27th November 2019 and asks this court to allow his application and dismiss the application dated 4th December 2019 in order to preserve the substratum of his intended appeal.

11. This court has considered the two applications which as I stated are such a decision on the application dated 27th November 2019 directly affects the application dated 4th December 2019.

12. The main issue is whether this court should lift the inhibition registered on 2nd May 2019 to facilitate implementation of the confirmed grant or order a stay in regard to court's decision of 13th November 2019 and grant leave to Applicant to file an appeal.

13. The Applicant in the application dated 27th November 2019 had in his application dated 15th April 2019 sought among others prayers suspension of registration of survey work conducted by a private surveyor done on 10th April 2019 in respect of L.R. Mwimbi/Murugi/253 and nullification of the surveyor work done and inhibition orders against dealings on parcel Mwimbi/Murugi/253.

14. This court entertained the said application and vide its ruling dated and delivered on 24th October 2019, this court determined that the District Survey goes to the ground under security and confirms if the work done conformed with the certificate of confirmation.

The District Surveyor pursuant to the court order visited the property Mwimbi/Murugi/253 and counter checked the measurements on the ground viza viza the certificate of confirmation and the respective developments and settlements of different beneficiaries on the ground. The District Surveyor through its report dated 1st November 2019 made a comprehensive report which indicated that the survey work done by Wainaina, a licenced survey was done professional and factored in all permanent structures on the ground and access to each share.

15. It is also instructive to note that prior to the hearing of the application dated 15th April 2019, this court had summoned the District Surveyor who came to court and told this court what her office had done in respect to registration of the mutation and subdivision of the estate as per the certificate of confirmation dated 25th September 2018 which certificate is uncontested in so far as each beneficiary's share is concern. The court's order for the District surveyor to go back to ground was as a result of the Applicant's insistence that the developments

were not factored in during subdivision. However the District Surveyor's report dated 1st November 2019 is comprehensive enough and it shows how each beneficiary has done on the ground and how they were factored in. It was on that basis that this court on 13th November 2019 determined the District Surveyor's findings had put to rest any issue raised in the application dated 15th April 2019.

16. The Applicant has now vide his application dated 27th November 2017 claimed that ruling made on 13th November 2019 has the effect of displacing him from his home. However a look at the mutation form indicates that his share in parcel No.5757 has a permanent house in place in his 1.21 Ha or approximately 2.989 acres, which is consistent with the 3 acres given to him in the certificate of confirmation. He says that the District surveyor's report is not independent and/or influenced but he really has not demonstrated precisely what is erroneous in the report, or in what way is he in "***danger of loosing my only home and development erected on the deceased's estate.***"

Certainly he is not losing his "***only home***" as he claims. The surveyor came to court and he had the opportunity to question her why his house had not been factored if that was the case. He did not question her or challenge her in her report. The only conclusion one can make from the sentiments expressed by the Applicant is that of crying wolf even when there is no necessity.

17. The question therefore posed is whether in the light of the above, the Applicant is deserving the orders of stay sought. In the case of **KUNGU MUTHUA -VS- JAMES ICHARIA RUNGU [2015] eKLR**, Muigai J had this to say.

“Moreover, Rule 5(2)(b) of the Court of Appeal Rules envisages that an Applicant who seeks to secure a stay of execution should demonstrate an arguable case and show that the intended appeal would be rendered nugatory if the stay is not granted. It is not the place of this Court to speculate on whether such a case has been or has not been made out by the Applicant, but the evidence on record does not support the Applicant’s case.

Be that as it may, this Court is also guided by sub-rule (2) of Rule 6 of Order 42 of the Civil Procedure Rules; it requires the Court to satisfy itself that the Applicant will likely suffer substantial loss unless the execution is not stayed, and that the application was made without unreasonable delay. This Court’s assessment of the grounds for application of stay of execution has not convinced this Court that it makes a sufficient case for the likelihood of substantial loss if the application does not succeed. The only reason advanced by the Applicant to support his claim is on the face of his application; that the Respondent will register himself as the owner of Githunguri/Nyaga/T.507 and Githunguri/Nyaga/T.510. This claim, even if it not improbable, is not of itself a sufficient basis on which to sustain the argument that the Applicant will suffer substantial loss if the stay is not granted.

Instructive guidance on the considerations that the Court must take into account when balancing the Applicant’s right of appeal vis-à-vis the Respondent’s right to benefit from the decision that is sought to be appealed from can be found in our case law. In the case of BOARD OF GOVERNORS, MOI HIGH SCHOOL KABARAK & ANOTHER V MALCOLM BELL & OTHERS, SC Petitions No. 6 & 7 of 2013, where the Supreme Court of Kenya, referring to the South African Supreme Court of Appeal’s decision in New Clicks South Africa (Pty) v Minister for Health and Another 2005 (3) SA 238 (SCA), articulated the following general principle concerning the grant of an order of stay pending appeal:

The advantages and disadvantages likely to follow upon the granting of the order must be weighed. If overall, and with due regard to divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application.”

18. In this instance, it is quite apparent that the applicant has failed to meet the threshold for grant of stay as well as grant of leave to appeal. It is true that a party who is desirous of appealing and/or who is aggrieved by a decision of the High Court requires leave to appeal. [see Court of Appeal decision in **Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another [2014] eKLR**] when it was stated;

“In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.

We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.

So, what is our decision in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this Court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this Court.”

19. The purpose of leave to appeal is as observed above is to promote finality and weed out parties who are merely intent at buying time against the interest of justice. In this matter, the Respondent Mercy Kambura Muchiri has been patiently waiting for the wheels of justice to roll and she states correctly that it has now taken more than 24 years. In such instances, a court must be satisfied that what is being taken to appellate court really merits consideration due to the weight of the issues raised. In this instance, the appeal is about factual findings of a District Surveyor. The Applicant complained initially that he was not involved in the survey work. I directed the District Surveyor to go to the ground in the presence of all the beneficiaries and the applicant has not stated that he was not involved in the fact finding mission by the District Surveyor on 31st October 2019. The report made by the District Surveyor dated 1st November 2019 as I have observed is comprehensive and puts the rest of issues that had been raised by the Applicant. He has not complained that he got less than what he was granted by this court which is 3 acres. This court finds that the Applicant has not met the threshold to invoke this court's discretion to grant

leave for him to appeal. It is quite apparent that the Applicant wants to buy time and his main problem in my considered view is reconciling with the fact her sister Mercy Kambura Muchiri is entitled to 2 acres of the estate as ordered by this court. He says the Respondent does not reside in the estate but what he has not been candid enough is admitting that he is the cause why the Respondent has not been able to get her share in the estate and /or the fact that he is uncomfortable to her getting a share of the estate.

20. In the premises this court finds no merit in the application dated 27th November 2019. The prayers sought in its entirety are disallowed. With that finding, the application dated 4th December 2019 stands allowed as I do not find any basis to maintain an impediment to the full realization by the Applicant of the fruits of her litigations. The said application is allowed in terms of prayer 2 and because the Applicant has been litigious and vexatious he will pay costs on both applications either to be agreed or taxed.

Dated, signed and delivered at Chuka this 10th day of March 2020.

R. K. LIMO

JUDGE

10/3/2020

Ruling dated, signed and delivered in the open court in presence of Kaumbi holding brief for Murithi for Respondent and in presence of parties.

R. K. LIMO

JUDGE

10/3/2020