



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 26'B' OF 2018

(FORMER HCC.A 10 OF 2018)

MUSYIMI KIEMA.....1ST APPELLANT/APPLICANT

AFRICA CHURCH OF THE HOLY SPIRIT KYANIKA Through

PASTOR DAVID KALEVE.....2ND APPELLANT/APPLICANT

VERSUS

KITHEKA MWIKYA.....RESPONDENT

CAROLINE MAWIA PAUL.....INTERESTED PARTY

RULING

1. By way of Notice of Motion dated 24th April, 2018, the Applicants/Appellants seek orders thus:

i) That the Honourable Court may be pleased to make an order to preserve the Estate and to prevent the Respondent or any third party from disposing of, transferring to third parties or in any way dealing with the land parcel Number **Nzambani/Kyanika/1232** pending the hearing and determination of this Appeal.

ii) That the Court be pleased to issue an order restraining and/or prohibiting the Land Registrar, Kitui County from registering any dealings with regard to all that parcel of land known as **Nzambani/Kyanika/1232** pending the hearing and determination of this Appeal.

iii) That costs of this application be provided for.

2. The application is premised on grounds that: The Appeal challenges the decision of the Lower Court on the mode of distribution of the Estate of the Deceased; Execution of the order of the Lower Court will render the Applicants' Appeal nugatory; the Applicants are likely to suffer loss as the buildings in the land are likely to be demolished and the 1st Applicant is likely to be disinherited of his lawful share in the Estate that he is entitled and the execution will cause hardship and prejudice to the Applicants/Appellants.

3. The 1st Applicant swore an affidavit with authority of the 2nd Applicant in support of the application where he deposed that; these proceedings relate to the distribution of the Estate of **Phyllisilla Mutongoi Mwikya** (Deceased), particularly land parcel No. **Nzambani/Kyanika/1232**, the only asset comprising the Estate of the Deceased; he was excluded from the Estate yet he is a relative while the 2nd Applicant is entitled to a share that the Deceased donated to it, a matter for determination in the Appeal.

4. That the Administrator of the Estate who is now seized of the power is likely to distribute the Estate and transmit titles to third parties; he has engaged surveyors who have been on the ground to effect subdivision on the ground, which calls for issuance of a preservative order of the Estate.

5. The application was duly served upon the firm of **Kimuli and Company Advocates** who made an appearance.

6. An application was made for filing of supplementary affidavit in the presence of both advocates appearing for the parties.

7. It was deposed further by the Applicant that the Respondent and some interested parties have already subdivided the subject land; the trial Magistrate has already made an order directing the Executive Officer of the Court to execute documents to cause subdivision of the property in the event that the Administrator declines to execute the same; an act that will change the subject matter of the Appeal.

8. Directions in the matter were given on the **20th February, 2019** in the presence of both counsels representing parties. The application was to be canvassed by way of written submissions but only **Mr. Kalili** for the Applicants complied.

9. It is submitted that on **5th June, 2018** the Principal Magistrate issued orders directing the Executive Officer to sign all necessary orders to ensure compliance of the Court order on distribution of the Estate. Consequently, the other parties caused the property to be subdivided.

10. In the result, the Applicants seek issuance of an order preserving the Estate to prevent the Respondent or any other third party from disposing off, transferring to third parties or in any way dealing with land parcel Number **Nzambani/Kyanika/1232** pending hearing and determination of the Appeal.

11. That the Appeal will be rendered nugatory if the order sought is not granted as the Court will have nothing to determine.

12. This calls for justice being done in an equitable manner.

13. The application herein is brought pursuant to the provisions of **Order 51 Rule 1** of the **Civil Procedure Rules (CPR)** which is in regard to the procedure to be adopted and **Order 42 Rule 6** of the **CPR** stipulates circumstances in which a stay of execution is granted. Principles of grant of stay of execution are stipulated in **Order 42 Rule 6(2)** of the **CPR** which provides as follows:

“(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.”

14. This Court is minded of the fact of such orders being discretionary, which should be exercised in a way that does not prevent an Appeal. **(See Butt vs. Rent Restriction Tribunal (1982) KLR 417).**

15. Looking at the relief sought in the application it does not suggest any prayer for issuance of stay of execution.

16. The relief sought is injunctive in nature. The Applicants were therefore duty bound to establish conditions for granting such orders. Such conditions were settled in the case of **Giella vs. Cassman Brown & Co. LTD (1983) EA** where the Court stated that such an application must show a *prima facie* case with a probability of success. Secondly, there must be evidence that the Applicant will suffer irreparable damage if the order sought is not granted and where the Court is in doubt, it will proceed to decide the application on a balance of convenience.

17. A *prima facie* case was defined in the case of **Mrao LTD vs. First American Bank of Kenya and 2 Others (2003) KLR 125** thus:

“4. A prima facie case in a civil application includes but is not limited to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself concludes that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

18. The impugned Ruling was not placed before Court hence the little this Court could use to discern whether or not there was a right that was likely to be undermined, was affidavit evidence. At paragraph 4 of the affidavit, the 1st Applicant avers thus:

“That I was excluded from sharing the Estate yet I am a relative of the Deceased.”

19. Being a relative would depend on the degree of relationship. The nature of consanguineal relationship, if any, was not disclosed. Therefore, it cannot be discerned whether or not he was entitled to benefit from the Estate of the Deceased. In the result, no *prima facie* case with a probability of success has been established.

20. However, in the instant case, I do note that the Respondent did not file any response to the application. It is averred in the Supplementary Affidavit that following the order of the Court the land in issue has been subdivided what seems to be pending is signing of transmission documents. This being a Succession matter which calls for justice being done; I hereby direct that status quo as at today's date be maintained pending hearing and determination of the Appeal.

21. It is so ordered.

Dated, Signed and Delivered electronically through **Skype** this **27th** day of **May, 2020**.

L. N. MUTENDE

JUDGE