



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

SUCC CAUSE NO. 1 OF 2017

IN THE MATTER OF THE ESTATE OF JOSEPH KITHOME KISILU (DECEASED)

MARY KITHOME..... APPLICANT

VERSUS

JOSEPHINE WAVINYA KITHOME.....1ST RESPONDENT

JANET NDUNGWA KITHOME.....2ND RESPONDENT

RULING

1. **Mary Kithome** the Applicant in the application dated 8th June 2020 seeks the following orders:
 - a. **That**, this application be certified as urgent dispensing with the service in the first instance.
 - b. **That**, an order do issue reviewing and setting aside the ex parte order extending the stay of execution issued on 2nd June 2020.
 - c. **That**, an order do issue barring the Respondents from intermeddling or in any way interfering with the Estate of the deceased pending the hearing and determination of this application.
 - d. **That**, an order do issue directing that all the revenue of the Estate from the rental houses, the guest house, the halls and the school or otherwise be deposited in court pending the determination of the appeal.
 - e. **That**, any other orders that this Honourable court deems fit and just to grant.
2. The application is supported by the grounds on its face and her affidavit. Her main issues are that:
 - The court illegally extended orders of stay of extension vide an application dated 2nd June 2020 without hearing her.
 - The Respondents are busy selling land and receiving rent within the deceased's estate yet there are orders staying the judgment. She has annexed a letter from the senior assistant chief (M4), showing the alleged sale of a plot at Kisingo.
 - That there is no good reason for the delay in processing the appeal at the Court of Appeal.
3. In their joint response the Respondents have opposed the application. They deny intermeddling with the estate of the deceased, and/or having misled the court in any way. They accuse the senior assistant chief as the one intermeddling with the deceased's estate by issuing various letters. They annexed copy of a letter to the sub-county commissioner dated 28th May, 2020 informing him of what the senior assistant chief was doing (JWK5).
4. They have denied selling any plot at Kisingo as claimed by the Applicant and senior assistant chief. On the issue of rent they say they collected the rent as they did before i.e. maintaining the status quo. That it is the Applicant who is acting contra the judgment by demanding for rent (JWK2).
5. They have expressed their inability to access the Court of Appeal in view of the lockdown. They say they are making arrangements to collect the typed proceedings which are ready.

Analysis and determination

6. A brief background to this matter will suffice. This is a succession cause, which was determined on 29th April 2020, during the Covid-19 pandemic lockdown. The judgment was delivered in open court in the absence of both parties but with their consent. Copies of the judgment were then sent to the parties vide their respective email addresses.

On 6th May 2020 the court on its own motion issued orders of stay of execution which were to run with effect from 29th April 2020.

7. The parties were duly notified, and the stay orders were to expire on 29th May 2020.

An application dated 2nd June 2020 seeking an extension of the said stay of execution orders was filed by the Respondents. The said application was placed before the court on 3rd June 2020 when the impugned order was given.

8. There is no dispute that the Respondents filed in this court, a copy of a Notice of Appeal to the Court of Appeal on 5th May 2020. Order 42 Rule 6(4) Civil Procedure Rules provides:

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court notice of appeal has been given.”

The concern of this court was whether the said Notice of Appeal had been filed at the Court of Appeal in Nairobi owing to the lockdown. For all purposes the said Notice confirmed that an Appeal had been filed against this court’s judgment as provided for under Order 42 Rule 6(4) Civil Procedure Rules.

9. Order 42 Rule 6(3) Civil Procedure Rules provides:

“Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

10. There is no dispute that the country of Kenya has had a lockdown since 16th March 2020 to date due to the Covid -19 pandemic. It is also true that Kenyans from other counties have been locked out of Nairobi. Makueni is one of the said counties. It is yet again not disputed that the Respondents herein are not represented by any advocate. For them to file the Record of Appeal and even engage an advocate as claimed they would be expected to travel to Nairobi which is not possible for now.

11. After considering all this and the limitations in hearing various matters and in granting the order of extension this is what the court said: -

“Owing to the prevailing circumstances in the entire country I hereby extend the orders of stay of execution for a further 30 days only. Parties to be notified.”

12. I do not therefore find anything illegal or unlawful about the orders of extension issued by this court. The law gives the court the power under order 42 Rule 6 CPR to grant such orders depending on the circumstances. The circumstances under which those orders were extended are known and were clearly stated by the court. On the issue of rent collection, I would want to state this: The rental houses at Quality estate were prior to the delivery of the judgment generating income and the parties know how it was being utilized. Implementation of the judgment of this court can only commence once the stay of execution lapses and/or as the Court of Appeal directs. For now, the status quo prevailing before the 29th April 2020 remains, and both parties are bound by that.

13. This matter is already before the Court of Appeal, proceedings have been typed and it would not be prudent to engage this court on matters already ruled on and being challenged in a higher court.

14. I have not been convinced by the Applicant as to why I should set aside the order of 3rd June 2020. I will only add that alongside the stay of execution both parties **must** maintain the status quo prevailing prior to the delivery of the judgment on 29th April 2020, as long as the order of stay of execution is in force. Secondly any further applications to be made before the court hearing the appeal.

15. The application dated 8th June 2020 is therefore dismissed with no order as to costs, this being a family matter

Delivered, signed & dated this 19th day of June 2020, in open court at Makueni.

.....

H. I. Ong’udi

Judge

Ruling sent to the parties by email, after notification to them twice of delivery of the same.