



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 232 OF 2007

In the Matter of the Estate of M'mugwika M'maitethia (Deceased)

M'RINCHUNI M'MUGWIKA.....PETITIONER

-vs-

JAPHET GIKUNDA.....1ST PROTESTOR/RESPONDENT

LOICE NGIRI M'MUKIRI.....2ND PROTESTOR/RESPONDENT

CATHERINE KARWITHA MAINGI.....3RD PROTESTOR/RESPONDENT

RULING

[1] Before me are two applications dated 25/07/2019 and 16/09/2019.

[2] The first application is a Summons dated 25/07/2019 which is expressed to be brought pursuant to **Rule 49 and 73 of the Probate and Administration Rules, Article 48, 164 (3a) and all other enabling provisions of the law**. The applicant who are protestors in these proceedings are seeking among other orders that

- 1. All the necessary documents to transmit the various shares to the beneficiaries in Land Parcel No. NTHIMBIRI/BONYAI/196 be signed by the Deputy Registrar;**
- 2. Survey and subdivision of the said land parcel be done by the District Surveyor Meru; and**
- 3. Security during survey and subdivision be provided by the OCS Meru Police Station.**

[3] The grounds upon which the application is premised are set out in the application and the supporting affidavit of Joyce Ngiri M'Mukiri sworn on 25/07/2019. It is contended that since judgment on distribution of the estate was delivered on 8/10/2018, the petitioner has adamantly refused to exercise his duty to facilitate distribution. The petitioner filed a notice of appeal on 12/10/2018 but to date the petitioner has never served the protestors with any record of appeal. His intention is to delay distribution and continue to enjoy the land to the exclusion of the other beneficiaries. Moreover, the petitioner has hidden the title deed for the land and he has refused to surrender it.

[4] Through the replying affidavit of M'Rinchuni M'Mugwika sworn on 16/09/2019 the application was opposed. He deposed that immediately after the judgment he issued and served a notice of appeal. He obtained typed proceedings and lodged an appeal, CA Appeal No. 118 of 2019. He has since served the protestors with the record of appeal. Therefore, the application is premature and it is only fair that the execution should await the determination of the appeal. He stated that he has not refused to sign the documents and is ready to do so if he loses the appeal.

[5] The second application consists in a Summons dated 16/09/2019 expressed to be brought pursuant to **Rule 49 and 73 of the Probate and Administration Rules, Article 48, 164 (3) (a) and all other enabling provisions of the law**. The applicant/petitioner seeks among other orders stay of execution and or implementation of the grant/orders issued on 18/10/2018 pending hearing of the Court of Appeal case No. 118 of 2019.

[6] The grounds upon which the application is founded are set out in the application and the supporting affidavit of M'Rinchuni M'Mugwika sworn on 16/09/2019. It is argued that the appeal which is yet to be heard on merit will be rendered nugatory if stay is not granted. That the respondents do not stand to suffer any prejudice if the orders sought are granted.

Submissions

[7] The applications were canvassed by way of written submissions. The protestors, in their submissions, reiterated their averments in the affidavit. They however relied on the case of **Wallace Kogi Mwaura and Another v Tirus Kamau Mburu (as the administrator ad litem of the estate of Miriam Muthoni Mburu (deceased) and another Nairobi Court of Appeal Civil Application No. 178 of 2018 (UR 146/2018)**.

[8] The petitioner too reiterated his averments in the affidavit but relied on the case of **Muriuki Kimondo v Ngima Solomon Ngunjiri [2011] eKLR** to support his application for stay of execution.

ANALYSIS AND DETERMINATION

[9] The two applications are two sides of the same coin- as it were- and will be considered together. Emerging out of these applications are two inextricable issues encapsulated in this question: -

- a) **Should the court order stay of execution pending appeal, or;**
- b) **Coerce implementation of the grant?**

Of stay of execution

[10] Borrowing from **Order 42, Rule 6 of the Civil Procedure Rules** the applicant should satisfy the court that there is sufficient reason to stay implementation of the grant. Sufficient reason ordinarily entails substantial loss which would result to the applicant unless the implementation of the grant is stayed. The application must however be made without unreasonable delay, and where applicable, security for the ultimate fulfilment of the decree or grant should be provided by the applicant.

Delay in filing application

[11] The petitioner has appealed against the judgment that was delivered on 8/10/2018. He filed his notice of appeal on 12/10/2018 without delay. However, he waited for more than ten months to file his application for stay. He has not explained to this court why he waited so long to come to court for redress, yet ten months in the circumstances of this case is quite unreasonable delay. I therefore find that this application was not made without unreasonable delay.

Of substantial loss

[12] **Be that as it may, will the petitioner suffer substantial loss if the implementation of the grant is not halted?**

[13] Substantial loss has been described as a qualitative concept which:

...refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or loss that is merely nominal". *Sewankambo Dickson vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*, High Court of Uganda at Kampala.

[14] The petitioner has appealed against the judgment that was delivered on 8/10/2018. He has now applied for stay of execution of the judgment. His argument is that his appeal will be rendered nugatory unless execution of the grant herein is stayed. I am greatly perturbed by the fact that the appellant merely stated in his application that his appeal will be rendered nugatory without demonstrating how and the kind of loss of real value or worth will occur unless stay of execution is granted. My feeling is that litigants think that an appeal against distribution of the estate by the court invariably demonstrates substantial loss. Far from it. The applicant should demonstrate substantial loss that would occur if the estate is distributed. This is the applicant's burden of proof which he must discharge. In this case, claims have been made that the appellant is using the court process to delay the implementation of the grant as long as possible, for he is enjoying the estate to the exclusion of others. I should therefore think that, whereas the appellant is exercising his unfettered right of appeal, he should realize that the other beneficiaries of the estate also have rights in the estate which have been vested in them by the judgment of the court. Their right in the estate is not the lesser as to be hindered at whims or without any sound and justifiable reason. Accordingly, there shall be no impediment on the immediate realization of the right to enjoy the fruits of a judgment except on the basis of justifiable reason which should be demonstrated by the applicant. Even in ordinary cases, stay of execution pending appeal is primarily founded on substantial loss occurring which must be established by the applicant. See the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63*** where it was held as follows;

"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars..."

[15] See also Odunga J in the case of **Socfinac Company Limited v Nelphat Kimotho Muturi [2013] eKLR**:

"Taking into account the principle of proportionality and equality of arms as required under the overriding objective principle I am of the view that in the absence of evidence that the appellant stands to suffer substantial loss coupled with the fact that the respondent has a judgement in his favour I am of the considered view that there would be a much larger risk of injustice if the court found in favour of the appellant, than if it determined this application in favour of the respondent. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589."

[16] This situation requires the court to engage in a novel balancing of these competing rights in order to do justice. Therefore, it bears repeating, the reason for which a court may stay or postpone the right of the other beneficiaries to realize their entitlement in the estate must be demonstrated by the appellant. The petitioner has not shown the substantial loss which will occur unless stay is granted. Mere stating that his appeal will be rendered nugatory if the grant is implemented does not suffice the test of the law. Such statement is not only at very high level of generalization, but feeble for lack of substance. Notably, from the judgment, the court noted that the petitioner's intention and conduct has been to deprive the other beneficiaries of their share of the estate. The court ordered that the estate be distributed equally amongst all the rightful beneficiaries. Since filing the notice of appeal in 12/10/2018 the petitioner only came to file his other documents on 30/05/2019 as per the filing receipt marked MM-04 and served the protestors the record of appeal on 1/08/2019. Recapitulation of steps taken by the petitioner is significant, for it depicts deliberate dilatory conduct on the part of the appellant. See this within the appellant's statutory obligation to help the court attain the overriding objective to dispose cases expeditiously and proportionately.

[17] Notably, the petitioner only served the protestors with the record of appeal after they had filed their application dated 25/07/2019. He also applied for stay after the protestors applied to the court for due facilitation to implement the grant. Accordingly, it is apparent that the petitioner's aim is otherwise than to vindicate the law. The claim by the protestors that he is using court process to frustrate the other beneficiaries and to prevent them from enjoying the fruits of the judgment is not unfounded. This court will always strive to do justice and will exercise discretion in favour of justice. Consequently, I am of the considered view that the petitioner has failed to satisfy the conditions for stay of execution. I dismiss his application.

Facilitation by court

[18] Based on the foregoing, I find that the grant herein should be implemented. As the appellant is unwilling to carry out his duties as an administrator of the estate, the court should exercise jurisdiction under section 47 and rule 73 of the Law of Succession Act and Probate and Administration Rules. Section 47 provides that: -

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient

[19] Accordingly, I hereby grant the application dated 25/07/2019.

Orders

[20] In the upshot, I issue the following orders:

a) The application dated 16/09/2019 is dismissed with no orders as to costs.

b) The application dated 25th July 2019 is allowed and more specifically, I order: -

i) That all the necessary documents to effect the transmission of various shares to the beneficiaries in regard to Land Parcel Number NTHIMBIRI/ABONYAI/196 shall be signed by the Deputy Registrar in place of the petitioner

ii) That the survey and subdivision of the Land Parcel Number NTHIMBIRI/ABONYAI/196 shall be done by the District Surveyor Meru and security during the said survey and subdivision be provided by the OCS Meru Police Station

iii) The petitioner shall produce and surrender the title deed for Land Parcel Number NTHIMBIRI/ABONYAI/196 to the Deputy Registrar of the Court within 14 days of today for onward transmission to the relevant land registrar which failing the land registrar is hereby directed to dispense with the production of the original title deed in the registration and transmission of the subdivisions herein. This order will facilitate distribution of the estate of the deceased.

iv) Costs to the protestors.

Dated, signed and delivered at Meru this 29th day of July 2020

.....

F. GIKONYO

JUDGE