REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISC. APPLICATION NO. 1 OF 2020

IN THE MATTER OF THE ESTATE OF MODKAYO OGUTA (DCD)

MARY ADHIAMBO SANNA.....1ST APPLICANT

JANET ANYANGO OGUTA.....2ND APPLICANT

VERSUS

IRENE AWINO OPONDO.....1ST PROTESTOR/RESPONDENT

PAMELA ATIENO OCHAR.....2ND PROTESTOR/RESPONDENT

RULING

1. The Applicants approached the court with the instant application vide certificate of urgency dated 18.5.2020 as well as notice of motion that was brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. They seek principally a main prayer namely that the 2nd Respondent do deliver to the 1st Applicant certificate of title to the suit property on LR number [xxxx] for safe custody. They also seek for an order of stay of execution of the judgement of the trial court pending interpartes hearing. The Application is supported by an affidavit deponed by Mary Adhiambo Sanna. She averred that the there is an intended appeal against the judgement of the trial court and that should the respondent commence the process of execution then the appeal will be rendered nugatory. A copy of a notice of appeal and letter requesting proceedings from the trial court are annexed to the affidavit.

2. The Application is opposed. In opposition, the Respondent deponed on 5.6.2020 vide a replying affidavit wherein she pointed out to court that there was no memorandum of appeal on record within the 30 days provided for by the law; that there was no requirement to file a notice of appeal to this court and that the order sought had been overtaken by events.

3. In rejoinder, the 1st applicant averred in her affidavit that there was no requirement for a memorandum of appeal and that the signature on the affidavit of the respondent dated 5.5.2020 was forged and she sought that the same be struck off. It was submitted that there was no evidence that the title deed was deposited in court.

4. In sur-rejoinder, the 1st applicant in her affidavit deponed on 19.6.2029 averred that the signature of the 1st respondent was a forgery. This assertion prompted the 1st respondent to file a further replying affidavit dated 14.7.2020 in which she denied the forgery allegations and further added that the subject title deed has since been handed over to the trial court for safe custody and in compliance with the judgement and hence the application has been overtaken by events.

5. The Application was canvassed by way of written submissions. Learned counsel for the applicants filed submissions on 26.6.2020 whereas the respondent's submissions were filed on 16.7.2020.

6. Learned counsel for the applicant in placing reliance on section 17 of the Oaths and Statutory Declarations Act as well as Order 19 of the Civil Procedure Rules submitted that the affidavit of the 1st respondent dated 6.6.2020 was not made by her and as such ought to be struck out. It was submitted that the applicant had met the threshold for grant of orders under Order 42 Rule 6 of the Civil Procedure Rules. Reliance was placed on the case of **Amal Hauliers Ltd v Abdulnasir Abubakar Hassan (2018) eKLR.**

7. According to counsel for the Respondent, the provisions of section 79G of the Civil Procedure Act are mandatory and as such the instant application offends the said provision of the law. Reliance was placed on the case of **Dilpack Kenya Limited v William Muthama Kitonyi (2018) eKLR** where it was found that there was no need sustaining an appeal whose substratum did not exist. He urged the court to dismiss the instant application.

8. The issue for determination is whether the application has merit.

9. This application is brought under Order 42 Rule 6 that provides for stay of execution pending appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are set out in the following terms:

> ***6. (1) <u>No appeal or second appeal</u> shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
>
> ***(2) No order for stay of execution shall be made under sub-rule (1) unless—***
>
> ***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***
>
> ***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.***

10. I have perused the application and have not seen a filed Memorandum of Appeal in this case. I therefore find that the application is a non-starter as there is no appeal in existence. The prayer for stay pending interpartes hearing seems to be already spent since the same appears not to have been pursued by the applicants at the ex-parte stage. Again, the applicants did not amend their application to introduce a prayer for an order for stay pending an intended appeal. Hence the prayer for stay of execution of the trial court 's judgement cannot be granted in the circumstances.

11. I have had due regard to the application and noted that there is no decree issued by this court as well as the trial court that is annexed to the application though alluded to by the applicant. I have seen the judgement that was passed by the trial court as well as the letter by the respondent's counsel indicating that the title deed has already been deposited in the trial court. I have considered the provisions of section 34 of the Civil Procedure Act that provides that (1) all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. From the remaining prayer being sought in the application, it would appear that the applicant has a question with regard to the satisfaction of the judgement that was passed by the trial court and it follows that this court has no jurisdiction to handle the instant matter; any questions arising from the satisfaction of the judgement of the trial court ought to be directed to the trial court. The applicant's apprehension is to do with the safety of the title deed that the trial court ordered to be deposited into court for safe custody and further orders. Now that the respondents have surrendered it, then the applicants concerns appear to have been taken care of and if they still have issues regarding the satisfaction of the judgement then they should approach the trial court. Again, it is noted that the applicants have not yet lodged an appeal and hence the prayers sought in a nonexistent appeal are incapable of being granted as the court cannot act in vacuum.

12. Finally, it is noted that the applicants seek for an order that the 2nd respondent be ordered to deliver up the title to the suit property to the 1st applicant. A perusal of the trial court's judgement reveals that the title to the suit property in possession of the 2nd respondent be deposited into court and which order has since been complied with. For the applicants to seek a contrary order even before an appeal is lodged, is quite improper to say the least as the same would amount to the applicants stealing a match against the respondents. In any event as the subject title deed has already been handed to the court as ordered in the judgement, then it would seem that the application herein has already been overtaken by events. I find the applicants have not satisfied the court that they merit the orders sought.

13. In the result, it is my finding that the applicant's application dated 18.5.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 23rd day of September, 2020.

D. K. Kemei

<u>Judge</u>