



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 731 OF 2012

IN RE ESTATE OF GERALD MWANGI MUGO (DECEASED)

GRACE KARWIRWA MWANGI.....1ST PETITIONER/RESPONDENT

VERSUS

JULIUS MWORIA M'NJOGU

M'MARETE M'MWITARI

PAUL MURIIRA M'NJOGU

JULIUS MWITI

JOHN MUTHOMI

DANIEL MUTUA MUGWIKWA

KIJUKI KAIGA

KAREMU M'ITUAMIKWA.....PROTESTORS

JUDGMENT

[1] I have been asked to stay these proceedings pending the hearing and determination of **Meru ELC No. 143/16 (O.S)**. IT is argued that the latter suit shall determine the existence or otherwise of the estate purportedly comprised in **L.R. No. Ntima/Igoki/2007** (hereinafter **Suit Land**). the applicants also sought that the status quo prevailing in the said land should be maintained until the suit herein is finally determined.

[2] The application is expressed to be brought under **Rule 73 of the Probate and Administration Rules** and is premised upon the grounds set out in the application and the supporting affidavit of Julius Mworja M'Njogu sworn on 15th May 2017. The applicants claim to have become entitled to the Suit Land by adverse possession and have applied in Meru ELC No. 143/16 (O.S) to be registered as the owners as they are solely in occupation of it together with their families. They argued that the Suit Land may have become a trust property in their favour against the estate of the deceased. And in the event that the court find in their favour the property shall not be available for distribution. In that case, they take the view that, as this property is the only property disclosed to constitute the estate; these proceedings should be stayed until the determination on adverse possession is made.

[3] The application was opposed vide the replying affidavit of Annet Kathure and Mercy Nyaguthi Mwangi sworn on 4th October 2017. They deposed that the application is unmeritorious since the applicants are strangers to the estate and have not sought leave of the court to be enjoined as parties. They stated that they are grandchildren and beneficiaries of the estate herein and rank in priority in the distribution of the estate. On that basis, they sought the application to be dismissed with costs.

Submissions by applicants

[4] The application was canvassed by way of written submissions. The applicants submitted that, under the provisions of **Section 37 (a) of the Limitations of Actions Act** upon the expiry of 12 years which is the prescribed period to recover possession of land, if the land is registered as is the case here, the legal title of the registered owner is by operation of law converted into a trust whose beneficiary is the adverse possessor. The registered owner becomes his trustee with all the legal obligations of a trustee. He cannot dispose of the trust property against the interest of the beneficiary and/or without his consent. Therefore, the Suit Land cannot be distributed amongst the dependants of

the deceased as part of his net estate pending the determination of the originating summons in the ELC court.

Submissions by protestors

[5] The 1st and 2nd protestor, Annet Kathure Mutethia and Mercy Nyaguthi Mwangi, submitted that **Section 28 of the Limitation of Actions Act CAP 22** states that an application for leave of the court for the purposes of **Section 27** shall be made ex parte except in so far as rules of court may otherwise provide in relation to application made after the commencement of a relevant action. **Section 28(4)** defines relevant action as any action in connection with which the leave sought by application is required. The alleged suit filed in Meru ELC cannot see the light of the day in that the intended applicants have only alleged that they have only lived on the Suit Land for a long time therefore the land is held by the protestors as their trustees. The Suit Land having been registered in the name of the deceased its title cannot be defeated. That the applicants are not persons stated under Section 29 of the Law of Succession Act and Section 35 does not provide that strangers get any share of the deceased's estate. They relied on the case of **Saina Makokha Kanyanya & another v Fatuma Owiti Kanyanya [2016] eKLR** and **Wilson Kamau Muigai v Njeri Kamau & another [2013] eKLR**.

ANALYSIS AND DETERMINATION

[6] The issue that falls for determination is whether there are sufficient grounds to stay these proceedings in respect of the Suit Land.

[7] This is probate and administration court with jurisdiction to determine the assets of the deceased, identify the rightful beneficiaries of the estate and persons beneficially interested in the estate, ascertain their respective shares and distribute the estate accordingly. Determination of the estate property includes collecting and preservation of the estate property. See the case of **In re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** that:-

“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

[8] Questions on ownership of property are therefore outside the jurisdiction of this court. This is a preserve of the Environment and Land Court. See article 162(2) of the Constitution and Environment and Land Act. The Suit Land is subject of Meru ELC Case No. 143 of 2016. In the circumstances, is stay of these proceedings available or feasible remedy pending the determination of the case in ELC?

Availability of and threshold for stay of proceedings

Many confuse stay of proceedings with stay of execution pending appeal provided in **Order 42 of the Civil Procedure Rules**. Stay of proceedings relates to stopping of an active proceeding from being litigated for some lawful reason or other, and is different from stay of execution pending appeal. Stay of proceedings is a grave one for it prevents a litigant from prosecuting his case- a right that should not be impinged upon unless for good cause. The threshold is therefore quite high for stay of proceedings interferes with right of a party to conduct his litigation. Quite apt rendition on these points is found in ***Halsbury's Law of England, 4th Edition. Vol. 37*** page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

[9] The decision to stay proceedings, albeit a matter of judicial discretion, it must be exercised in the interest of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded upon in a masterly fashion by **Ringera J (as he then was) in Daniel Walter Rasugu Nbi Hccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000** to be:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

[10] In succession cases, stay of proceedings is strictly restricted but not prohibited. Instead of providing for stay of proceedings, special procedures have been designed by the Law of Succession Act, for instance, rule 41(3) of the Probate and Administration Rules requires the

court to set aside property about which questions have arisen which cannot be or conveniently determined by the court for determination by the right court. See the rule below:

41(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

[11] Therefore, issuing a stay of proceedings in a succession cause should be with much caution, for such intervention will not only be an interference with the beneficiaries' right to conduct and conclude the litigation, but will also be an impediment to the exercise of court's power upon the estate property for purposes of active and due distribution and administration of the estate. In this case, ownership of **LR. NO. NTIMA/IGOKI/2007** is directly in controversy in the MERU Environment and Land Court Case No. 143 of 2016. The question herein has arisen before confirmation of grant and raises bona fide issues worthy of trial, yet, this court does not have jurisdiction to try the question of ownership;- ELC does. Accordingly, I hereby set aside the said piece of land to abide by the determination of the question on adverse possession.

In passing...

[12] In ordinary cases, rule 41(3) of the Probate and administration Rules should be utilized and avert paralysis of the entire proceedings through stay of proceedings. This provision creates a kind of statutory interdependence between courts of distinct jurisdictions but of equal status. However, stay of proceedings may be an option where, say, the only property of the estate is directly in controversy and has been set aside for determination of the ownership wrangle by ELC. Practically, there will be no use in continuing with such proceeding. So, the court's general practice should be, to impose stay in only exceptional cases where, beyond all reasonable doubt, the proceeding ought not to be allowed to continue. But it be known that, the court must weigh the bona fides of the applicant's claims in an application for stay of proceedings or under rule 41(3) of the Probate and Administration Rules. The potency or otherwise of the argument that distribution of the property in controversy will render otiose the claimant's cause of action is also a relevant consideration in such applications.

Applying the test

[13] I will not stay these proceedings because there are other estate properties. Instead, I set aside the suit property to abide by the decision of ELC as stated above. Parties to apply for directions on the remainder of the estate. No orders as to costs.

Dated, signed and delivered in open court at Meru this 24th day of January, 2019

F. GIKONYO

JUDGE

In presence of

Mwarania for protestors

Ngugi for Kaimenyi for 1st and 2nd protestors

Ms Kiyuki for Muthomi for petitioner

F. GIKONYO

JUDGE