

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 125 OF 2018

GRACE MWELU KIMENYE.....APPELLANT

VERSUS

1. AGNES MUENI KIVILU

2. EVANS MASAI MUTUKU KIVILA.....RESPONDENTS

RULING

1. The appellant has filed a chamber summons application dated 26th September, 2018. She seeking an order of stay of execution of the ruling issued on 29th August, 2018 in **Machakos Chief Magistrate's Succession Cause No. 188 of 2016** and all consequential orders pending the hearing and the determination of the appeal. The application is based on the grounds on the body of the application and the supporting affidavit of the appellant.

2. She stated that based on the grant of confirmation issued in **Machakos CMC Succession Cause No. 188 of 2016**, the respondents filed **Machakos ELC No. 398 of 2017** in which suit they seek among others, her eviction from as well as the transfer of property Malili Ranch Agricultural Plot No. 545 into their names. She stated that the sole reason why she filed the summons for revocation of grant is that the respondents had obtained a grant in the estate of Benjamin Masai Mutuku Kivila and in which grant her alleged property was listed as one of the properties belonging to the deceased. She stated that the appeal has overwhelming chances of success and unless the order of stay is granted, she stands to suffer irreparable loss. She stated that she is willing to deposit any security as the court may direct as a pre-condition for granting orders of stay.

3. The respondents on the other hand filed a replying affidavit on 12th October, 2018. They contend that the court did not issue any orders capable of being executed. That the appellant has not shown what substantial loss she stands to suffer if the orders sought are not granted and that she stands to suffer no loss. That the appellant admits that she is in possession of the subject land and that there is no order of eviction from any court neither have they attempted to evict anyone. That the appellant is a party to **ELC No. 398 of 2017** which has not even gone through pre-trial stage and this application is meant to assist her to jump the gun. That they have all along insisted that if the appellant has evidence that the deceased owed her some money then she should go to the civil court for recovery instead of meddling with the estate of the deceased in which she is not a beneficiary. That revoking the grant would have the effect of making **ELC No. 398 of 2017** nugatory which is the aim of the appellant. That she should use the evidence she has to defend herself in the ELC case instead of interfering with the whole estate. That the appellant has either misapprehended the ruling of the trial court or she is deliberately attempting to mislead this court. That the application before the magistrate was not dismissed on the sole ground that the appellant was not a beneficiary.

4. Due consideration has been given to the application herein. This being an application for stay of execution, the appellant needs to satisfy that she stands to suffer irreparable loss, that the application is brought timeously and that security is to be furnished. The appellant's application was filed on 26th September, 2018 while the ruling was delivered on 29th August, 2018. The same is therefore filed timeously. She has further expressed that she is willing to deposit security. The appellant has satisfied two requirements for grant of stay. On the issue of loss, she stated that she stands to suffer loss. She specifically contended that based on the grant of confirmation issued in **Machakos CMC Succession Cause No. 188 of 2016**, the respondents filed **Machakos ELC No. 398 of 2017** in which suit they seek among others, her eviction from as well as the transfer of property Malili Ranch Agricultural Plot No. 545 into their names. She stated that the sole reason why she filed the summons for revocation of grant is that the respondents had obtained a grant in the estate of Benjamin Masai Mutuku Kivila and in which grant her alleged property was listed as one of the properties belonging to the deceased. The appellant has however not tendered any evidence to show that the respondents are in the process of or intend to evict her from the property. She has further not tendered any evidence to establish her allegation that the respondents intend to transfer the property. The lower court had declined to revoke the grant and there is no execution which can be said to ensue from such an order. The Appellant can properly and easily proceed to ventilate her appeal against the ruling of the learned magistrate. In any case there is a pending ELC matter involving the parties herein and the ELC court would be in a better position to make orders as are appropriate as regards the Appellant's status on the suit land. Indeed the Appellant as alluded to the issues that the Respondents are out to evict her which issues are properly being currently before the ELC court for determination. The trial court did not issue any orders of eviction against the Appellant and it would appear that the Appellant's apprehension is misplaced. She should address those concerns before the ELC Court. In order to fasttrack the appeal, the appellant should proceed to set the appeal for directions as a matter of priority. The Appellant has not shown that she will suffer irreparable harm if the order is not granted.

5. In the result it is my finding that the Appellant's Application dated 26/09/2018 lacks merit. The same is ordered dismissed. Each party to bear their own costs.

Dated and delivered at Machakos this 25th day of April, 2019.

D. K. KEMEI

JUDGE