



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 22 OF 1995

IN THE MATTER OF THE ESTATE OF M' MUGAMBI M' RIMBERIA (DECEASED)

LUCIANO KIRUKI MUGAMBI.....1ST APPLICANT

DANIEL KIGORA MUGAMBI.....2ND APPLICANT

ZACHARY MUTIORA MUGAMBI.....3RD APPLICANT

VERSUS

SESARY GATOBU M' MUGAMBI.....RESPONDENT

RULING

[1] The Summons dated 25th January 2019 and brought pursuant to Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules seek stay of execution of the judgment delivered on 17th December 2018, pending the hearing and determination of an intended appeal.

[2] The application is premised on the grounds inter alia that judgment on distribution of the estate was delivered on 17th December 2018 and that the Applicants were dissatisfied/aggrieved with the aforesaid judgment and had filed a notice of appeal against it. The Applicants further contended that they would suffer irreparable loss unless execution of the said judgment was stayed.

[3] The application was opposed via a replying affidavit filed in court on 23rd April 2019 by the respondent where he deposed inter alia that the application was not meritorious as it sought to stay a judgment given in a cause which commenced more than 2 decades ago. In any event, in the impugned judgment, the court observed that the respondent had been in exclusive occupation for more than 6 decades and was gifted to the respondent by the deceased *inter vivos* and that the applicants had not demonstrated how they would suffer irreparably should the land be registered in his name. The Respondent further urged the court to order the Applicants to deposit Kshs 200,000 as security for costs should it be inclined to allow the application.

ANALYSIS AND DETERMINATION

[4] The Applicants are essentially seeking stay of execution of the judgment delivered on 17th December 2018 in which the court inter alia held that ABOTHUGUCHI/U- KAONGO/1050 was a gift *inter vivos* given to the respondent. Stay of execution pending is not given as a matter of right or simply because one has filed an appeal. It is granted at the discretion of court after being satisfied that there is a sufficient reason to so order. This is because the court has to balance two competing rights; the appellant's right of appeal which includes right for appeal not to be rendered nugatory; and the respondent's right to immediate enjoyment of his judgment. None is the lesser. Therefore, the court must consider all the circumstances of the case as it is guided by the traditional prerequisites in Order 42 rule 6 of the Civil Procedure Rules namely; whether substantial loss will occur if the order is not granted; whether the application has been brought without unreasonable delay; and provision of security for performance of the decree as the case maybe. These principles were restated by the Court of Appeal in the case of **CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997**, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

[5] In this case, the court made a finding that land parcel number ABOTHUGUCHI/U-KAONGO/1050 was a gift *inter vivos* made to the

respondent by the deceased. Such property is not estate property except it is only taken into account under section 28 and 42 of the Law of Succession Act in determining the ultimate entitlement of the donee beneficiary in the estate. Stay is helpless or superfluous in such case. I do not see how such declaration may be stayed. In any event, the applicants have not shown how such order will cause them substantial loss. Perhaps the only thing that may dissipate the said property is disposal of it by way of sale, exchange or charge by Sasery. Therefore, I can only restrain any disposal by Sasery Gatobu of the said property to a third party pending hearing and determination the intended appeal. To avoid doubt, I will make appropriate order herein.

[6] What about the other order that land parcel number ABOTHUGUCHI/KAONGO/580 be shared equally amongst the sons of the deceased? Evidence shows that all the children of the deceased settled in this land. The court simply adopted what the parties had proposed. I do not therefore, think that a stay of the entire judgment is merited.

[7] In light of the above, the appropriate order to make is to restrain Sasery from selling or disposing of or charging or exchanging ABOTHUGUCHI/U-KAONGO/1050. This order does not operate as a stay of execution on my judgment whatsoever. It simply restrains Sasery from disposing of the above property once it is registered into his name. In this manner, the said property is preserved for purposes of the intended appeal. Effectively, stay of execution is denied. It is so ordered. No orders as to costs.

Dated, signed, and delivered in open court on 23rd May 2019

F. GIKONYO

JUDGE

M/S Kiome for Kaumbi for applicant

Kiogora for Gitonga for respondent

F. GIKONYO

JUDGE