



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 368 OF 2011

IN THE MATTER OF THE ESTATE OF M'LIMBIINE M'NAUATA alias M'LIMBINE M'MAUTA (DECEASED)

PETER MUKARIA..... PETITIONER

VERSUS

IBRAHIM M'IKIAO.....1ST OBJECTOR

IBRAHIM KANGENTU..... 2ND OBJECTOR

RULING

1. This matter relates to three applications brought by way of Summons and Notice of Motions dated 9th May, 21st May and 17th June 2019 respectively.

2. The Summons were filed by the objectors who seek among other orders eviction of the petition from land parcels ITHIMA/ANTUAMBUI/7137 and 7138 with the help of the OCS Laare police station to provide security. The grounds upon which the application is grounded upon are set out in its body and the supporting affidavit of Ibrahim Mugathia Ikiao sworn on 9th May 2019.

3. It is argued that the objectors are the legal registered owners of the suit land parcels. The petitioner challenged their titles by filing a claim of fraud in MERU CMCC NO. 231 OF 2005 which was dismissed. The petitioner did not appeal but preferred another suit MAUA CMCC CIVIL SUIT NO. 73 OF 2018 which was dismissed as well. That the petitioner is still in occupation of the land parcels notwithstanding the certificate of title being issued and registered in favour of the objectors.

4. The petitioner opposed this through his replying affidavit sworn on 17th June 2019. He deponed that he is not in dispute that the court pronounced itself with regard to ownership of the said land parcels. But it is as a result of this he has proceeded to appeal. If the application is allowed his appeal will be rendered nugatory.

5. The petitioner thereafter filed an application by way of Notice of Motion pursuant to **Order 42 Rule 6 of the Civil Procedure Rules and any other provision of the law**. The petitioner sought among other orders an order for stay of execution of the ruling delivered on 2nd May 2019 pending appeal and a temporary injunction restraining the objectors from acting in any way with the following parcels ITHIMA/ANTUAMBUI 7135, 7136, 7137, 7138 and 7139.

6. The grounds upon which the application is based upon are in the body of the motion and supporting affidavit of Peter Mukaria sworn on 21st May 2019. It is contended that he is in the process of filing an appeal which has high chances of success. That for the appeal to operate a stay of execution is necessary. If orders sought are not

granted he stands to suffer irreparable loss.

7. He also filed a Motion dated 17th June 2019 pursuant to **Sections 1A, 3A of the Civil Procedure Act, Rule 42 & 43 of the Court of Appeal Rules and any other relevant provision of the law**. The applicant seeks to be granted leave to appeal to the Court of Appeal. The grounds upon which his application is grounded upon are in its body and supporting affidavit of Peter Mukaria sworn on 17th June 2019. He affirmed that his appeal has high chances of success and the delay in making the application is due to the waiting for a copy of the ruling. If his prayer is denied the estate stands to suffer immensely.

8. The objectors opposed the two applications through the replying affidavit of Ibrahim M'Ikiao filed on 8th July 2019. He deponed that the orders sought from the applications are not tenable in law as the cause is fully determined since the court pronounced itself. The court dismissed the petitioner's application where he sought revocation and a dismissal order cannot be stayed technically. That the orders of temporary injunction are not available as nothing ideally is being sought to be injected. Leave to appeal is also not available as the applicant

has not complied with the procedure by annexing the order or decree sought to be appealed. Thus the applications ought to be dismissed.

9. This matter was canvassed by way of written submissions. The petitioner submitted that the eviction order is unmerited as the objectors have not convinced the court that he is an unlawful occupant or a trespasser. His applications should be allowed as he has evidenced that the objectors will suffer no harm plus a balance of convenience tilts in his favour as he and other beneficiaries reside in the suit land parcels. He implores the court to ignore the technicality made of filing his application for stay of execution before the application for leave to appeal. He pleads that the decision be based on the merits of intended appeal.

10. The issues of determination are:

- a) ***Whether to issue a temporary injunction restraining the objectors from acting in any way with the following parcels ITHIMA/ANTUAMBUI 7135, 7136, 7137, 7138 and 7139***
- b) ***Whether to issue a stay of execution of the ruling delivered on 2nd May 2019***
- c) ***Whether to issue an eviction order for the petitioner from land parcels ITHIMA/ANTUAMBUI/ 7137 AND 7138***
- d) ***Whether to grant the petitioner leave to appeal to the court of appeal***

11. When it comes to issuance of a stay of execution pending appeal the main principles are well enumerated under **Order 42 Rule 6(2) of the Civil Procedure Rules**. An applicant has to demonstrate how they have met the pre-requisite conditions which are:

- a) The application has been made without unreasonable delay
- b) Substantial loss may result to the applicant unless the order sought for is made
- c) The applicant provides security as may be ordered by court for the due performance of the decree or order

12. In this cause the application seeks to stay the ruling dated and delivered on 2nd April 2019 where among the orders sought were that the grant be reinstated and that subdivisions arising out of Ithima/Antuambui/219 be cancelled. The court only decided to reinstate the grant and provided the mode of distribution. It expressly stated that it had already been determined that the objectors are the legal owners of land parcels Nos. 7137 and 7138. They are the *bona fide* purchasers as determined in CMCC No. 231 of 2005 and an appeal has not been preferred against that decision. In its ruling the court stated, and I quote: ***‘it would be pre-emptive to make a second find on an issue already litigated upon without the court being properly moved’***.

13. The ruling dismissed part of the orders sought particularly on the issue of cancelling the subdivisions. Therefore, stay may not be issued to this negative order as Makhandia J (as he then was) held in the case of **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010** as follows

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant’s appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court’s judgement or decree.”

14. Alternatively, the petitioner has not evidenced substantial loss considering the land parcels No. 7137 and 7138 do not belong to him and he did not appeal of the decision that established it (CMCC No. 231 of 2005). The purpose of this court is to facilitate the collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets (See: **In re Estate of Alice Mumbua Mutua (deceased) [2017] eKLR**). Jurisdiction to hear and determine title is borne by another court which has already made its decision which this court stands guided by. Hence, the stay of execution cannot be granted.

15. On the issue of a temporary injunction this court stands guided by the principles laid down in the renowned case of **Giella v Cassman Brown & Co. Ltd [1930] EA 358**. This case stipulated the pre-requisites an applicant has to establish. They are a *prima facie* case, irreparable harm and when court is in doubt to determine based on a balance of convenience.

16. The petitioner seeks a temporary injunction order to restrain the objectors from acting in any way with the following parcels ITHIMA/ANTUAMBUI 7135, 7136, 7137, 7138 and 7139. The applicant has failed to prove that he has a *prima facie* case with a probability of success. I say so because he has failed to show ownership particularly on the subdivisions owned by the objectors. The fact that he is in occupation of the land is not a ground to issue an injunction for he has been in knowledge of this ever since judgment was delivered in 2017. The fact that he chooses to stay there illegally does not prove that he will suffer irreparable harm. Issuing the injunction would be aiding the petitioner’s unlawful behavior.

17. The objectors have sort an order to evict the petitioner from land parcels ITHIMA/ANTIAMBUI/7137 and 7138. It was established vide the ruling dated 2nd May 2019 that these parcels do not form part of the estate of the deceased. According to **Rule 63 of the Probate and Administration Rules** its provides that

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Accordingly, I am of the view that this order is merited and ought to be granted.

18. Lastly, is whether or not to grant the petitioner leave to appeal to the court of appeal? Regarding the issue at hand, in probate and administration matters there is no automatic right of appeal to the Court of Appeal. Leave must first be sought from the High Court which is granted where it is ascertained from the face of it that there are substantial grounds of appeal. This was well explained by the Court of Appeal in the case of ***Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR*** where it held:

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

19. I am in agreement with the thoughts of the learned judges that the purpose of seeking leave first is to promote finality and expedition in the determination of probate and administration disputes. This in turn tends to promote the provisions of our Constitution. The petitioner seeks to appeal the ruling of 2nd May 2019. But most importantly he seeks to challenge the ownership of the objectors as established in the CMCC No. 231 of 2005. This matter was determined and the petitioner failed to appeal in the appropriate court. He cannot then seek to challenge their ownership under the umbrella of this court since this is not the appropriate forum as clearly explained above. Litigation must come to an end even though a person is unsatisfied with the decision. Therefore I am of the view that leave to appeal to the Court of Appeal must be refused.

20. Accordingly, the applications dated 21st May 2019 and 17th June 2019 are hereby dismissed with costs. The application dated 9th May 2019 is allowed with the court in the following terms :

- a) THAT an eviction order do issue against the petitioner parcel of land no. ITHIMA/ANTUAMBUI/7317 and 7138 forthwith
- b) THAT the OCS Laare police station to provide security during the exercise of eviction of the petition from LR. ITHIMA/ANTUAMBUI/7317 and 7138.
- c) The Petitioner to pay costs of application dated 21st May 2019 and 17th June 2019.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2019

IN THE PRESENCE OF:

CA:

PETITIONER:-Mr Marete for Petitioner

1ST OBJECTOR :- Mr Miriti for Interested parties/Objectors.

2ND OBJECTOR:-

HON A. ONG'INJO

JUDGE