

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 118 OF 2013

ALICE WAIRIMU MWANIKI.....APPLICANT

-VERSUS-

1. MARY WAIRIMU MWANIKI

2. EUNICE WANGUI GATIMU....RESPONDENTS

RULING

The applicant has filed a motion dated 6 June 2019 primarily seeking stay of execution of the judgment delivered by this court (Matheka, J) on 23 May 2019. The application is purportedly made under Order 42 rule 6 of the Civil Procedure Rules. According to rule 63 of the Probate and Administration Rules, Order 42 of the Civil Procedure Rules is not amongst the civil procedure rules applicable in succession proceedings and therefore I say that the rule has been purportedly employed advisedly.

Be that as it may, the application is made on the basis that the applicant is the occupant of the suit property Title No. Konyu/Ichuga/696 but her otherwise hitherto quiet enjoyment of this property will certainly be disturbed if this court's judgment is executed. She wants the execution stopped pending the hearing and determination of the appeal.

The respondents opposed the motion contending in their replying affidavit that all the children of the deceased are entitled to occupation and enjoyment of his estate as much as the applicant. They have also deposed that the notice of appeal was incompetent and, effectively, there is no appeal the basis upon which an order staying execution of a judgment would ordinarily be granted. In any event, so they argued, Order 42 of the Civil Procedure Rules does not apply in succession proceedings.

The essence of the decision sought to be stayed is that the court found as a fact that the applicant is the deceased's widow and the respondents, among others, are his children though from a different house. The deceased's estate was accordingly distributed between these houses.

My reading of the applicant's application is that she is bent on enjoying the status quo. She has stated in unequivocal terms that she has been in exclusive occupation of the deceased's land which, as noted, is the only asset comprising his estate.

Now, if it has been established that the respondents are the deceased's heirs and are equally entitled to his estate in that capacity, I see no reason why their rights cannot be enforced merely because the applicant's quiet enjoyment of the estate will be interfered with in one way or the other. In any case, it has not been demonstrated that the applicant will be uprooted from where she is settled if the scheme of distribution of the estate ordered by the court is adopted. Even if she was to be unsettled in some way, that in itself cannot be a reason why the deceased's heirs should, effectively, be disinherited.

As noted earlier, Order 42 of the Civil Procedure Rules has no place in succession proceedings; it is simply not one of the rules adopted by rule 63 of the Probate and Administration Rules to apply in succession rules.

The applicant's application is therefore not only misconceived but also there is no merit in it; it is hereby dismissed. Parties will bear their respective costs.

Dated, signed and delivered in open court this 20th day of December, 2019

Ngaah Jairus

JUDGE