



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 83 OF 2017

(FORMERLY NAIROBI SUCCESSION CAUSE NO. 371 OF 1997)

IN THE ESTATE OF DAVID KIONGERA KINYANJUI (DECEASED)

RULING

1. The long history of this dispute was well documented in the judgment of **Musyoka J**, delivered on 12th May, 2017. The judgment was in relation to an application to revoke a grant issued in April 1997 to **Serah Njoki Kiongera**. In his judgment, **Musyoka J**, allowed the application and further appointed **Serah Njoki Kiongera** and **Amos Ikere Kiongera**, the Applicant as administrators of the estate of **David Kiongera Kinyanjui**.

2. Other consequential orders included the cancellation of all dealings/transactions in land parcels **No. Kiambaa/Kihara/1931, 1932, 1933 and 1934**, and the inclusion of **Amos Ikere Kiongera, Peter Mungai Kiongera** and **George Ngugi Wambui** whom he found to be children of the deceased, in the list of survivors and therefore beneficiaries to the estate of the deceased. He further directed the newly appointed administrators to apply within 60 days to confirm the grant.

3. Instead, **Serah Njoki Kiongera** (the Applicant) filed a notice of motion on 8.6.17 seeking stay of execution of the judgment of **Musyoka J**, pending appeal. The motion is expressed to be brought under Order 42 R 6 of the Civil Procedure Rules and is based on grounds that the Applicant stands to suffer substantial loss if transactions in respect of the subject properties are cancelled as the Applicant and other beneficiaries have developed their portions. That the Applicant is willing to offer security, and the Respondent will not be prejudiced by a stay order.

4. **Amos Ikere Kiongera** (the Respondent) responded through a Replying affidavit filed on 17.8.18. To the effect that only two properties i.e. **Kiambaa/Kihara/1933 and 1932** will be affected by the order for cancellation of dealings as parcels **No. 1931 and 1934** remain in the name of the deceased; that the estate may be subjected to waste if there are no administrators in place, that the Applicant's interests if any, are not at risk as no action may be taken without her involvement as a co-administrator, that the Applicant being neither owner or beneficiary to suit properties is not liable to suffer substantial loss through eviction or other risk to her interest.

5. The application was canvassed by way of oral submissions. Mr. Gathogo submitted on behalf of the Applicant that their prayer is for stay of execution in respect of four parcels of land whose titles are liable to be cancelled pursuant to the decision of **Musyoka J**. He submitted that the application was filed within reasonable time. Further, that the Applicant will suffer substantial loss, having occupied the suit property for 70 years and that there are permanent residential buildings which stand the risk of being demolished, thereby rendering the appeal nugatory. He stated that the Applicant was willing to deposit the four subject titles into court. The court was urged to issue a prohibition order to maintain the *status quo* in allowing the application.

6. Mr. Osoro, counsel for the Respondent opposed the application. He submitted that the suit properties are not registered in the name of the Applicant and thus she has no direct interest in any of the properties. It was submitted that it was premature for the Applicant to allege apprehension related to eviction. The Applicant's assertions were termed as speculative. The Applicant's undertaking to deposit the titles into court, it was argued, is not supported by the beneficiaries whose names are reflected on the two titles already transferred, from the deceased's name i.e. **Kiambaa/Kihara/1932 and 1933**. Counsel submitted that the Applicant had failed to satisfy the requirements for the grant of an order for stay. There is no threat of substantial loss and in the Respondent's view, the appeal stands no chance of success. Moreover issues relating to distribution raised by the Applicant are premature as the grant is not yet confirmed. He urged court to dismiss the application

7. The court having considered the material canvassed in respect of the application takes the following view of the matter. The Applicant is evidently aggrieved with the decision by **Musyoka J**, revoking the initial grant in her name and ordering the cancellation of transactions in respect of the suit parcels. Her application is brought under Order 42 R 6 of the Civil Procedure Rules. The application was undoubtedly brought in a timeous manner. The court notes that a notice of appeal has been lodged. The crux of this application lies with the question of substantial loss.

8. While the Respondent belaboured the issue, at this point, the court is not concerned with the merits of the appeal. Has the Applicant demonstrated that substantial loss will result if the orders sought are denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Limited -Vs- Kibiru & Another [1986] KLR 410**. It is relevant even though the instant appeal

is not in respect of a money decree.

9. Holdings 2 and 3 therein are particularly relevant. These are that:

“1.

2. **In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**

3. **In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**

4.

5.”

10. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out the different circumstances when substantial loss could arise. The Ag JA (as he then was) stated inter alia that:

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. (emphasis added)

11. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,..... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

12. Whereas the Applicant may not be listed among the beneficiaries of the estate of the deceased as per the confirmed grant, she was previously the administrator responsible for the distribution of the estate. For that reason, she is under a fiduciary duty, even under the new joint grant, to ensure that the estate does not suffer loss and that the distribution benefits the correct beneficiaries. That is the context in which the Applicant’s interest must be viewed. Reference to eviction is based on the consequence that some of the beneficiaries living on the suit property may be required to give up their developed parcels to accommodate the new beneficiaries.

13. In as much as the Respondent cannot effect distribution without involving the Applicant, or seeking the courts intervention, the Applicant is dissatisfied with the decision appointing the Respondent as a co-administrator and the inclusion of other persons as children of the deceased. If stay is not granted, the Respondent may well seek to effect the distribution of the estate under the terms of **Musyoka J’s** decision. The possibility that the appeal may thereby be rendered nugatory is not farfetched.

14. The Respondent is evidently satisfied with the orders of **Musyoka J**, and if stay is not granted, there will be no ground or reason to stop the Respondent from pursuing the confirmation of the grant and the distribution of the estate to the beneficiaries, including himself and others who were recognized in the judgment appealed from. The very result the Applicant is apprehensive about. It is relevant that the subject matter is land that may be difficult to recover, once distributed to beneficiaries, some of whom may well dispose of their shares.

15. The Applicant has by her affidavits expressed apprehension the estate will suffer substantial loss if distribution proceeds on the basis of the judgment appealed from. She fears that the beneficiaries who have developed some of their assumed portions of the land may lose their investments. The fear appears rational in light of orders in the judgment for the cancellation of transactions in respect of the suit property, and the inclusion of new beneficiaries. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

See also **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR.**

16. It is my considered view in this case, that the estate, and by extension the Applicant, might suffer substantial loss if the stay order is denied and therefore there is a just cause in the court staying execution. However, the Respondent's interests must also be considered. In order to maintain an even keel between the interests of both parties, I would grant a conditional order to stay the execution of the lower court judgment.

17. The nature of this case does not lend itself to the demand for a security in the form of money or bonds. The Applicant has offered to deposit into court the title documents in respect of the estate property or to furnish an undertaking. I agree with the Respondent that two of the titles are in the names of persons not applying before this court, at least not directly. I note however the uncontroverted fact that the Respondent had in 2012 caused restrictions to be registered against any dealings in the subject titles [see annexures **SNK 6, 7, 8** and **9** to affidavit of the Applicant]. This court therefore is satisfied that the restrictions provide a firm security in favour of the Respondent and also serve to preserve the substratum of the appeal. This court therefore deems the said restrictions as such security and directs that they shall remain in place pending the determination of the appeal. In light of the nature of the dispute, the parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF NOVEMBER 2018

C. MEOLI

JUDGE

In the Presence of:

For the Applicant – Mr. Botany holding brief for Mr. Gathogo

For the Respondent – No appearance

Court Clerk - Nancy