



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 175 OF 2012**

**IN THE MATTER OF THE ESTATE OF MAGU MWENJE ALIAS PETER WANDI  
MWENJE (DECEASED)**

**AND**

**ANNAH WANJIKU WANDI.....PETITIONER**

**VERSUS**

**JANE MUTHONI MUCHIRA.....PROTESTOR**

**RULING**

1. **ELIUD MWENDIA WANDI** has brought an application dated 3<sup>rd</sup> November, 2015 brought under **Rules 49** and **73** of the **Probate and Administration Rules** for the following orders:
  - i. *That the hon. Court be pleased to hear this matter exparte in the first instance due to its urgency.*
  - ii. *That the hon. Court be pleased to stay execution of the judgment of the court made on 29<sup>th</sup> September, 2015 pending the hearing and determination of prayer 3 and 4 herebelow.*
  - iii. *That this hon. Court be pleased to stay execution of the judgment of the court made on 29<sup>th</sup> September, 2015 pending the hearing and determination of the appeal lodged before the court of appeal vide the Notice of Appeal dated 12<sup>th</sup> October, 2015.*
  - iv. *That costs be provided.*
2. The grounds upon which this application was brought were as follows:
  - a. *That the applicant has lodged an appeal against the judgment of this court vide Notice of Appeal dated 12<sup>th</sup> October, 2015.*
  - b. *That unless the application for stay is allowed the intended appeal would be rendered nugatory and make the applicant suffer irreparably.*
3. At the hearing of this application applicant's learned counsel **Mr. Magee** concentrated his energies on prayer 3 as prayer 1 and 2 had been spent. He submitted that the execution of the judgment given by this Court on 29<sup>th</sup> September, 2015 had began in earnest without involvement of the applicant and that developments carried out by the applicant even when the deceased in this cause was still alive are likely to be affected by the Respondent's possession of the part of the estate granted to her by this Court.
4. The applicant further submitted that the surveyor visited the land forming the estate and carried out survey work and sub-division pursuant of the judgment of this Court. He however, admitted that the houses were unaffected by demarcation. He further submitted that though the estate has

- been sub-divided the Respondent is yet to take possession of her portion and insisted that what she is occupying is less than  $\frac{1}{4}$  of an acre. Mr. Magee therefore argued that the application for stay was to stop the Respondent from taking possession of what the surveyor demarcated for her. He submitted that the issue of possession is an issue in the appeal and if the stay is not granted the applicant would be prejudiced in the appeal and that land matters being emotive it would be fair to give a chance to the applicant to mitigate his case to the highest possible level. According to him the Respondent will suffer no prejudice if stay is granted.
5. He further submitted that the appeal filed is not likely to take long and drew this Court's attention with a view to taking judicial notice that appeals at the Court of Appeal these days do not take long to be concluded. In his view the Respondent will not be denied the fruits of litigation for long.
  6. The Respondent opposed this application vide a replying affidavit sworn on 6<sup>th</sup> November, 2015 and through submissions made on her behalf by her learned counsel M/S Ndorongo. According to her the appeal filed is a delaying tactic to deny her her fruits of judgment. The Respondent deposed in her replying affidavit that she is now quite old at 86 years of age and would have preferred to enjoy her rights after litigation that has lasted for 19 years.
  7. The Respondent further deposed that the applicant refused to cooperate by refusing to execute requisite documents to enable each one of them get their respective titles. She further added that she is living on the estate together with her children as established by the trial magistrate Hon. N. M. Kiriba when she visited the suit property during the trial at the subordinate court.
  8. The Respondent further submitted that the application has been overtaken by events as the land forming the estate has been sub-divided and that form L.R. 7 (transfer by transmission) has already been registered at the lands office by Lands Registrar.
  9. M/S Ndorongo for the Respondent further submitted that the applicant had not satisfied the requisite conditions for stay of execution pointing out that he has not demonstrated what substantial loss he would suffer if stay is not granted as what is being sought to be stayed has already taken place. She added that the applicant will suffer no prejudice as no house was touched during demarcation and no house will be demolished as each party's house remained where it was before demarcation. The Respondent contended that what was remaining as far as execution was concerned was fencing and collecting of titles which she submitted were being processed.
  10. This Court has considered the application and the provisions of the law invoked by the applicant which is *Rule 73 of Probate and Administration Rules*. The provisions give inherent powers to this Court to make "any order as may be necessary for the ends of justice or to prevent abuse of the process of court."
  11. The applicant is applying for stay of execution of the judgment of this Court pending appeal which both parties admitted at the hearing of this application has already been filed and served. The only thing remaining is the hearing and determination of the same.
  12. Both parties to this application were in agreement that sub-division of the estate in this cause have already taken place pursuant to the judgment of this Court. The only point of contention was the issue of occupation with the Respondent maintaining that they have taken occupation and the applicant maintaining that the Respondent was only in occupation of  $\frac{1}{4}$  of an acre in the estate. If this is the position obtaining then the application before Court has substantially been overtaken by events and what is remaining to be stayed as admitted by the applicant is occupation by the Respondent and her children on the part that has been in the hands of the applicant.
  13. The applicant was challenged to demonstrate what prejudice or substantial loss he would suffer by the Respondent occupying her portion as granted by the judgment of this Court, and his response through counsel was that occupation was an issue at the Court of Appeal. This Court was however, not satisfied with the explanation given on the question of prejudice. The Respondent deposed in her replying affidavit that the applicant has been difficult and refused to cooperate to facilitate sub-division and transmission to the beneficiaries as per the judgment of this Court. The applicant through counsel denied from the bar that he was reluctant. However I find that the applicant did not respond on oath what the Respondent deposed about his reluctance to execute requisite documents (R. L. 19 and L.R. 7) to facilitate survey work and transmission.
  14. This Court finds therefore that the Deputy Registrar was in order to execute the documents on behalf of the applicant. But what is more significant is that the interest of justice must be balanced in order to address the concerns of all the parties in this cause. The applicant has appealed and he

is entitled to that right of appeal. This Court will guard that right against anything that is likely to take away that right. At the same time the interest of justice cannot be oblivious of the rights of all the parties in this cause as per the finding of this Court and the need to ensure that no one is unfairly denied that right especially given the age of the case and the Respondent herein.

15. On the basis of the above, this Court finds that what the applicant is seeking to stay has already taken place. If he was to suffer any prejudice which the applicant was unable to demonstrate then the same has already been suffered. An order of stay of execution will not be of any assistance to the applicant. The only thing that would prejudice the applicant is if the Respondent was to get the title to her portion and dispose it to the 3<sup>rd</sup> parties so that in the event of the appeal filed succeeding part of the estate would be in the hands of 3<sup>rd</sup> parties. In the light of this, this Court declines the reliefs sought in the application dated 3<sup>rd</sup> November, 2015 but restricts the Respondent or any of the named beneficiaries in this cause from alienating or disposing any part of their respective portions pending the hearing and determination of the appeal. The parties are however, at liberty to utilize their respective portions as per judgment of this Court to earn a living. That will serve the ends of justice and prevent abuse of Court process. That is the order of this Court and it is so ordered.

*Dated and delivered at Kerugoya this 28<sup>th</sup> day of January, 2016.*

**R. K. LIMO**

**JUDGE**

28.1.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Kiragu for applicant present

Ndorongongo absent for Respondent

Eliud Mwendia present

Albert Njagi present

Elvin Wanjohi present

Interpretation English-Kiswahili

**COURT:** Ruling dated, signed and delivered in the open Court in the presence of Kiragu for the applicant and in the presence of Eliud Mwendia, Albert Njagi and Elvin Wanjohi.

**R. K. LIMO**

**JUDGE**