



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS 203 OF 2014

IN THE MATTER OF THE ESTATE OF ALBERT KIHARA NDUNYU (DECEASED)

MARGARET N. BARAGU.....APPLICANT

VERSUS

MAINA NDUNYU.....RESPONDENT

RULING

PLEADINGS

By an application filed on 3rd June 2014 brought under **Order 51 rule 1 of the Civil Procedure Rules 2010; Sections 1A, 1B & 3A of the Civil Procedure Act**; the Applicant sought the following orders;

- a. The Respondent, his agents and/ or servants give vacant possession of the property known as Nairobi /Block 77/177 Buru Phase V house No. 73.
- b. The Respondent, his agents and/ or servants be evicted from the property known as Nairobi /Block 77/177 Buru Phase V house No. 73
- c. The Officer Commanding Buru Police Station (OCS) to supervise enforcement of any orders given.
- d. The Costs be borne by the Respondent.

The Applicant relied on the following grounds;

The property Nairobi Block 77/177 Buru Phase V House No 73 belongs to the estate of the late Albert Kihara Ndunyu husband to the Applicant Margaret N. Baragu.

Upon the deceased's death, the Respondent's eldest brother, Maina Ndunyu forcefully took over possession of the said property.

The Applicant widow to the deceased applied for grant of letters of administration and was granted in **Succession Cause 271 of 2003**. She filed summons for confirmation of grant and the Respondent objected to the confirmation of grant. The objection and summons were heard interpartes culminating with the judgment of Hon. Justice Onyancha of 26th November 2012, which was in her favor. She obtained confirmation of grant on 4th February 2014.

The Respondent filed a Replying Affidavit on 18th November 2014 and stated that the suit

property was where his brother the deceased resided with his son until he died. After that he took over and has been in charge.

The Applicant left the deceased a long time ago and did not live with him. Following the Judgment of Hon. Justice Onyancha of 26th November 2012 he was dissatisfied by the outcome and he lodged an appeal evidenced by copies of Notice to Appeal dated 27th November 2012 and the Memorandum of Appeal (unstamped and undated) He alleged the Court was yet to supply him with typed copies of the proceedings. The appeal is on course and status quo should be maintained.

The Applicant filed a further affidavit on 10th June 2015 in reply to the Respondent's Replying Affidavit. The Applicant stated that the issue of the suit property, Nairobi/Block/77/1777 Buru Buru Phase V house Number 73 was canvassed and determined in the trial and judgment delivered on 26th November 2012. The Respondent's objection was dismissed and confirmed grant issued to the Applicant as widow of the deceased.

The Respondent's intention to appeal against the said judgment has not materialized. The Respondent has not pursued the appeal. He continues to enjoy possession of the house and or rent from the house. The Respondent's continued occupation of the property is unlawful as it amounts to trespass

On the other hand she has all court orders in her favor in this matter, yet she continues to suffer. She has 2 children pursuing college education and they are denied access and use of their home the suit property. The Applicant has suffered substantial prejudice and loss from the Respondent's refusal to give vacant possession of the suit property.

The Respondent filed a Further Replying Affidavit on 23rd September 2015 in response and he reiterated the content of his affidavit of 18th November 2014.

HEARING

The hearing of the Application dated 3rd June 2014 was by Counsel for the Applicant who informed the Court in detail the events of this matter as outlined in the pleadings filed culminating with the present application.

The matter was adjourned to 29th June 2015 to allow the Respondent obtain legal representation to proceed with the matter as he requested from the Court.

On 29th June 2015 Counsel for the respondent informed the Court he did not have instructions to proceed. The Respondent sought for the second time to obtain legal Counsel. The Court in the interim period ordered that the Applicant and Respondent share the rent equally at Ksh. 10,000/- each. The Court adjourned the matter to 28th September 2015.

On 28th September 2015, the Respondent did not attend Court; no reasons were presented to Court to explain his absence from Court.

The matter proceeded *ex parte* and the judgment date issued.

DETERMINATION

The Court considered the pleadings filed and oral submissions by Learned Counsel for the Applicant and finds as follows;

The matter regarding the suit property Nairobi /Block 77/177 Buru Phase V house No. 73 was

heard and determined before a Court of competent and equal jurisdiction. This Court has perused through the content of **Succession Cause 721 of 2003**. The Court conducted *interpartes* hearing culminating with the judgment of 26th November 2012. The Court held vide **Section 35 of the Law of Succession Act Cap 160**; the widow and children of the deceased are beneficiaries of his estate and not his brother.

The matter is closed and cannot be reopened in the High Court for full hearing again and can only be the subject of an appeal unless it is a review based on the statutory requirements in the CPR 2010.

The Respondent purports to have filed an appeal. The Notice of Appeal of 27th November 2012 is not proof of a filed appeal. The memorandum of Appeal attached to the Replying affidavit of 18th November 2014 is unstamped (what is visible is a stamp that is cancelled) and undated to show it is filed in the Court of Appeal. The Respondent pleaded that he sought typed proceedings of the hearing and judgment of 26th November 2012 in Succession Cause 271 of 2003. He did not provide a letter requesting the same or official requisite payments made to facilitate the typing of the said proceedings. So the claim that his appeal is stifled by the High Court delaying release of the typed record is not borne out by evidence. In a nutshell the Respondent has deliberately stalled the hearing of the appeal for 4 years now. The matter cannot abate indefinitely.

The Applicant pursued the matter through the legal process to the logical conclusion. The Applicant is entitled to the fruits of the judgment of the Court. Relying on the 2 following cases;

- a. **HIGH COURT CIVIL CASE 231 of 2000 (MSA)**
- b. **HIGH COURT CIVIL APPEAL 372 of 2012 (NBI)**

Both authorities on the issue of stay of execution applications cited the case of

- c. **MACHIRA T/A MACHIRA & CO ADVOCATES VS EAST AFRICAN STANDARD (NO2) [2002] KLR 63;**

The Court stated as follows;

to be obsessed with the protection of an appellant or intending appellant in total disregard of fleeting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.

In the absence of any evidence for the Court to consider why the appeal by the Respondent has taken a long time and why he failed to appear in court to put his case forward to this Court, the Court grants the application of 3rd June 2014 as pleaded.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2016

M.W. MUIGAI

JUDGE

In the presence of: