



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.56 OF 2001

In the Matter of the Estate of M'Mukindia M'Kuugia alias s/o Mukindia (Deceased)

M'MBUI MUKINDIA.....PETITIONER/APPLICANT

Versus

NKANATA MUKINDIA.....OBJECTOR/RESPONDENT

RULING

[1] I have before me a Chamber Summons Application expressed to be brought under Rule 49 and 73 of the Probate and Administration Rules and Section 47 of the Law of Succession Act CAP 160 of the Laws of Kenya. The significant order sought in the application is: *A temporary stay of execution, enforcement or implementation of its orders made herein on 31st July 2009 pending the filing of the Record of Appeal, hearing and determination of the Appeal at the Court of Appeal of Kenya at Nyeri.* They also sought that costs be in the cause.

[2] The said application is premised upon the following grounds:

- a. **This honourable court made an order herein on 31st July 2009 for subdivision of land parcel No. Abothuguchi/U-Chure 434 and for the sharing of the same equally amongst the surviving children of the deceased.**
- b. **The Petitioner/Applicant was dissatisfied with the said order and proceeded to lodge a Notice of Appeal on 4th August 2009 which was received by the Deputy Registrar on 6th August 2009.**
- c. **This honourable court granted the requisite leave to the Petitioner/Applicant on 18th April 2013 for purposes of the said appeal.**
- d. **The Petitioner/Applicant is therefore only waiting to be supplied with a copy of the proceedings and judgment herein to enable him file the record of appeal.**
- e. **The said proceedings were applied for on 7th August 2009 but are yet to be supplied.**
- f. **The objector/respondent is now actively pursuing implementation, execution or enforcement of the orders made on 31st July 2009 and the District surveyor has issued notice for a visit to the said land parcel on 29th August 2015 for subdivision purposes.**
- g. **The said appeal will be rendered nugatory unless an order for stay of implementation, execution or enforcement of the said orders is made forthwith.**

Brief facts

[3] It is true this honourable court made an order on 31st July 2009 for the subdivision of land parcel No. ABOTHUGUCHI/U-CHURE/434 and sharing of the same equally amongst the deceased's surviving children. It is this order the Applicant is seeking stay of execution. The basis of the application is that he lodged a Notice of Appeal on 4th August 2009 and immediately applied to be supplied with copies of certified proceedings. He also had sought leave to file the requisite record of appeal which was granted by the court on 18th April 2013. The Applicant further contended that the Respondent was now actively pursuing the execution of the orders made on 31st July 2009, despite the pendency of the said appeal and that unless an order for stay of execution of the orders made on 31st July 2009 is issued, the whole substratum of the Appeal would be lost.

[4] The Respondent opposed the Application through a Replying Affidavit filed in court on 12th November 2015. He contended inter alia: (1) that the intended Appeal is just a delaying tactic designed to forestall the court's judgment; (2) that the Applicant has been indolent; and (3) that he was not taking the court seriously. He stated that the Applicant had not shown the steps he had taken to obtain copies of proceedings and judgment.

[5] On 16th November 2015, it was agreed that this application be disposed of by way of written submissions. The Applicant submitted in support of the above grounds but added that; it was mandatory in law for a party intending to appeal to the Court of Appeal to seek leave of the court; and that he had an arguable appeal with a high chance of success, therefore, any execution herein will occasion him irreparably. The Respondent also filed written submissions in which he amplified his opposition to the application. He emphasized that the Applicant applied for proceedings and judgment on 7th August 2009 but he had not shown any steps which he has taken to obtain the proceedings for the last 6 years. Consequently, the Respondent urged the court to dismiss the application.

[6] I have carefully considered the application, the rival submissions by the parties and the authorities relied upon by the Applicant. The main issue for determination in the present case is whether the Applicant merits a stay of execution. This application for stay the execution of a decision of the court was made pursuant to **Rule 49** of the **Probate and Administration Rules** which provides that:

“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”

This application has also invoked the inherent jurisdiction of the court to order stay of execution in order for the ends of justice to be met. I should say that once a judgment on distribution of the estate is given, all beneficiaries have a legitimate expectation to receive their respective entitlements in the estate as a matter of right. The person appealing also has a right to his appeal. Thus, the court has to perform a novel balancing act of these two rights. Therefore, the right to appeal must be weighed against the right of the beneficiaries to receive their respective entitlement in the estate of the deceased. The test therefore is that, the court will not postpone the right of the beneficiaries to receive their entitlement in the estate except where the person appealing has shown sufficient justification. It becomes imperative for the person appealing not to be guilty of unreasonable delay in applying or in taking reasonable steps to vindicate his right. Again, he must show that he will suffer substantial loss if stay is not granted. I am content to cite the case of ***M/S Port Reitz Maternity vs. James Karanga Kabia Civil Appeal No. 63 of 1997***, that:

That right of appeal must be balanced against an equally weighty right; that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.

Indolence of the person appealing

[7] In applications such as this, matters of inordinate delay or indolence of the person appealing are a fundamental consideration. Arguments that the Applicant has not shown the steps he has taken to procure proceedings and judgment for six years now have featured prominently in this case. Thus, in the present

case this Court must satisfy itself that the Applicant's application is not aimed at frustrating the Respondent from reaping the benefit of the judgment of this court. What are the obtaining circumstances herein? In the instant case the decision which the Applicant is appealing against the decision of this court that was made on 31st July 2009. Subsequently, thereafter the Applicant applied for certified copies of judgments and proceedings on 7th August 2009 and was granted leave to appeal on 18th April 2013. A considerable period of time- about seven (7) years now- has passed by. Whereas the Applicant contended that he was yet to be supplied with certified proceedings and judgment, he did not show the exact steps he had taken to have the same supplied to him. I have not been shown any follow-up or letters of reminder or otherwise. In view of the foregoing, the Applicant has not exhibited *bona fide* desire to pursue his appeal. In fact, the allegations by the Respondent that the Applicant is using the appeal and this application to prejudice the rights of the Respondent make a lot of sense in the circumstances of this case. Similarly, the Applicant is not an example of a diligent and keen suitor; and equity would deny such person remedy. Despite his claim that the substratum of the appeal will be taken away by the execution, the truth is that, this Court is not satisfied that the Applicant deserves a stay of execution in the circumstances of this case. Judicious exercise of discretion dictates that I should decline the order sought. The upshot therefore is that I find the Applicant's application dated 28th September 2015 to be devoid of merit and is hereby dismissed. This being a succession matter I will make no order as to costs. It is so ordered.

Dated, signed and delivered in court at Meru this 15th day of February 2016

F. GIKONYO

JUDGE

In the presence of:

Mr.Kaimenyi advocate for B.G. Kariuki for Objector

No appearance for the petitioner.

F. GIKONYO

JUDGE