



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO 51 OF 1998

In the Matter of the Estate of Rumuri Kireri (Deceased)

REBECCA MUNGA SOKERA.....1ST APPLICANT

STEPHEN KAAI.....2ND APPLICANT

Versus

LAZARUS MUKINDIA.....PROTESTOR

RULING

Extension of time to file appeal and stay of execution

[1] The application dated 22nd July 2015 is a twinning of a request for:

- (a) Enlargement of time to file appeal; and
- (b) Stay of execution pending intended appeal

The said application is expressed to be made under Section 47 of the Law of Succession Act, Rules 49,59 and 73 of the Probate and Administration Rules as well as article 165 (2) (a) of the Constitution of Kenya, 2010. The application is premised upon the supporting Affidavit sworn by Lazarus Mukindi on 22nd July 2015 and other grounds set out in the application and the submissions filed on 14th March 2016. The Protestor also filed a Supplementary Affidavit sworn on 26th February, 2016 from which he also drew support to the application before me.

[2] From the above pleadings filed by the protester, the major grounds for applying are that his protest filed on 8th August 2014 was dismissed on 4th June, 2015 upon a preliminary objection raised by the applicants. Again, he complains that he was not advised by his counsel M/s. Murongo & Co. of the adverse effects the judgment dated 26th June 2014. And that, it was only after his protest was dismissed the adverse effects of the judgment dawned upon him. He now feels aggrieved and needs to appeal against the said judgment. He claims to be innocent litigant who should not be visited with the failure of his counsel to render proper legal advice to him on this matter. He stated that unless this judgment is stayed, he will be disinherited forever, thus, suffering irreparable loss. Accordingly, he prayed for stay of execution of the said judgment pending appeal. He took the view that stay orders will not occasion any harm upon the Respondents. He also contended that it is only fair and just that his application should be granted.

[3] In addition to the foregoing the protestor submitted that his application is competent and properly before the court. He appealed to the powers of the court which he said should avert injustice and disasters in law. In support of this proposition he relied on the case of **DECALINA NJANAIRO vs .DAMULTON NO. 30 of 1972 E.A.** He emphasized that his application should be allowed in order to protect his fundamental rights. He claimed that there was an error or omission in the case of the record because of misinterpretation of Section 7 of the Registered Land Act – repealed. He also made a claim of adverse possession. His submission was that he had stayed on the land for 39 years and had developed it – all that will be lost if the judgment is not stayed and that is serious deprivation of his right. He contended that allegations that he was a stranger to the family of the Respondents are, therefore, a fabrication to deprive him of his property rights acquired through adverse possession of LR. Nyaki/Thuura/1165. But, on another instance, he also averred that he inherited the suit land from his father, M'Irera M'Amburugua who died in 1997. He annexed a letter by the Chief dated 22nd February 1983 which he says confirmed his father's ownership of the land. On the basis of the above he prays for his application to be allowed.

Respondents opposed application

[4] The Respondents opposed the application and filed two replying affidavits sworn on 15th September, 2015 and 29th February 2016. The major averment was that the protestor's application is an afterthought and is purely made to frustrate the realization of the judgment herein. They said that the appeal is even a nonstarter as all matters he is raising now were determined by the court and it was found that he was a stranger to the estate. His protest was also dismissed by the court for being an appeal in disguise. The 2nd Respondent also averred that the protestor never had any property and never developed the estate property as he alleges. His claims are, therefore, hollow and vexatious and should be dismissed. The Respondents took a quick swipe at the claim by the Protestor on Chief's competence and power to determine dependants or beneficiaries of the estate of a deceased person.

[5] The Respondents also filed submission on 16th February, 2016 and 16th March, 2016 in which they amplified the foregoing arguments. They emphasized that the Protestor went to sleep since 16th June, 2014 until 1st September, 2015 when he filed the application. They urged that all the legal ventures of filing protests were mere sideshows by the Protestor and that does not explain the said inordinate delay after he was actually aware of the judgment in question. The Respondents thought it is significant to note that this cause was commenced in 1998 and it is time this litigation is brought to an end. To them there is therefore no good reason to exercise discretion in favor of such dilatory suitor. Again, the Respondents argued that the Protestor has come to court with unclean hands and should not be accorded any equity. They urged the court to see through the intentions of the Protestor which is to keep using the estate property to the detriment of the rightful owners of the estate property. The Respondents released more salvos: that the Protestor in his evidence at page 16 of the typed proceedings confessed that he lives on his father's land namely L.R NYAKI/THUURI/685 which adjoins the estate property.

DETERMINATION

[6] Before me are two requests; (a) to enlarge time for filing appeal; and (b) order a stay of execution of the judgment of this court dated 26th June 2014. I will deal with the request for enlargement of time first. Enlargement of time is a discretionary remedy. Therefore, for the court to enlarge time for doing an act or taking a step or proceeding, the party applying should show that there has been no inordinate delay in so applying. There may be no precise measure of what amounts to inordinate delay, but looking at the circumstance of each case, any delay which is beyond acceptable limits is inordinate. Also the court should examine the case to establish whether the delay has been explained. If no reasonable explanation has been given for the delay, the delay is inexcusable and the court should not exercise its discretion in favour of the applicant. Applying this test to this case, I note that the judgment herein was delivered on 26th June 2014 and the Protestor filed this application on 22nd July 2015- slightly over one year thereafter. Contrary to the submissions by the Protestor that he was not aware of the effects of the judgment dated 26th June 2014, the material before this court clearly show that the Protestor was fully aware of, and the purport of the judgment herein. The judgment arose from an application for revocation of the grant of

representation of the estate of the deceased which had been issued to the Protestor on 6th October 1998 and confirmed on 19th September 2001. He even filed a Protest on 8th August 2014 urging the court to consider him in the confirmation as one of the dependants of the estate of the deceased. See his affidavit of Protest and also the Ruling of the court dated 4th June 2015. Therefore, the allegation that the Protestor did not receive proper legal advice from his advocates at the time is neither here nor there- it lacks any substance and is awfully feeble. Again, the reason given that he only became aware of the adverse effects of the said judgment is untenable. Accordingly, the Protester has not given any reasonable explanation for the inordinate delay herein. He does not deserve the discretion of this court. On that basis, I refuse to enlarge time to file appeal out of time.

[7] I turn to the application for stay of execution. In view of the finding on the request for enlargement of time, I should and I hereby decline the request for stay of execution of the judgment herein. Nonetheless, I would still refuse it on other substantive grounds. In view of the finding on the request for enlargement of time, I do think any substantial loss would occur. Similarly, an application for stay of execution should always be made promptly without undue delay. I have already stated that this application comes after one year since the decision of this court was made. The delay has not been explained at all. As such, the application for stay of execution would still fail.

[9] Before I close, I wish to state the following. First, I have perused the record with scrupulous care, and my overall impression of the entire circumstances of this case is that the Protestor is bent at prolonging this case for as long as he can in order to keep away the beneficiaries of the estate from the estate property. The Protestor did not come to equity with clean hands and he should not expect equity to aid him. The record at page 16 of the typed proceedings clearly shows that the Protestor lives on his late father's land, namely No 685 which is quite distinct from the estate property. Second, I should state that there were other substantive arguments which were presented by the Protestor especially on adverse possession and that he allegedly inherited the estate property from his late father. But I will not consider them for the following reasons;

- (a) The question of adverse possession is not a matter I can determine in an application of this nature; and
- (b) The allegation that he inherited the estate property from his late father is misplaced as these proceedings do not relate to the estate of his late father, one M'Irera M'Amburugua- it relates to the estate of RUMURI KIRERA;
- (c) The above two arguments are in complete contrast and totally irreconcilable.

[10] The upshot of my analysis of the case is that I dismiss the application dated 22nd July 2015 with costs to the Respondents. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of July 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Gikunda advocate for administrators

Applicant in person - present

F. GIKONYO

JUDGE