



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 543 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE LATE PHARIS MWANGI NGIGE (DECEASED)**

**SAM KARUGA MWANGI.....1ST APPLICANT**

**WILSON MACHARIA MWANGI.....2ND APPLICANT**

**GATHURA WA MWANGI.....3RD APPLICANT**

**VERSUS**

**GIBSON GACHERU MWANGI.....RESPONDENT**

**RULING**

This ruling is in respect of the application dated 5th July, 2012 and another dated 27th August, 2014.

By way of a notice of motion dated 5th July, 2012 Sam Karuga Mwangi, Wilson Macharia Mwangi and Gathura Mwangi (hereinafter the applicants) sought orders:

- a) Spent
- b) That the Honourable court do order the Respondent to vacate LR Nos.NYANDARUA/KAHURO 3346, 3347 and 3348 belonging to the applicants which land he has been using single handedly.
- c) That the OCS Engineer Police Station do give security to the surveyors to place the beacons the respondent had uprooted from LR Nos.NYANDARUA/KAHURO 3346, 3347 and 3348.
- d) That the OCS Engineer Police Station do ensure the applicants have taken possession of their parcels LR Nos.NYANDARUA/KAHURO 3346, 3347 and 3348
- e) That costs of this application be provided for.

The application is premised on two (2) grounds namely:

1. That the grant in this case was confirmed on 22nd March, 2000.
2. That since the grant was confirmed, the respondent has never allowed the applicants to take possession of their parcels L.R.Nos.Nyandarua/Kahuro 3346, 3347 and 3348 respectively and also

on the supporting affidavit of Sam Karuga sworn on his own behalf and with authority of the other two (2) applicants.

The gist of the grounds and the Supporting Affidavit is that a grant of representation was issued in respect of the estate of Pharis Mwangi Ngige to Phylis Kabura Mwangi (the mother to the deponent) and Tabitha Wangari Mwangi.

That the said Phylis Kabura Mwangi was given parcel of Land L.R. No.Nyandarua/Kahuro/3343 and who in turn subdivided the same equally to her four male children.

The respondent was allocated parcel LR No.Nyandarua/Kahuro/3345 and which was registered in the names of Phylis Kabura Mwangi to prevent the respondent from disinherit his first wife who is estranged.

An application to annul the grant was unsuccessful and was dismissed on 18th May, 2012.

The respondent is accused of forcefully using the applicant's parcels of land Nos.3346, 3347 and 3348.

It is urged that the intervention of the OCS Engineer Police Station is necessary to offer security to allow re-erection of beacons and to allow the applicants take possession of their respective parcels of land.

The application is opposed and in a Replying affidavit Gibson Gacheru Mwangi, (hereinafter the respondent) denies forcefully using Land parcels Nos.Nyandarua/Kahuro 3345, 3346, 3347 and 3348. He states that no survey has ever been done to demarcate parcel numbers 3345 3346, 3347 and 3348. He states that parcels Nos.3345 and 3346 lie where he has developed extensively and the applicants' intent is to have his hard earned development brought down.

He states that having filed an application for stay of execution and an appeal, it is only fair that this application awaits the outcome of the appeal.

The 2nd application is the one by Gibson Gacheru Mwangi (hereinafter Gibson) dated 27th August, 2014).

Through a summons premised on **Section 47** and **rule 73** of the **Probate and Administration Rules**, Gibson seeks orders:

1. Spent
2. Spent
3. That pending hearing and determination of the intended appeal against the entire decision of Hon. Justice H.A. Omondi in the judgment dated 18th May, 2012, to the Court of Appeal, the honourable court be pleased to issue an order staying execution of the judgment issued on 18th May, 2012.
4. That costs of this application be in the cause.

In support of the application is his affidavit sworn on the 27th August, 2014 and grounds listed on the face of the application namely:

- 1) That on 18th May, 2012 Hon. J.A. Omondi delivered the judgment in this matter.
- 2) That in the judgment, the court dismissed the Applicant's case.
- 3) That the Applicant herein applied for a review of the orders contained in the judgment dated 18th May, 2012.

- 4) That vide a ruling delivered and dated 11th July, 2014, the court dismissed the Applicant's application with costs to respondents
- 5) That in view of the above foregoing, the Applicant had duly filed a Notice of Appeal and also applied for copies of the proceedings for purposes of pursuing an appeal with the Court of Appeal
- 6) That unless the application was allowed, there was to be execution of the judgment issued in this matter
- 7) That if the judgment was executed, the same would create a new state of affairs (status) in the suit property, with the Applicant having been evicted therefrom pursuant to the orders of the courts.
- 8) That execution of the judgment issued in the matter would have rendered the intended appeal nugatory.
- 9) That the Applicant brought the application not to derail and restrain the Respondent from enjoying the fruits of the judgment but rather in quest of a just determination of the dispute in the Court of Appeal taking into account the issue the Applicant had with regards to the judgment of the honourable Judge
- 10) That the damage that would be suffered by the Applicant if the judgment was executed would be immense and irreparable and the ends of justice would be defeated.

The gist of the affidavit and grounds raised is that the applicant intends to appeal the entire judgment by Omondi J. He exhibits a notice of appeal. He fears that if stay is not granted, he shall be evicted from the land thus rendering his appeal nugatory.

The application is opposed and in a Replying Affidavit, Sammy Karuga Mwangi (hereinafter Sammy) depones that the notice of appeal herein is only meant to frustrate other beneficiaries from enjoying their parcels of land which the applicant has continued tilling to the detriment of other beneficiaries.

The attention of court is drawn to a letter by Gibson's lawyer dated 26th June, 2012 in which it was stated that Gibson had no problem with the judgment of the court and he sought to have the winning party foregoing costs.

It is urged that if a stay was to be granted, then it ought to be on condition that Gibson ceases use of all the land other than his rightful parcel being parcel No.Nyandarua/Kahuruko/3345.

Both counsel for the parties have filed written submissions on both applications herein.

I have had occasion to consider the applications, the supporting and opposing affidavit evidence and the learned submissions of counsel.

I elect to determine the application by Gibson dated 27th August, 2014 first as the outcome thereto would have a direct bearing on the application dated 5th July, 2012 more so if the application dated 27th August, 2014 was to be successful.

Gibson seeks a stay of execution of the judgment of the court principally on grounds that he has filed a notice of appeal and secondly, if the judgment is executed is shall create a new state of affairs (status) in the suit property as he is likely to be evicted. In countering this, it is indicated by the Respondents that Gibson's only intent is to keep other beneficiaries away from their entitlement. Indeed a letter is exhibited showing that Gibson had no problem with the judgment of court and his complaint was only on costs.

The granting of a stay of execution pending appeal is a discretionary power bestowed on the court. Like all discretionary powers, the same must be exercised judiciously.

The principles applicable in an application of this nature are well summarised in this court's decision (Kuloba, J) in Machira t/a Machira & Co. Advocates V. East African Standard, Civil Case No.612 of 1996 thus:

**“ 1.In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interest of one party.**

**2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruit of his judgment or of any decision of the court giving him success at any stage.**

**3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.**

**4.In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss will result.**

**5.In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.**

**6.Where no pecuniary tangible loss is shown to the satisfaction of the court, the court will not grant a stay.**

**7.The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.**

**8.In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.”**

Looking at the application dated 18th July, 2014 and applying the principles aforesaid, the application must fail for the following reasons:

i. Judgment in this matter was delivered on 18th May, 2012. It is not until 18th July, 2014 that an application for stay is filed. The court considers the delay herein inordinate and inexcusable.

ii. A successful party is entitled to the fruits of his judgment. The Respondents have been kept away from the fruits of judgment for approximately five (5) years and counting. Notably, the applicant has indicated in writing his satisfaction with the judgment of court in the letter dated 26th June, 2012 and the seriousness in the pursuit of the intended appeal is questionable. It is noteworthy too that the notice of appeal is taken out on 24th July, 2014 and on the material before me, it is not clear whether the appeal has actually been filed to date.

iii. The applicant's bonafides are questionable in that he appears to clutch on any straw along the way to derail the implementation of the judgment of court herein. The review application dated 28th January, 2013 that he lodged in court is a case in point.

To quote Kuloba J in the Machira Case (supra):

**“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting 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 principles for the exercise of judicial discretion.”**

With the result, I find the application dated 24th July, 2014 completely without merit and dismiss the same with costs to the Respondents thereto.

Onto the application dated 5th July, 2012. In essence, this application seeks enforcement of the judgment of this court of 18th May, 2012. The Respondent's mainstay against this application is that if the judgment is implemented, he stands to lose major developments made in the last forty (40) years. This is not supported by any empirical evidence. Again, any form of development is quantifiable and it is not shown that the intended appeal is arguable and stands chances of success. Indeed there is no evidence of a filed appeal.

Having dismissed the application for stay above, my considered view is that the applicants in the application dated 5th July, 2012 ought to enjoy the fruits of their judgment. On the material before me, this will only be possible if the orders sought in the application dated 5th July, 2016 are allowed.

Consequently and in order that the orders of court of 18th May, 2012 are given effect I will allow the application dated 5th July, 2016 and make the following orders:

- (a) The Respondent do vacate LR Nos.NYANDARUA/KAHURO 3346, 3347 and 3348 belonging to the applicants which land he has been using single handedly.
- (b) The OCS Engineer Police Station to give security to the surveyors to place the beacons the respondent has uprooted from LR Nos.NYANDARUA/KAHURO 3346, 3347 and 3348.
- (c)The OCS Engineer Police Station do ensure the applicants have taken possession of their parcels LR Nos.NYANDARUA/KAHURO 3346, 3347 and 3348.
- (c)Each party to bear its own costs.

**Dated, Signed and Delivered at Nakuru this 27th day of July, 2016.**

**A. K. NDUNG'U**

**JUDGE**