



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL &ADMIRALTY DIVISION

CIVIL CASE NO. 427 OF 1974

WAITHIRA GACHINO ::::::::::: PLAINTIFF/APPLICANT

VERSUS

KAMAU KABURU ::::::::::: 1ST DEFENDANT/RESPONDENT

NGANGA KABURU ::::::::::: 2ND DEFENDANT/RESPONDENT

R U L I N G

1. The application before the court is a **Notice of Motion** filed in court on 7th October 2014 and filed in court on the same day. It is filed under Order 42 Rules 6 (1) and 6 (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all enabling provisions of the law. The application seeks the following orders:-
 1. *That this application be certified as urgent and be heard ex-parte in the first instance.*
 2. *That there be an order of stay of execution of the Ruling/Order of this court delivered by Hon. Justice Ogola in HCCC No. 427 of 1974 Nairobi delivered on 25th July 2014, until the application for stay is heard and determined.*
 3. *That there be a stay of execution of the Ruling by Hon. Justice Ogola in HCCC No. 427 of 1974 Nairobi delivered on 25th July 2014, pending the hearing and determination of the Appeal to the Court of Appeal against the said Ruling/Order under such terms as the court may deem fit.*
2. The application is premised on the several grounds stated therein and is supported by affidavit of **Francis Wambiru Kibiro** dated **7th October 2014**, with its annexures. The application is opposed by the Respondent's replying affidavit sworn on 27th October 2014. Parties filed written submission to the application.
3. The brief history of the application is as follows. On 4th November 2011 Justice Leonard Njagi delivered a Ruling herein in favour of all the parties in the suit, in the following terms:-
 1. *That the suit property be divided into five equal plots to be shared among the Plaintiff and the other four brothers namely:-*
 - a. *Waithira Gachino alias Mukurata Waithira Kibiro,*
 - b. *Kibiro Kaboro,*
 - c. *Matheri Kaburu alias Thuo Kimani,*
 - d. *Kamau Kaburu lais Mwangi Muchai,*
 - e. *Ng'ang'a kaburu.*
 2. *That the Plaintiff be allocated the portion where her dwelling place presently lies.*
 3. *That the Deputy Registrar be and is hereby authorised to sign the requisite documents to facilitate the said sub-division and transfer including the application for consent of the relevant control board, the mutation forms, the transfer of land documents and*

necessary documents to ensure the smooth and peaceful sub-division and transfer of the said portions of land to the above named persons.

4. That each party shall bear its own costs of the application.

4. The Plaintiff was not happy with the said Ruling and sought to appeal the same. Vide the Plaintiff's Notice of Motion application dated 1st December 2011, the Plaintiff sought a stay of execution and of the proceedings to enable the Plaintiff file and prosecute the intended appeal. In the Ruling of this court dated 8th May 2012 the court was not convinced that the Plaintiff merited the stay pending appeal, but the court nonetheless allowed the application and a stay of execution was granted pending the hearing and determination of the intended appeal to the Court of Appeal. At this juncture, I should note that the said appeal has to date never been lodged and appears to have been overtaken by events as the Applicant appears to never have followed the issue since the said Ruling. By an application dated 7th February 2014, the current Applicant brought an application urging this court to substitute him for the Plaintiff since the Plaintiff had died on 14th September 2012 – about four months after the Plaintiff had secured the said stay pending appeal. At the same time the Defendants also filed an application dated 22nd October 2013 seeking that the said stay orders granted to the Plaintiff in 8th May 2012 be vacated and the Defendants be allowed to execute the decree of 4th November 2011. The above two applications were heard together and a Ruling delivered on 25th July 2014, with the results that the Plaintiff's application for substitution of the Plaintiff was dismissed while the Defendant's application for the vacation of the stay order of 8th May 2012 was allowed.

The current application now seeks the stay of execution of the Ruling of this court of 25th July 2014 pending the hearing and the determination of the Appeal to the Court of Appeal against the same.

5. I have considered the submissions of the parties in this matter. There is, in my view, only one issue for this court to determine in order to reach a Ruling in this matter, and that is:-
1. ***Whether the orders sought are tenable and whether the Applicant is abusing the process of this court.***
6. The Rulings of this court dated **4th November 2011, 8th May 2012** and **25th July 2014** are on record and they speak for themselves. When the Plaintiff came to court with the application dated 1st December 2011 seeking stay pending appeal, this court allowed this application on 8th May 2012. The Plaintiff never made any efforts to appeal although it appears he may have been sickly considering that he passed on on 14th September 2012, about four months after the stay was granted. It is also noteworthy that although the current application is seeking stay of execution pending appeal, there is no evidence that a Notice of Appeal has been filed. It is difficult not to reach the conclusion that the Applicant, who is duly represented by a counsel, is not abusing the court process.
7. More importantly, however, is the fact that pursuant to the Ruling of this court dismissing the application by the intended Plaintiff to be substituted for the deceased Plaintiff, the suit herein stood abated as against the deceased Plaintiff's estate and that being so, this court would be acting in vain to stay those orders since there is nothing to stay.
8. Further in the Ruling dated 25th July 2014 the Defendants were granted the orders they sought which were vacating the stay order of 8th May 2014 and also allowing the Defendants the liberty to execute the Judgement of 4th November 2011. I have no reason to stay those orders which were granted to the Defendant.
9. The upshot of the matter is that I find no merit in the current application which I herewith dismiss with costs to the Defendant/Respondent.

Orders accordingly.

READ, DELIVERED DATED AND AT NAIROBI THIS 30TH DAY OF JANUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Muriithi holding brief for King'ori for the Plaintiff/Applicant

M/s Ngonde holding brief for Nyagah for the Defendants/Respondents

Teresia – Court Clerk