



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 624 OF 2008

***(IN THE MATTER OF THE ESTATE OF THE LATE IBRAHIN GIKARIA NDONG'O alias
GIKARIA NDUNGU (DECEASED))***

JAMES MWANGI GIKARIA.....PETITIONER/RESPONDENT

VERSUS

LUCY NYAWIRA GICHUHI

RAHAB WANGECHI KIRAGU

ELIZABETH WANJIRU THUNI

SIMON THEURI GIKARIA.....OBJECTORS/APPLICANT

RULING

On 18th November, 2011, the court (Sergon, J) delivered a judgment in respect of a summons for confirmation of grant of letters of administration intestate of the deceased's estate and a protest filed against the said confirmation; the summons was filed by the petitioner/respondent while the protest was filed by the objectors/applicants. The court allowed the summons for confirmation of grant and dismissed the protest and thereby effectively brought this cause to its conclusion.

The objectors were not satisfied with the judgment of the court and so on 1st December, 2011, they filed a Notice of Appeal under **Rule 74** of the **Court of Appeal Rules** intending to appeal against the judgment of this court; this notice did not, however, last long as it was withdrawn on 16th December, 2011.

On 19th December, 2011, the objectors filed an application for review of the judgment of 18th November, 2011, which they erroneously described in the application for review as a "ruling". The petitioner, on his part, filed an application dated 23rd May, 2013 principally seeking orders directing the deputy registrar of the High Court, Nyeri and Nyeri District Land Registrar to execute the necessary documents giving effect to the certificate of confirmation of grant issued pursuant to the judgment of the court confirming the grant.

The two applications by the contesting parties were heard simultaneously and on 15th October, 2014 the court (Wakiaga, J.) delivered its ruling dismissing the objectors' application for review of the judgment and allowing the petitioner's application for execution of the transmission documents by the deputy registrar and the land registrar.

Again, the objectors were not satisfied with this decision and are now appealing against it; in this regard

they filed a Notice of Appeal on 9th December, 2014. On the same date, they filed a summons in general form under **Rule 73** of the **Probate and Administration Rules** seeking the following orders:-

- “a) THAT the Summons General Form (sic) herein be certified as urgent.**
- b) THAT the court be pleased to grant an order for stay of execution of the order issued on 15th October 2014 pending the hearing and determination of the application herein.**
- c) That the court be pleased to order for stay of execution of the order issued on 15th October, 2014 pending hearing and determination of the Appeal.**
- d) THAT costs be provided for.”**

The application was supported by a joint affidavit sworn by three of the applicants; in that affidavit the applicants swore that their appeal has high chances of success; that if the order for stay for execution is not granted the applicants will be evicted from land parcel referred to as **Othaya/Kihugiru/30** and that their appeal will thereby be rendered nugatory.

The petitioner opposed the application; he filed a replying affidavit in which he basically outlined the events that followed the judgment of 18th November, 2011. He states that no appeal has been preferred against that judgment and the application for stay of execution has no basis.

The argument by the respondent that the decision which the applicants ought to be concerned about is the judgment confirming the grant of letters of administration bears some force; although it has been brought out in his affidavit, it is more of a legal issue than a factual one. I would agree with the respondent that it is out of the judgment delivered on 18th November, 2011 that the respondent has obtained the certificate of confirmation of grant which, for all intents and purposes is the decree that the respondent is seeking to execute.

In my humble view, the execution process that the applicant is apprehensive of does not stem from the ruling delivered on 15th October, 2014 dismissing the applicant’s application for review of the judgment in question. The petitioner’s source of authority to execute, which is encapsulated in the certificate of confirmation of grant is derived from that judgment delivered on 18th November, 2011.

Execution of transmission documents either by the deputy registrar or the land registrar *in lieu* of a hesitant or reluctant party is only a step in the entire execution process which in itself cannot be halted unless the judgment and the decree from which this execution process flows is being questioned or the process itself is being undertaken in an irregular or unlawful manner.

And there is no dispute that the applicants have, prior to this application, questioned the judgment in question; their action in that regard was demonstrated by their application for review of the judgment where they also sought a stay of execution of the judgment pending the hearing and determination of that application. As noted, the application was dismissed and if any order of stay of execution was granted in that regard it went with the dismissal of the application.

I have not heard the applicants question the execution process itself; in fact, the learned judge held in his ruling that the applicants did not oppose the respondent’s application to have the High Court’s deputy registrar and the land registrar execute the transmission documents. The learned judge essentially allowed the application because it was not opposed.

In the premises, I consider the applicant’s application dated 9th December, 2014 as misconceived; the grant of orders sought would only be an exercise in futility. I dismiss the application with costs

Signed, dated and delivered in open court at Nyeri this 13th day of April, 2015

Ngaah Jairus

JUDGE