



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO.19 OF 2000
IN THE MATTER OF THE ESTATE OF TERESA NYABATE ASANGO – DECEASED
MONICAH NYABOKE JOHN.....PLAINTIFF/APPLICANT
VERSUS
ASKAH MOCHACHE MOMANYI.....DEFENDANT/RESPONDENT
RULING

1. There are two applications. Both are inter-related.

The FIRST APPLICATION by the Plaintiff-Applicant, **Monicah Nyaboکه John** is dated 17th May 2013.

This application seeks for **TWO ORDERS**:

1. To discharge, vary and or set aside orders issued on 23rd May 2011, to enable the applicant confirm the grant dated 8th June 2011.

THIS APPLICATION relies on several grounds.

2. **GROUNDS**:

a. The Court granted a stay of execution of orders on 16th May 2011.

b. The said court ordered for fresh grant in the joint names of the applicant and the Respondent, either of them or jointly who may apply for confirmation.

c. The said stay was granted pending the hearing and determination of the intended appeal.

d. The notice of the intended appeal was issued and served on 27th May 2011.

e. The record of appeal ought to have been filed within 60 days of filing of notice.

f. To-date no record of the intended appeal has been filed and therefore there is no appeal pending hearing and determination.

g. The Respondent herein appears to have abandoned the intended appeal.

h. Therefore, the order issued on 16th May 2011 be discharged, to set and set a stage for confirmation.

3. The applicant has filed his supporting affidavit sworn on 17th May 2013 in which restates the evidential reasons for his application.

4. The Respondent's replying affidavit to this first application dated 17th May 2013. The Respondent depones as follows:

5. The Respondent's replying affidavit to the applicant's first application dated 17th May 2013. The Respondent depones as follows:

1. The grant herein was confirmed on the 6th February 2000, see "AMM-1"

2. I filed Civil Suit No.111 of 2002, judgment was entered in default, see "AMM-2" (a), (b), (c) & (d).

*3. Upon the death of **Bethseba Bosibori**. I filed Civil Suit No.55 of 2008 against Wilfred Mong'are barring him from burying her in Land Known as **NYARIBARI CHACHE/BB/5054**, see "AMM-3"*

4. The defendant – Wilfred Mong'are Orina filed an Appeal, No.146 of 2008 – the same is still pending, see "AMM-4"

5. The Respondent – Askah Mochache Momanyi applied for revocation of the grant under application dated 26th 2008, see "AMM-5"

6. At the same time the applicant Monicah filed an application dated 24th September 2008 for an injunction amongst other prayers which was dismissed by this court on 6th June 2009, see "AMM-6".

7. I filed HCCC No.83 of 2009 between myself and the Respondent-objector, see "AMM-8".

8. When the application dated 3rd June 2009 came for hearing, my submissions were missing, hence the ruling in favour of the Respondent necessitating the filling of the application dated 25th August 2010, to set aside the decision of Musinga J, as it was occasioned by an act of sabotage or crime as such.

9. That when I filed an application for stay, my advocate's luggage disappeared on arrival at Kisii and had to prepare another bundle for filing in court.

10. That, again, on 12th September 2011, my advocate was involved in a road accident and suffered injuries.

11. That he has not fully recovered to proceed with the case coupled with the advocate's strike at Kisii Law Courts.

12. That it was then agreed to canvass the application dated 24th September 2008 by way of written submission, see "AMM -9".

13. That on 16th May 2011 the ruling allowed the application, I instructed my advocate to appeal and notice of intended appeal was filed as required by Law, see "AMM-10"

14. The intended appeal raises certain fundamental legal issues for consideration:

a. Whether the decision made on the 16th May 2011 by this Honourable Court borders on judicial anarchy or not?

b. Whether or not a window of opportunity provided under the customary law for courting woman to woman marriage extends to polygamy or not?

c. Whether or not the decision tends to licence polyandry or not?

6. THE APPLICANT'S SUBMISSIONS:

He submits that:

Following the court process, the earlier grant having been revoked, fresh grant in joint names of the applicant and the Respondent were but have never been confirmed, because a stay of those Interim orders were issued on 23rd June 2011 due to the Respondent intention to file an appeal which appeal notice of which filed but no record of the appeal itself has ever been filed – two years down the line. The rule is that the appeal must be filed within 60 days from the date of notice. The Respondent not only has not filed the appeal, neither did she proceed to the court of appeal and obtain stay.

It is the Respondent's contention however that the appeal is deemed to have been withdrawn under **Rule 82** of the **Court of Appeal Rules**, since no appeal was filed within 60 days of lodging of the Notice of Appeal as required by **Rule 81** of the said Rules.

7. The applicant relies on Machakos, HCCC No.531 of 1994, between **Mbuvi Kisavi vs. Maingi Mutisya Nzioka** (*unreported*) where the court held Interim Orders ought to have a limit within which to operate. The orders as issued seem to last ad-indefinitum.

8. Therefore I urge that Interim Orders issued on 23rd June 2011 be discharged and this court be asked to confirm the grant without necessarily waiting for a further six months statutory requirement with which to confirm the said grant.

9. The Respondent, Ascah Mocheche Momanyi, will not suffer any prejudice of orders sought herein are granted.

10. ISSUES FOR DETERMINATION:

1. Since the Interim Orders issued on 23rd May 2011 were premised on the intended Notice of Appeal and which appeal has not been prosecuted for now two years. Can the same now be discharged, varied and set aside, as the basis for which they were granted has since been abandoned?

2. Therefore can the fresh grant issued in the joint names of the Applicant, Monicah Nyaboke John and the Respondent, Askah Mocheche Momanyi be now confirmed without waiting for the expiry of the necessary statutory period?

11. ANALYSIS OF THE EVIDENCE AND THE LAW:

It is obvious from the affidavit of the applicant that the Respondent lodged a Notice of Appeal and obtained orders issued on 23rd May 2011, to have the joint grant, not confirmed, maintain the status quo until the prosecution of the intended appeal. Which appeal he did not pursue – two long years, to-date. **Section 82 of Court of Appeal Rules** decrees that after lodging a Notice of Appeal as required by **Rule 81** of the said Rules the appeal has to be filed within 60 days. This was not done.

I have read the Ruling of Hon. Lady Justice Wendoh, delivered on 5th February 2004, Civil Case No.531 of 1994 (unreported).

Again, the applicant in his application dated 12th September 2013, he seeks the stay of the application dated 17th in which he is representing the Respondent, Askah Mocheche Momanyi, pending hearing and determination of his application for REVIEW. And further this court do vary/discharge and set-aside it's orders given on 16th May 2011 and issued on 24th May 2011, subsequent, incidental and consequential thereto. The gist of this application is to vary, discharge and set-aside the revocation of 16th May 2011.

This court considers this latest application dated 12th September 2013 as yet another delaying tactic by the applicant. Askah Mocheche Momanyi and his counsel. Assertions relating to theft of Court papers was but an event, and this alone could not deter, the filing of the appeal.

It is therefore in the interest of justice litigation must be seen to come to an end. **Section 1A** says: *The overriding objective of.....Civil Procedure....and the rules made hereunder is*

1. *“to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.*
2. *The court shall.....seek to give effect to the overriding objective.*
3. *The party and the advocate for such party is under a duty to assist the court to attain this overriding objective.....*

For this reasons, this court allows the application dated 17th May 2013 and arising thereof, does confirm the grant dated 8th 2011.

It is so ordered.

Dated, signed and delivered at Kisii this 19th day of June, 2015

HON. C. B. NAGILLAH

JUDGE

In the presence of:

- M/S Nyawencha holding brief for M/S Bosire Gichana for the Plaintiff/Applicant
- M/S Gichore Bwomwando (**absent**) for the Defendant/Respondent
- Samuel Omuga: Court clerk