



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 538 OF 2009

IN THE MATTER OF THE ESTATE OF COSMAS M' THURANIRA M' MAGIRI-DECEASED

MARGARET NCHEKEI THURANIRA PETITIONER

-versus-

MARY MPINDA.....1ST PROTESTOR

REBECCA KARWITHA M'MAGIRI.....2ND PROTESTOR

RULING

1. Before me are two different applications one by the Petitioner and the other by the protestors. The 1st application by the petitioner is dated 2nd December 2014 brought pursuant to the provisions of Section 47 of The Laws of Succession Act (CAP 160) of the Laws of Kenya and Rule 49 and 73 of The Probate and Administration Rules in which application the petitioner seeks the following orders:

1. **This application be certified as urgent and be heard on priority basis.**
2. **That this honourable court be pleased to order stay of execution of its orders on distribution made on 13th November, 2014 in respect of L.R NO. Kiirua/Naari/1363 pending the hearing and determination of the objectors/applicant appeal by the court of appeal.**
3. **That this honorable court be pleased to place an inhibition on L.R NO. Kiirua/Naari/1363 pending the hearing of the said appeal or further orders of the court.**
4. **That costs of this application be provided for.**

The said application is premised on the following grounds:

- (a) **That the petitioner has already filed a Notice of Appeal and served the advocates for the protestors.**
- (b) **That there are good grounds both legal and factual for the court of appeal to go into.**
- (c) **That the protestors who do not leave on the land are in a hurry to sell it.**

(d) That it is fair and just to await the determination of the court of appeal.

2. The 2nd application by the protestors is dated 10th January 2015 and brought under **Rule 73 of the Probate and Administration Rules** in which application the protestors have sought the following orders:

1. **That this application be certified and be heard on priority basis.**
2. **That this honourable court be pleased to authorize the Deputy Registrar to execute all transfer instruments to enable the applicant one Rebecca Karwitha effectuate the grant dated 13th November 2014 in relation to L.R Kiirua/Naari/Maitai/1363.**
3. **That this honourable court be pleased to issue further orders as it may deem fit and proper in the interest of justice.**

3. The said application is premised on the grounds that the petitioner Margaret Nchekei has refused to execute the transfer documents to effectuate the grant; that the aforesaid petitioner has virtually frustrated the implementation of the grant herein as confirmed on 13th November 2014 and that it is only fair, just and equitable that this application be allowed.

4. The brief facts in this case are that this honourable court delivered a judgment in this succession cause on 13th November 2014, which judgment was favourable to the protestors and proceeded to distribute the deceased's estate to the petitioner and all the other dependants as well as the protestors herein by awarding them 3 acres each of the suit property herein. The petitioner was dissatisfied with the decision and judgment of this court and proceeded to file notice of appeal awaiting proceedings so as to lodge the appeal to the Court of Appeal thus provoking the two opposing applications now before this court.

5. When the matter came up for hearing on 30th April 2015, the parties agreed that the two applications be determined by way of written submissions. It was submitted for the petitioner that she was not satisfied with the judgment of this court on distribution whereupon she gave a notice of appeal to exercise her constitutional right and that she has already prepared the record of appeal and served the same on the protestors. That going with the speed at which the Court of Appeal is disposing of appeals, this matter will be heard soon and in a matter of months and that since the protestors want to sell their share, it will be complicated if 3rd parties are brought into the matter especially in the event of the appeal succeeding.

6. On the other hand, with regard to the protestors' application dated 10th January 2015, it was submitted for the petitioner that it is not true that the petitioner was using delaying tactics to delay conclusion of the case as she had shown her seriousness by filing the appeal as soon as the record was made available.

7. On the other hand, it was submitted for the protestors that the petitioner's application dated 2nd December 2014, in which they are seeking inter alia; an order of stay of execution of the order for distribution of the suit property was an afterthought and that the same had no chances of succeeding and that further the said application is only intended to continue delaying the conclusion of the matter and the same ought to be dismissed.

8. With regard to the protestors application dated 10th January 2015, in which the protestors seek an order authorizing the Deputy Registrar to execute all the transfer documents in respect of the suit property, the protestors submitted that it was very unlikely that the petitioner's appeal will succeed and the continued frustration being played out by the petitioner in delaying the implementation of the judgment was unfair and an injustice to the protestors, who had a valid and legal entitlement to the said portions of land. They therefore submitted that the petitioner's application dated 2nd December 2014, seeking stay of implementation should be dismissed and the protestors' application dated 10th January 2015 be allowed so as to effectuate the judgment that was delivered by the court.

9. I have carefully considered the two opposing applications by the parties and the rival submissions by

the parties counsel. It is not in dispute that this court on 13th November 2014 made its orders on distribution of the deceased Estate whereupon the petitioner was dissatisfied with the same and preferred an appeal to the court of appeal. The petitioner thus filled the instant application where she seeks orders of stay of execution of the judgment made on 13th November 2014 and inhibition on the suit property pending the hearing of the intended appeal.

10. The protestors on the other hand have filed an application dated 10th January 2015, in which they seek an order to authorize the Deputy Registrar execute all the transfer documents to enable the applicants (protestors) effectuate the grant dated 13th November 2014 in respect of the suit property, since the petitioner has refused to execute the documents to effectuate the grant.

11. It was contended by the petitioner that the protestors intend to dispose of the land. No evidence was tendered to prove these allegations. The protestors on the other hand denied these allegations and stated that the said allegations were false and were meant to mislead the court. The conditions to be satisfied by an applicant before the court can exercise its discretion in granting an order of stay of execution are well set out in **Order 42 Rule (6) of the Civil Procedure Rules 2010**. The said Order provides as follows:

“ (1) no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made to consider such application and make and to make such orders thereon as it may deem fit and just and any person aggrieved by order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) no order for stay of execution shall be made under sub rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

12. In the instant case it is not in dispute that the order that the petitioner is seeking to appeal against was made on 13th November 2014. The application for stay was made on 2nd December 2014. This was probably a period of 2 weeks after the judgment was delivered. The application was therefore brought without unreasonable delay. On the other hand it was contended by the petitioner that the protestors intend to dispose off the suit property. No evidence was tendered to prove these allegations. The protestors denied this allegation as well. From the circumstances of this case I am not satisfied that the petitioner will suffer substantial loss if an order of stay is not made. In the case of **M/S. PORT REITZ MATERNITY V JAMES KARANJA CIVIL APPEAL NO.63 OF 1997**, the court said as follows:

“that right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

13. I further to the above appreciate that no valid sale agreement can be entered into by the protestor and a third party as the property is still in the name of the deceased and further no valid transfer can be effected today as the petitioner has to execute transfer documents or the Deputy Registrar of this court but on court's decision.

14. For the above reasons and having come to the above conclusion and in exercise of my discretion, I

find the petitioner's application dated 2nd December 2014 to be without merits and I accordingly dismiss the same. In the end result I allow the protestors application dated 10th January 2015 but put it in abeyance in view of the pending appeal at the Court of Appeal but should the court of appeal decide the appeal in their favour they are at liberty to have the Deputy Registrar execute all relevant transfer to effectuate the granted dated 13th November 2014.

15. The upshot is that the petitioner's application is dismissed for lack of merits. The protestors' application is allowed as prayed but put in abeyance to await the decision of the Court of Appeal in the pending appeal. The protestors are awarded costs of this application.

DATED at Meru this 22nd day of October, 2015.

J.A. MAKAU

JUDGE

22.10.2015

Delivered in open court in the presence of:

M/s. Gituma for the petitioner

Mr.Mutegi holding brief

Mr.Kaimenyi for protestors.

F. GIKONYO

JUDGE

22.10.2015