REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE No.294 OF 1993

IN THE MATTER OF THE ESTATE OF THE LATE NDERITU KARIUKI KOIGI

THEURIKAHOYA GITUNE ..... APPLICANT

VERSUS

MARGARET GAKENIA NDERITU..... 1ST RESPONDENT

DANSON MWAURA MWANGI.....2ND RESPONDENT

RULING

The application dated 4th September 2013 is made pursuant to the provisions of **Order XLI Rule 4(1)** and **section 3A** of the **Civil Procedure Act**. It seeks that court grants orders of stay of execution of the orders dated 26/10/2009 which read thus:-

> ***"1.THAT, the Applicant's summons for Revocation of the Grant be and is hereby disallowed and that the Grant be rectified to the effect that the 2nd respondent be and is hereby awarded 5 acres of L.R. NYANDARUA/SOUTH KINANGOP/7 while the applicant gets the remainder thereof.***
>
> ***2. THAT the costs of the proceedings to the respondents."***

The applicant is aggrieved by the orders on ground that the 2nd respondent (DANSON MWAURA MWANGI) never exhibited to the court, that the 1st respondent (MARGARET GAKENIA NDERITU) was dead. He fears that the respondents are at the verge of executing the orders and the only legal avenue is to allow the application.

In the supporting affidavit, the applicant deposes that his family has been residing on the said parcel since the year 1963, occupying 3 acres of the same, until the time when the respondents begun demarcating the portion of land in question. He laments that the contested orders of 26/10/2009 in effect awarded the 2nd respondent 5 acres, resulting in his loss of some acreage.

The applicant contends that the 1st and 2nd respondent had bought land from the deceased and the same had already been divided during the deceased's lifetime, but upon the deceased's demise, both parties found out that they had been given less land than they had purchased, and the land had been divided according to the ratio they had each purchased.

Further, that, although execution is proceeding, the respondents have failed to disclose that the 1st respondent is deceased.

In opposing the application, the 2nd respondent has deposed by way of a replying affidavit that the application is frivolous and not merited, and judgment was pronounced before the death of the 1st respondent. The certificate of confirmation of Grant was also extracted before the 1st respondent's demise.

He describes the application as being designed to frustrate him from enjoying the fruits of the judgment. He also laments that the

applicant has disobeyed court orders by failing to sign documents which would give effect to the orders dated 05/10/2011 issued by Ouko J (as he then was) which required the respondent to demolish the structure standing on the 2nd respondent's portion of land.

The applicant denies any disobedience, stating in a supplementary affidavit that the Title Deed issued to the 2nd respondent is suspect, as it was issued long after the 1st respondent's death. In any event, he has been ailing and he has filed a notice of appeal challenging the decision, hence his reluctance to demolish the structure which he describes as his home, and where his son's grave stands.

The court directed that the application be disposed of by way of written submissions, but I only received written submissions from the 2nd respondent's counsel. The submissions gave a background of this matter, which was heard and determined by Hon. Justice Mugo. The 2nd respondent's counsel submits that there is no basis for issuance of stay orders or review of those orders, four years after they were made. He draws to the court's attention the notice of appeal which was lodged on 1st October 2009 and says no serious attempt has ever been made to pursue that appeal. Counsel points out that the firm of Charles Gai & Co. Advocates which has filed the notice of appeal are strangers to this case, as they never participated in the proceedings. Counsel contends that in any event the fact that a notice of appeal has been filed is not good reason to warrant granting stay of execution. The death of the 1st respondent is described as having no effect on the orders issued, as all the transfer documents had been duly executed. The court is urged to dismiss the application.

The application on the face of it does not disclose what would be pending while the stay is in force. It seems to suggest that applicant is seeking stay pending hearing of application for review. However, in the supporting affidavit, it seems the stay is sought on grounds that the applicant intends to appeal against the order, although no memorandum of appeal has been filed. If the application is for review, then the applicant has failed to satisfactorily address the court on what portion of its decision requires to be reviewed. He has not disclosed any new and important matter which may have existed at the time the court made the orders, and which even with due diligence he would not have discovered.

He appears to suggest that there is an error on the face of the record regarding the acreage awarded to the respondent, yet he has annexed nothing to support that, and it would appear to me that if the error was in the trial Judge's understanding/ comprehension of the facts, and the final decision, then I do not think review offers the solution. This would be tantamount to a judge of equal jurisdiction sitting on appeal over the decision of another judge.

This then brings us to the issue of the "*pending appeal"* which has no memorandum annexed. A notice of appeal was filed 4 years ago, and beyond that, the applicant has done absolutely nothing. It would seem he has content with the status then existing, that as long as the respondent did nothing to execute he'd also do nothing to purse the appeal.

It has not been clarified to this court how the death of the 1st respondent affects the execution process being pursued by the 2nd respondent. It is also not clear what is "*suspect"* regarding the 2nd applicant's title document.

Order 42 Rule 6 of the Civil Procedure Rules is clear that an appeal by itself does not operate as a stay. There has to be sufficient cause for such an order to issue and this would require the applicant under Order 41 Rule 6(2) to:-

(a) Demonstrate that he will suffer substantial loss, and that the application has been made without unreasonable delay.

(b) Security for due performance of the decree.

The applicant has moved this court for orders of stay 4 years after the orders were issued, and no explanation whatsoever is given for this delay. The only reasonable conclusion I can draw is that the application is made with a lot of mischief and is intended to frustrate the applicant and deny him, for as long as is possible, the fruits of the judgment.

Secondly, the applicant says the order will result in his family losing **"quite some acreage."** The issues he finds fault with were considered by the trial judge in her decision. The loss he alleges is not said to be irreparable, and although he claims that the structures ordered to be demolished houses his family house and son's grave, this is contested in the further replying affidavit on grounds that the structures were only erected soon after the application for revocation was filed. Further that the 2nd respondent who has lived on the land for 32 years

has never seen a grave on the 5 acre portion. I take note that the purported deceased's son is nameless and it is not even specified when he died, or how long the grave has been in existence.

I am not satisfied by the applicant's claims and I reject the same. The application for stay orders is not merited, and is dismissed with costs to the 2nd respondent.

Delivered and dated this 22nd day of September, 2014 at Nakuru.

H. A. OMONDI

JUDGE