



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 523 OF 1999

FESTUS NJUNJI THAIRU..... DECEASED

AND

REGINA WANJIRU NJUNJI PETITIONER

VERSUS

WAHOME THAIRU.....OBJECTOR

RULING

1. By an application dated 28th September 2012 the petitioner/applicant REGINA WANJIRU NJUNJI sought for an order of stay of execution pending hearing and determination of intended appeal with cost. The application was supported by an affidavit sworn by the applicant in which she deponed that she was dissatisfied with the judgment entered on 23rd day of May 2012 and on 5th day of April 2012 applied for copies of judgment/ruling for purposes of appeal which have not been availed to her.
2. She deponed that she would wish that there be a stay of execution by way of transfer pending the determination of the intended appeal which has good chances of success and if execution is effected the respondent intends to transfer the land to a third party which would render the appeal nugatory.
3. In response thereto the respondent filed grounds of opposition in which he stated as follows:
 - a. *The application is misconceived and incompetent.*
 - b. *The application is bad in law a gross abuse of the process of court and untenable.*
 - c. *The application is fatally defective*
 - d. *The application is frivolous vexatious and without merit.*

BACKGROUND

4. The Petitioner filed succession cause No. 345/1986 in the Resident Magistrate's court at Nyeri in respect of the estate of FESTUS NJUNJI THAIRU and named the asset of the estate as NYERI/ISLAND FARM/217.
5. The Objector Wahome Thairu filed an objection to making grant and a cross petition for grant in which

he stated that he had lived on half of the said land since 1962. The matter had its share of litigation before the lower court and on 28th July 2004 MELLANIA NDUTA WANJOHI filed an application under certificate of urgency seeking that the honourable court make an order for finalization of this matter and on 28th June 2007 grant of letters of administration was issued to Regina Wanjiru Njunji, Mary Wambui Wahome, Wahome Thairu and Mellania Nduta Wanjohi.

6. On 14th September 2009 Mellania Nduta Wanjohi (third party) took out summons for confirmation of grant and proposed distribution as follows:

- a. Mellania Nduta Wanjohi - 4 acres
- b. Mary Wambui Wahome - 2.18 acres
- c. Regina Wanjiru Njunji - 3.18 acres

7. On 29th September 2009 the petitioner Regina Wanjiru Njunji filed an affidavit of protest on the basis that the proposed mode of distribution did not reflect the wishes of the deceased and that Wahome Thairu and his wife Mary Wambui Wahome had been provided for in Ndathi Mugunda Plot No. 3227.

8. It was further deponed that the applicants claim that she purchased two acres from the petitioner and a further two acres from Mr. Wahome Thairu was not maintainable in law since the plot could not be sold before obtaining letters of administration and on 24th May 2011 the petitioner and their advocates appeared before Sergon J. when Mr. Wagiita for the Petitioner indicated to court that he needed time to talk to the same on the issue of the refund of purchase price to the interested party and by consent it was agreed that a valuer be appointed to ascertain the market value of four acres which report was filed on 3rd October 2011.

9. On 14th November 2011 the court ordered that the petitioner refunds Ksh. 2,400,000 being the value of 4 acres or transfer four acres to the interested party and on 23rd March 2012 the grant was confirmed.

10. On 8th October 2012 the application dated 28th September 2012 was fixed for hearing on 7th November 2012 and order of stay of execution issued until then and further fixed for 9th December 2012.

11. On 9th December 2013 the respondent third party filed a replying affidavit in which she deponed that no appeal had been filed and therefore there can not be stay of execution when there is no appeal pending. It was further deponed that on 14th November 2011 the honourable court ordered that the applicant pay Ksh. 2,400,000 or transfer four (4) acres which has not been done. It was therefore deponed that the applicant cannot keep both the land and the money.

12. On 9th June 2014 when the application was scheduled for interpartes hearing Mr. Ndirangu for the applicant was absent while Mr. Wahome for the respondent was present and urged the court to dismiss the application.

DETERMINATION

13. I have looked at the application herein and note that it is for stay of execution of the order issued by Justice Sergon in which he ordered that the petitioner/applicant pay the respondent Ksh. 2,400,000/- or transfer four acres of land to the respondent.

14. It is not in dispute that rather than filing notice of appeal the applicant has not filed any appeal against the said order and therefore as at the time of this ruling there was no appeal pending to enable the court issue stay of execution of the orders pending the determination of the appeal.

15. It is also not in dispute that this matter has been pending before various courts for the last 28 years and whereas no party should be denied access to justice, the right of appeal must be balanced against the equally weighty right that the successful party has to enjoy the fruits of the judgment delivered in his

16. Since the subject matter of this application is land which is very emotive in our country and since the parties had consent on the valuation of the suit land which valuation has not been disputed by the applicant and in the interest of justice I hereby grant the applicant stay of execution of the order of my brother Justice Serگون on the following terms:

- a. The applicant shall deposit the sum of Ksh.2,400.000/- being the value of the four (4) acres sold to the respondent within the next 14 days from the date herein in joint interest account in the names of the advocates.***
- b. The applicant shall take steps towards filing the intended appeal herein within the next 14 days from the date herein.***
- c. In default of clause No. (a) the Deputy Registrar of this court shall execute all the necessary documents for transmission of the four acres of land to the respondent.***
- d. The applicant shall pay the respondent the cost of this application.***

Dated, signed and delivered at Nyeri this 19th day of September 2014.

J. WAKIAGA

JUDGE

Court: Read in open court in the presence of the advocates for the parties and in the presence of the parties.

J. WAKIAGA

JUDGE

19/9/2014