



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 47 OF 1990

IN THE MATTER OF THE ESTATE OF M'THIRANGE THIRANGE (DECEASED)

JULIA KALANGI MBAABU.....PETITIONER

VERSUS

JOYCE KOOLO MBAABU.....OBJECTOR

R U L I N G

1. The petitioner/applicant JULIA KALANGI MBAABU through summons dated 15th July, 2011 brought pursuant to Section 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules sought orders that the Honourable court be pleased to discharge the orders of injunction issued over parcel NO. Ithima/Ntunene/37 against transfer or sale of the said parcel land of together with costs. The application is based on the grounds on the face of the application inter alia; that the order of injunction was pegged upon filing of an appeal; that to date no appeal has been filed yet; that the statutory period within which such appeal would have been filed has lapsed; that no steps have been made by the objector to remedy and or rectify the situation and that the applicant is being held at ransom by the alleged intended appeal. The application is further supported by an affidavit of Mr. Leonard K. Ondari learned advocate for the petitioner/applicant and further by the applicant's affidavit dated 15th July, 2011.
2. The objector Joyce Koolo Mbaabu filed a replying affidavit on 22nd November, 2012 stating inter alia; that the orders sought are in bad faith and meant to circumvent the cause of justice; that the application is incompetent. That it has not been disclosed what prejudice the applicant will suffer if the orders of injunction remain in force; that it is not disputed that the respondent filed a notice of appeal and applied for the proceedings for the purposes of the said appeal; that it is the court of appeal that deals with filing and serving the records and also giving of date and the delay herein cant therefore be attributed to the respondent.
3. That subsequently on the application dated 15th July, 2011 the parties filed two applications dated 21/11/2012 and 18th June, 2012. The application dated 21/11/2012 sought orders of inhibition over Ithima/Ntunene/37, injunction and revocation of grant issued to the parties herein whereas application dated 18th June,2012 was seeking that the application dated 15th July, 2011 be certified urgent and be heard on priority basis. That both applications were on 7th July, 2014 withdrawn by consent to allow hearing and determination of the application dated 15th July, 2011. The court gave directions that both parties file and exchange written submissions within 7 days and set them down

for mention on 28th July, 2014. The applicant filed her submissions but the respondent/objector has not. The court gave the objector upto 3rd October, 2014 to file submissions but the objector did not do so, consequently the court gave the objector 2 weeks to file her submissions and the court set the matter down for ruling on 27/11/2014. That the two weeks expired on 17/11/2014 without the objector having filed her submissions. The objector has even todate not complied with the court's order.

4. The Succession cause herein was heard and judgment delivered on 22/10/2010 by Honourable Lady Justice M. Kasango. That after judgment was delivered the objector indicated to the court of her intention to challenge the decision by way of appeal; subsequently an application for stay of implementation of the judgment and application for injunction was filed on 6th December, 2010. The court on the 8th December, 2010 granted orders restraining the petitioner/applicant from selling land Ref. Ithima/Ntunene/31 pending the hearing of the appeal by Joyce Koolo Mbaabu.
5. The court has carefully considered the applicant's application, the affidavits in support and the respondent's replying affidavit and submissions by counsel on the court record. The issue for consideration is whether the applicant's application is merited and whether it ought to be granted or rejected.
6. There is no dispute that judgment was delivered in this cause on 22nd October, 2010 and that the objector obtained an order restraining the applicant from selling L.R. Ithima/Ntunene/31 on 8th December, 2010 till hearing and determination of appeal by Joyce Kooro Mbaabu. The objector filed Notice of Appeal dated 27th October, 2010 which was served on 12th November, 2010. The objector applied for the court proceedings on 6th December, 2010. In her replying affidavit dated 22nd November, 2012 filed after 2 years since judgment was delivered she did not mention having filed an appeal to the Court of Appeal. To date 4 years since judgment was delivered in this cause there is no mention of any appeal having been filed to the Court of Appeal. The learned Judge's order was based on an intended appeal which todate has not been filed. The applicant urges that no appeal has been filed and served todate. She urges there is indeed no appeal and that the statutory period upon which such an appeal ought to have been filed has lapsed.
7. I have carefully considered the pleadings and submissions and I have no doubt that the objector's application was allowed as the court was of the view that the objector would file an appeal within a reasonable time but was not intended to give the objector a licence to deny the applicant the enjoyment of the fruits of her judgment. The objector has not demonstrated why for the last 4 years down the line no appeal has been filed. The only reason for delay could be that she obtained a restraining order against the applicant armed with it she has decided to hold the applicant at ransom by an intended appeal, an appeal that she may never intend to file as none has been filed and as no steps have been taken to actualize the filing of the appeal. This court finds 4 years waiting to file an appeal to be by all standards to be unreasonable delay and can only draw a conclusion that the objector was never interested in filing an appeal. The objector has not bothered to indicate whether she has filed an appeal or not or whether any is intended to be filed. I find no reason for maintaining the orders of injunction issued on 8th December, 2010. I find the applicant's application dated 15th July, 2011 merited and justified. I accordingly discharge the orders of injunction ordered upon Land Parcel No.Ithima/Ntunene/37 against sale or otherwise. The applicant gets costs of this application against the objector.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF NOVEMBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR. Leonard Ondari for Applicant

2. Mr. Kirima for objector

J. A. MAKAU

JUDGE