



REPUBLIC OF KENYA

High Court at Nyeri

Petition 2 of 2010

NGAMBI MBAU.....PETITIONER

versus

STEPHEN MUTHAMI MBAU & 5 OTHERS.....RESPONDENT

RULING

This ruling is on an application dated 14th February 2012 brought under order 22 rule 48,58,59, 60, 61 and 64 of the Civil Procedure Rules in which the applicant seeks the following:

- a) ***That an order be made prohibiting the judgment debtor from transferring, leasing or charging land parcel Tetu/Unjiru/1934 and prohibiting all persons from taking any benefit from such purported transfer, lease or charge until the whole decretal amount is paid and until further orders of the court.***
- b) ***That the judgment debtor's interest in the land parcel Tetu/Unjiru/1934 and being the interest of the judgment creditor herein be sold and the proceeds thereafter deduction of expenses attributable and incidental to such sale or such amount as shall satisfy the decree in this cause be paid out to the judgment creditor.***
- c) ***That the sale of the said property be conducted by M/S Hippo Merchants - Nyeri.***
- d) ***That the public notice and advertisement of the said Sale be done once in the Daily Nation.***
- e) ***That the decree holder be authorised to bid for and purchase the said property aforesaid.***
- f) ***That the cost of the application be awarded to the respondents***

The application is supported by the affidavit of Stephen Mithamo Mbau.

When the matter came before me for hearing Mr. Kingori advocates for the respondent informed the court that the respondent had died and that the applicant can only claim now against the estate of the same and that under section 45 of the Law of Succession the execution proceeding should be included as a liability against the estate.

He was therefore of the considered opinion that any order issued by the court will be in vain.

Mr. Karweru for the applicant submitted that the death of a party at the execution stage does not affect the same and that any individual who is interested in the property can come in and state their claim.

He submitted that under order 24 of the Civil Procedure rule 10 thereof there is a property in judgment .

The issue for this court to determine is whether the orders sought by the applicant can be granted in view of the death of the respondent?

Whereas the order 24 rule 10 states that the death of a party does apply to proceedings in examination of a decree or order, section 37(1) of the Civil Procedure Act provides as follows:

“Where a judgment debtor dies before the decree has been fully satisfied the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased or against any person who was inter-meddled with the estate of such deceased.”

To my mind then it means that the decree hold can execute the decree herein against the legal representative of the judgment debtor and since there is no legal representative of the judgment debtor before the court I am of the considered opinion that the only order which can be granted at this stage is prayer number (a).

I therefore issue an order prohibiting the judgment debtor and or his estate from transferring leasing or charging land parcel Tetu/Unjiru/1934 and prohibiting all persons from taking any benefit from such purported transfers lease or charge until the whole decretal amount is paid and until further orders of this court with cost thereof being in the cause.

Dated and delivered at Nyeri this 29th day of November 2012.

J.WAKIAGA
JUDGE

Mr. Wahinya for Mr. Karweru for 1st defendant

No Appearance by Mr. Kingori

Judgment read in open court in the preence of mr. Wahinya.

J. WAKIAGA
JUDGE