



CIVIL PRACTICE AND PROCEDURE

- Stay pending appeal.
- Lifting of inhibition order.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE CASE NO. 309 OF 2002

IN THE MATTER OF THE ESTATE OF LAWRENCE DOUGLAS MAGAMBO (DECEASED)

JANERUSA NCHENGE PETITIONER

VERSUS

AYUB KITHARA MAGAMBI OBJECTOR

RULING

This court delivered its judgment on 22nd October 2010 whereby the deceased estate was divided between the petitioner and the objector. There are two applications which are for consideration in this ruling. The first is dated 22nd October 2010. It is filed by the petitioner. She seeks in that application for the lifting of inhibition order issued in favour of the objector in this matter over parcel number *Abothuguchi/Upper Kaongo/709*. The background of that inhibition is clear from the proceedings in this matter. The objector applied for inhibition to issue over that property by his Chamber Summons that was dated 31st May 2005. The court on entertaining that application on 14th July 2005 granted an order of inhibition to last for three months. That order was extended on various dates and lastly on 2nd October 2006 where it was extended to subsist up to 28th November 2006. The application for inhibition dated 31st May 2005 was dismissed for non attendance on 26th March 2007. The objector immediately thereafter, that is, on 27th March 2007 filed an application to reinstate the inhibition orders and for the reinstatement of the Chamber Summons dated 31st May 2005. On 18th June 2007, the court recorded the following order:-

“By consent

Application dated 27th March 2007 is allowed as prayed. Costs for Kshs. 1,000/= to the petitioner to be paid within 30 days. Application dated 31st May 2005 is stood over for hearing on 1st October 2007. Order of inhibition extended till that date.”

The matter was not listed for hearing on 1st October 2007 and was not fixed for hearing subsequent to that date. It therefore follows that there are no inhibition orders subsistent in this matter. There is therefore no basis to allow the inhibition order registered against the property to continue to subsist on that title when it long expired in this court file. For that reason the petitioner’s application for lifting the inhibition orders from the title is merited. That application by the petitioner for the lifting of the inhibition order was

opposed by the objector. It was opposed on the basis that the objector had filed a Notice of Appeal in the Court of Appeal against this court's judgment of 22nd October 2010. However, having the history of the objector's application in mind, there is no basis for that opposition. The fact is that there is no inhibition in existence in this matter. The 2nd application under consideration was filed by the objector and is dated 25th May 2011. It prays for the following orders:-

“2. That there be a stay of execution of the decree in respect of this court's judgment dated 22nd October 2011 until this application is heard and determined or until further orders of this court. (Underlining mine)

3. That the applicant be granted leave to appeal against this court's judgment dated 22nd October 2010.”

When the learned advocate for the objector submitted in support of that application, she did not urge the court to grant the 3rd prayer for leave to file an appeal against this court's judgment. In any case, a Notice of Appeal was filed on behalf of the objector and is dated 2nd November 2010. I will therefore take it that the 3rd prayer reproduced above was abandoned. The only prayer for consideration is one for stay. I draw close attention to that prayer. It sought stay pending the hearing and determination of the application. It did not seek stay pending appeal. The learned advocate did not seek to amend that prayer when she argued the application. That being so, the application dated 25th May 2011 which was heard on 30th May 2011 and which is by this ruling being determined there will be no prayer subsisting for determination. There is no prayer for stay beyond the period after the application is determined. Certainly, there is no prayer for stay pending appeal. It should also be noted that the objector delayed in filing his application for stay for the execution. This court delivered its judgment on 22nd October 2010. The application for stay was filed in May 2011. The delay from October to May was not explained by the objector. For that reason also it fails. For that reason, the application will fail. I grant the following orders:-

1. An order is hereby issued vacating/lifting and discharging the order of inhibition registered against parcel Abothuchuchi/Upper Kaongo/709 which was issued in this matter.

2. The costs of the application dated 28th October 2010 are awarded to the petitioner.

3. The application dated 25th May 2011 in respect of prayer number 2 is hereby dismissed with costs to the petitioner.

Dated, signed and delivered at Meru this 30th June 2011.

MARY KASANGO
JUDGE