



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 27 OF 2010

(AN APPEAL FROM THE JUDGMENT OF D.A. OCHARO R.M. AT WANG'URU IN MISC. SUCC. NO.41 OF 2007 DELIVERED ON 15TH APRIL 2010).

FRANCIS MUREITHI MWANGI.....APPELLANT

VERSUS

SUSAN WANJIRA MWANGI.....1ST RESPONDENT

JOYCE KIROGO MWANGI.....2ND RESPONDENT

FRIDA MICERE MWANGI.....3RD RESPONDENT

RULING

This is the Application dated 9th June 2011. It's supported by the affidavit of the Applicant. The orders sought are stay of execution of the Judgment dated 15th April 2010 by Resident Magistrate Wanguru pending hearing and determination of this Appeal. He says he was nominated as the heir to his deceased father's rice holding No.3404 at Mwea Irrigation Settlement. The Judgment did not confirm him as heir. He is aggrieved because of the shares that have been removed from him yet he had been working on the rice field for the last 20 years.

The Respondent has opposed this application saying its defective as it has not followed the procedure under Order 51 Rule 1 Civil Procedures Rules. Secondly she says Order 42 rule 6 (1) Civil Procedure Rules has not been satisfied.

I have considered this application and the affidavits and annexures filed. I have also perused the lower court record. It is clear that the Applicant was a nominee of the deceased for his Rice Holding. It would be important to know how the learned trial magistrate ended up dividing the holding into 3.

Counsel raised an issue about the application being defective for not complying with Order 51 rule 1 Civil Procedure Rules. The Applicant filed a Chamber Summons instead of a Notice of Motion. Order 51 rule 10(2) Civil Procedure Rules provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

I do not find that failure to file application as Notice of Motion affects the substance of the application.

I however find that the Applicant has an arguable case and if the execution proceeds then his appeal may be rendered nugatory if he succeeds.

I also wish to put the Applicant on notice concerning his deliberate delay in prosecuting this Appeal. The Appeal was admitted on 24/6/2010 and upto now he has not prepared records. I will grant him stay of execution which will only last for 90 days.

Costs in cause.

DATED, SIGNED AND DELIVERED AT EMBU THIS 15TH DAY OF DECEMBER 2011

H.I. ONG'UDI

J U D G E