



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Succession Cause 758 of 2007

IN THE MATTER OF THE ESTATE OF RUCHU NJUGUNA RUCHU (DECEASED)

MONICAH NYAMBURA RUCHU.....1ST PETITIONER

MARGARET WANJIRU RUCHU.....2ND PETITIONER

RULING

In my judgment delivered in this cause on 5th March 2009, I distributed the deceased's estate amongst the heirs. Monica Nyamburu Ruchu, one of the widows of the deceased not being satisfied with my judgment have evinced her intention to appeal against it by filing a notice of appeal. She has come back to me with an application under **Section 47** of the **Law of Succession Act** and **Rules 49** and **73** of the **Probate and Administration Rules** seeking a stay of the implementation of my judgment until her appeal to the Court of Appeal is heard and determined. In her affidavit in support of the application she has averred that pursuant to that judgment the 2nd petitioner together with her children staking a claim of the portion of land she is occupying has started cutting down trees growing thereon and is preparing to subdivide the land in accordance with the judgment. She claims that if that is allowed to go on the substratum of her appeal will be destroyed thus rendering her appeal nugatory. She therefore prays for a stay and the maintainance of the status quo.

The 2nd petitioner cannot hear of that. In her replying affidavit she has averred that this application is only intended to enable the 1st petitioner to continue enjoying the use of the bulk of the deceased's land to the detriment of the other beneficiaries. She claims that due to the number of appeals pending before the Court of Appeal this appeal will take a very long time to be disposed of. A stay of execution will therefore perpetuate her suffering. She is prepared to have the land subdivided and each heir given his or her portion but the issue of Title Deeds be suspended until the appeal is heard and determined.

I have considered the application. Though not cited in this application **Order 41 Rule 4(2)** of the **Civil Procedure Rules** gives the criteria for granting a stay of execution pending appeal. It provides:-

“No order for stay of execution shall made under subrule (1) unless –

- (a) **the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- (b) **such security as the court orders for the due performance of such a decree or order as may ultimately be binding on him has been given by the applicant.”**

The applicant has not been indolent. She filed this application within two weeks of my said judgment. She has therefore satisfied the second limb of the first criterion in the above provision. But I reject her contention that unless stay is granted the substratum of her appeal will be changed. The subject matter of the appeal is a piece of land and unless it is disposed of to a third party, the substratum of the appeal will not be affected as the applicant claims.

The applicant and her children have, to the detriment of the other heirs, enjoyed the use of a larger portion of the deceased's piece of land and they want to continue to do that. That is, in my view, not fair. In the circumstances I direct that the estate piece of land be subdivided in accordance with the judgment and each heir be given possession of his or her portion but the issue of Title Deeds to those subdivisions be suspended until the applicant's appeal to the Court of Appeal is heard and determined. Save for this I dismiss this application with no order as to costs.

DATED and delivered this 10th day of February, 2010.

D. K. MARAGA
JUDGE.