

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU Civil Appeal 2 of 2010

JANE MARTHA NJERU.....1ST APPELLANT
NDIA NJERU.....2ND APPELLANT
VERSUS
EUSTACE KENT NKONGE.....1ST RESPONDENT
PETKEY SHEN MIRITI2ND RESPONDENT
BENSON MICHENI PETER.....3RD RESPONDENT

RULING

The applicants to the Chamber Summons dated 26th January 2010 seeks for stay of execution of the Chuka SRM Succession Cause No. 39 of 2006 delivered on 14th October 2009. The applicants stated that they are aggrieved by the judgment of the lower court because the effect of it would be to lead to the beneficiaries moving their houses from where they have built and it would change the areas that the beneficiaries cultivate. The deponent, Jane Martha Njeru deponed in the affidavit in support of that application as follows:-

“That my house hood (sic) and other 3 house hood (sic) had their distinct portions of land on which portions they were cultivating and the judgment of the court is completely against the way the estate of the deceased was being used and after the lifetime of the deceased.”

The respondent to this appeal opposed the application and stated in the replying affidavit that after the Chuka Magistrate’s court decision was made, subdivision had taken place and that the present application had accordingly been overtaken by events. Interestingly it is the respondents who in their replying affidavit disclosed that the applicants had filed a similar application for stay in Chuka Magistrate’s court after the Chuka court delivered its judgment. Since the lower court’s file is before me, I can confirm that the appellants filed a Chamber Summons dated 14th October 2009 seeking stay pending the intended appeal. Chuka SRM dismissed the application on 6th November 2009. The applicants then approached this court by the present application dated 26th January 2010. As stated before, that application seeks stay of execution which are the very same orders that were denied by SRM Chuka. I have perused the Succession Act and I cannot find that Order XLI Rule 4 has been adopted by the Succession Act. That is the Rule under which a party seeking in a civil matter stay of execution pending appeal would come under. The application for stay of execution having been dismissed by SRM Chuka in my view, the only

avenue open to the applicants was to appeal against that decision. The reason I state so is because the Order XLI Rule 4 is the only Rule that provides that when an application for stay is denied in the lower court a party is still entitled to approach the High Court with a similar application. Since that Rule is not one of the Rules adopted under Rule 63 (1) of the Probate and Administration Rules, the applicants could not again file a similar application in the High Court seeking stay of execution. It is clear to me that Order XLI Rule 4 does not apply in Succession matters. That being so, the present application is incompetent. Again, I am of the view that the only avenue that was open to the applicant was to appeal against the refusal of stay of execution by SRM Chuka. The appeal which is before me as per the Memorandum of Appeal dated 26th January 2010 does not relate to that refusal by the learned magistrate. It is confined to the judgment delivered by him on 14th October 2009. In view of my sentiments in this ruling, the applicant's application dated 26th January 2010 is hereby dismissed with costs being awarded to the respondents and the stay orders which were issued on 11th March 2010 are hereby vacated.

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE