



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 116 OF 2009

ELISHA NJERU JAMES.....APPELLANT

VERSUS

FELISTA NGIMA ELIJAH.....RESPONDENT

RULING

The Chamber Summons dated 14.12.09 is pending in respect of prayers 3 & 4 as hereunder:-

3. ***That there be a stay of execution of the judgment delivered on 13.8.2009 and any other subsequent decree order(s) thereto be granted pending the hearing and determination of the Appeal.***

4. ***That the Respondent and all persons included in the confirmed grant issued under the said judgment of the subordinate court be restrained from interfering with the deceased's estate pending the hearing and determination of the Appeal.***

The same is premised on the 5 grounds on its face and the supporting Affidavit of Elisha Njeru James. The judgment giving rise to the said Appeal was rendered on 13.08.09 by the **Senior Resident Magistrate at Runyenjes in Succession Cause No. 15B of 2006**. It is imperative to note that the Appellant/Applicant was a co-petitioner in that cause, and a question will definitely arise as to whether one can seek a revocation of a Grant where he himself is a petitioner. I will not go into that issue in detail for purposes of this ruling.

The gist of this application is that the Appellant is challenging the said Grant by way of Appeal because he did not get any share of the deceased's land as he anticipated. In paragraph 6 of his supporting affidavit, he describes himself as a beneficiary of the estate of the deceased by virtue of the fact that he claims to have bought 2 acres of the deceased's land and had lived there since 1964. That is therefore the matter he wants the court to decide by way of Appeal by revoking the said grant and redistributing the Estate of the deceased.

In her replying affidavit dated 3.5.2010, the Respondent opposes the Application. She has deponed in paragraph 5 of the said replying affidavit that the Applicant herein is not one of the beneficiaries or dependants of the deceased and is not therefore entitled to any part of the deceased's estate. In her submission in court, she said that she has already distributed the land in question as per the certificate of confirmation of Grant in the Runyenjes court.

Interim orders of stay were issued earlier on but the Respondent herein displayed total contempt of the said orders although they had been extended by the consent of both parties. She even had to be put in for contempt of court and I doubt if she was relented in her blatant defiance.

I have considered the Application along with the rival affidavits. Although she claims to have subdivided and transferred the properties to her children as per the Grant, she did not annex any copies of the register in support of the said contention. I will therefore proceed on the premise that the said plots have not been transferred yet. I have nonetheless noted that the order of stay sought is against the execution of the entire judgment and all persons included in the entire grant. If granted it would affect persons who are not party to this Application or even the Appeal that is before the court. That would fly in the face of the revered rules of natural justice which this court has a duty to uphold. It would not therefore be in the

interests of justice to grant a blanket order for stay of the entire judgment. I have also read carefully the contents of the judgment of the subordinate court. Although it is accepted that the applicant herein has lived on the plot in question for decades, his recourse does not lie through a succession cause but by way of an originating summons through which he can lodge a claim for adverse possession. It is highly unlikely that any court would revoke the impugned grant given the fact that the Appellant is one of the petitioners.

I cannot therefore say that the Applicant has a good appeal with high chances of success. However unfair it may seem to the applicant herein, I must dismiss his Application for stay of execution for the reasons I have given above. He may wish to pursue his claim by way of originating summons but he is not obligated to take my gratuitous advice. It is purely up to him. His Application is nonetheless dismissed with an order that each party bears its own costs.

**W. KARANJA
JUDGE**

Delivered, signed and dated at Embu this 14th day of October 2010.
In presence of:- Both parties but in absence of counsel.