REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 2 OF 2010

LESIIT J.

JANE MARTHA NJERU.....APPELLANT

VERSUS

EUSTACE KENT NKONGE.....RESPONDENT.

RULING

The application is dated 2nd November 2010 brought under sections 47 and 50 of the Law of Succession Act and rules 49 and 73 of P&A Rules and sections 128 and 129 of the Registered Land Act. It seeks an order or of stay of proceedings of Chuka SRM Succession Cause NO.39 of 2006, pending the hearing and determination of this appeal. It also seeks an order of inhibition of Land Parcel NO. Magumoni/Thuita/384 and Karingani/Mungirirwa/493 and an order for the registration of the said inhibition with the Meru South District Land Registrar. It also seeks an order of status quo in the occupation and cultivation of the said land parcels. The grounds cited on the face of the application are actually evidence which ought to have been outlined in an affidavit. Indeed there is a supporting affidavit sworn by the 1st applicant Jane Martha Njeru which sets out the facts of the case. Of the grounds outlined the following are the cardinal ones:-

i. After the applicants/appellants filed the appeal hearing, the Lower Court Original File vide Chuka S.R.M.C. SUCC. No. 39 of 2006 was brought to Meru High Court and enjoined with the Court file for Civil Appeal No. 2 of 2010.

ii. ……

iii. ……..

iv. ……..

v. ……..

vi. That land parcels LR No. MAGUMONI THUITA /384 and KARINGANI/MUGIRIRWA 493 are the subject matter of the instant appeal which appeal emanates from Chuka S.R.M.C. SUCC. No. 39 of 2006.

vii. ……

viii. That to date no subdivision have been done on L.R. Nos. MAGUMONI/THUITA/384 and L.R.KARINGANI/MUGIRIRWA/493 pursuant to the grant.

There is also a replying affidavit opposing this application sworn by the 1st respondent, Eustace Kent Nkonge.

It is not in dispute that the 1st applicant, the 1st, 2nd and 3rd respondents were appointed administrators over the estate of the deceased. It is not disputed that there is a Confirmed Grant which sets out the mode of distribution of the estate among the

beneficiaries said to be 22 in number. It is not disputed that the appellants were dissatisfied with the distribution and have filed this appeal before this court.

Mr. Nyamu represents the appellants/applicants in this application. Mr. Nyamu in his submissions urged that the stay of proceedings was very important because according to him after an appeal was filed to this court against the decision of SRM Court, it served as a bar to further proceedings in the lower court unless leave was granted by this court. Mr. Nyamu submitted that after the appeal was filed here the original file from Chuka was annexed to this appeal. However, Mr. Nyamu complained, the respondent had opened a skeleton file and were seeking orders to compel the applicants to sign the transfer forms in order to effect the order of the lower court.

Mr. Mutitu (Rtd. Judge) opposed this application on behalf of the respondents. Counsel submitted that action taken at the Chuka Court case was facilitated because there was no stay of proceedings granted either by the lower court or the High Court. Counsel however submitted that the Chuka Court had on its own violation decided to await the outcome of the instant application.

In regard to the submission by Mr. Nyamu that the filing of this appeal was a bar to any proceedings in the case appealed against cannot be a correct submission. Mr. Nyamu did not cite any law which provides that the filing of an appeal is a bar to further proceedings in the case appealed against. Order 41 rule 4(1) specifically provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except where such order is specifically made by the court appealed from or by the appellant court. There has been no order of stay of proceedings in this matter.

Mr. Nyamu has urged the court to issue an order of inhibition in order to preserve the parcels of land named pending this appeal and also for an order of status quo.

Mr. Mutitu challenged the bringing of the instant application on grounds that it was an abuse of the court process, was scandalous, frivolous and vexatious and also res judicata. Counsel urged that the applicants have been heard twice once before the lower court and once before this High Court in applications seeking stay of the proceedings, order of inhibition among other orders. He says that the lower court dismissed the said application while the high Court disallowed the application on grounds it was res judicata. Mr. Mutitu urged that the application before the court was seeking a stay of the proceedings and an order for inhibition and that the effect of both orders is to stay the proceedings which prayers have already been heard and determined by the court.

Mr. Nyamu responded to the submission by Mr. Mutitu and to the replying affidavit of Eustace. Mr. Nyamu submitted that the application was properly before this court and that sections 47 and 50 of the Law of Succession Act gives the court power to entertain the same. In regard to the numerous applications that the applicant has made seeking similar orders Mr. Nyamu submitted that the application dated 7th June 2010 and the one dated 21st July 2010 were withdrawn. That the application dated 14th October 2009 was urged before the SRM Court. He submitted that the application dated 26th January 2010 was declared res judicata by the High Court. Counsel urged that the instant application raises different issues and ought therefore to be heard.

Regarding the jurisdiction of this court to entertain the application, section 47 of the L of S Act provides for the jurisdiction of the High Court to entertain any application and determine any dispute under the Act. Section 50(1) provides that appeals shall lie to the High Court in respect of any order or decree made by the lower court. That not withstanding, the L of S Act does not declare that in entertaining any applications, disputes, or appeals from the lower court section 7 of the Civil Procedure Act shall not apply. The sections invoked by Mr. Nyamu in bringing this application do not allow him to bring an application similar to the ones already determined by the lower court and this court, touching on the same subject matter. The question is whether this application is res judicata.

The application before this court is seeking an order of stay of proceedings of the lower court and an order of inhibition of the suit properties. The application that was heard by the SRM Chuka was dated 14th October 2009. It was seeking an order of stay of the execution of judgment of the lower court. That application was declined on grounds the applicant had not invoked the jurisdiction of the court to entertain the application and secondly for the reasons that the grounds needed to be proved in order to obtain the order were not established by the applicant.

The applicant prosecuted the application dated 26th January 2010 in the instant appeal. In that application the applicant sought a stay of execution of the judgment of the SRM Court. That application was declined on grounds it was res judicata. The two applications for stay of execution of judgment are quite similar to the application of stay of proceedings of the lower court which is before this court. Once the High Court ruled that the application was res judicata the appellants were bound by that decision. Under section 50 of the Law of Succession Act no provision is made for an appeal against the decision of the High Court to the Court of Appeal. In fact what the applicant ought to have done in the first instance was to appeal against the decision of the lower court instead of filing a similar application before this court. The effects of the three applications are in my considered view the same. The instant application is therefore res-judicata. I will nonetheless consider the application.

The applicant has not invoked the jurisdiction of the court to grant the order of stay of proceeding applied for. Stay of proceedings is not provided for under the Law of Succession Act and therefore we must revert back to the Civil Procedure Act. Order 41 rule 4(1) provides for stay of proceedings. The wording of that order is clear that the stay of proceedings can only be made where the proceedings are going on and where determination has not been reached. The same order 41 rule 4(1) provides for stay of execution over decree or order appealed from. This was the proper application to make in the instant case because the suit before the lower court was concluded by the time the applicant moved to this court and is in the process of execution. In order to justify an order of stay of execution of a decree or order of the lower court an applicant must show that if the order is not made the appeal will be rendered nugatory and that the applicant will suffer irreparable loss. The application must itself have been brought with expedition in the first place. The grounds cited on the face of the application does not invoke the grounds upon which, if proved stay can be granted. The applicant has shot himself in the foot by failing to rely and therefore failing to prove that if the stay sought is not granted the appeal will be rendered nugatory or that the appellant will suffer irreparable loss.

An order of inhibition is provided under the Registered Land Act which has been invoked in this application. Section 128 gives the court discretion to make an order of inhibition where it thinks it is necessary to preserve the subject matter, that is immovable property. The applicant seeks an inhibition order over two parcels of land which are named. The applicant has not demonstrated that there is a need to preserve these two properties before the appeal filed herein is heard.

In regard to the prayer for status quo to be maintained in terms of occupation and cultivation of the said land parcels, the applicants have not demonstrated what the status quo is. This prayer is amorphous as the status quo is unknown and I do not see how such a prayer can be granted by a court.

Having come to the conclusion I have of this application the best order to make is to dismiss the application for two reasons firstly being res judicata and secondly on the grounds that the applicants have failed to demonstrate that they are deserving of the prayers sought in the application. The costs of the application shall be in the cause.

Dated Signed and delivered at Meru this 26th day of November 2010.

LESIIT, J

JUDGE

In the presence of the parties
Kirimi – Court Clerk.
Mr. Nyamu Nyaga for appellants/applicants
Mr. Mutitu for respondents

LESIIT, J

JUDGE

DATE
CORAM
Hon. Lady Justice J. Lesiit – Judge
C/Clerk Mwonjaru/Kirimi

Mr. Appellant/Applicant
Mr. For Defendant/Respondent

ORDER
Judgment/Ruling delivered in open court.

J. LESIIT

JUDGE.