



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 172 of 1998

RACHEL JEBWAMBOK SOI AND

ESTHER JEPKEMEI BARNGETUNY

(Legal Representative of

KITUI ARAP

BARNGETUNY)PLAINTIFF

VERSUS

ELIZABETH CHEBOO MARINDICH1ST
DEFENDANT

SUSANA JEPKORIR KIRWA.....2ND
DEFENDANT

R U L I N G

On 14th March, 2009 this Court delivered a Judgment in favour of the Plaintiff. The Defendants being aggrieved with the said Judgment wish to appeal to the Court of Appeal against the said Judgment. They have brought this application by way of Notice of Motion under Order XLI Rule 4 of the Civil Procedure Rules seeking stay of execution of the said Judgment pending the hearing and determination of the intended appeal. The application is based on the grounds as set out in the body of the Notice of Motion.

The application is also supported by an affidavit sworn by Elizabeth Cheboo Marindich with the consent of the Co-Defendant to swear the same in which she avers that they were aggrieved with the said Judgment; that they are apprehensive that the Respondent may proceed to execute the decree unless this Honourable Court expeditiously intervenes and that they stand to suffer irreparably given that the Judgment directed that their titles be cancelled.

The facts which gave rise to this litigation briefly may be stated.

The Applicants Elizabeth Cheboo Marindich and Susana Jepkorir Kirwa are daughters of Kirongo Marindich and Chebichiy Tapsianga Marindich who are now deceased while the Respondent Kitui Arap Barngetuny is the 1st son of Kirongo Marindich. The applicants are married women staying with their husbands. When Kirongo Marindich died his widow Chebichiy Tapsianga Marindich petitioned for a Grant of Letters of Administration to her late husband's estate being Eldoret HC. P&A Cause No. 3 of 1993 where the Grant was issued but the same has never to date been confirmed. The applicants

confirmation of the said Grant notwithstanding went ahead and caused subdivision of the late Kirongo Marindich's land parcel No. 7739/9 and subsequently transferred the subdivisions into their names and secured Title Deeds.

The Respondent filed a suit in this High Court being Eldoret HCCC. No. 172 of 1998. The suit was heard by Nambuye Judge who found in favour of the respondent herein and made the following orders:-

1. That an Order be and is hereby made and declared that the sharing out of the estate of the late Kirongo Marindich without the lawful approval of the Court is null and void.
2. That an Order be and is hereby made and declared that the Plaintiff is entitled as of right to a share of his father the late Kirongo Marindich's estate.
3. That an Order be and is hereby made directing the Land Registrar Uasin Gishu District to cancel the registration of the following land titles in the names of the Defendants namely:-

(i) Ngeria/Megun Block 5/57

(ii) Ngeria/Megun/Block 5/59

and restore the same in the original name of the deceased Kirongo Marindich.

4. That an Order be and is hereby made and ordered that the estate of the late Kirongo Marindich be determined in accordance with the Law of Succession Act Cap 160 Laws of Kenya.
5. That an Order be and is hereby made that pending cancellation of the two titles registered in the names of the Defendants as in No. 3 above an injunction be and is hereby issued to restrain the Defendants jointly and severally from wasting, alienating, damaging or charging the parcels of land:-

(i) Ngeria/Megun Block 5/57

(ii) Ngeria/Megun/Block 5/59

6. The Defendants to pay costs of the suit to the applicants.

These are the orders the Applicants seek to stay pending the intended appeal.

In support of the application Elizabeth Cheboo Marindich with the consent of Susan Jepkorir Kirwa has sworn an affidavit giving grounds. She avers that she is apprehensive that the Respondent may proceed to execute the decree unless this Honourable Court expeditiously intervenes; that they stand to suffer irreparably given that the Judgment directed that their title be cancelled.

I have considered the application in light of the affidavit evidence and submissions by both the applicant and the respondent. It is evident that when Kirongo Marindich died on 7-1-91, his widow, the late Chebichi Tapsianga Marindich petitioned for Grant of Letters of Administration to her late husband's estate vide Eldoret HCC. P&A No. 3 of 1993 and a Grant was issued but the same has never been confirmed to date. That being the position the subdivision of Land parcel No. 7739/9 which was part of the estate of Kirongo Marindich and subsequent issuance of Titles was null and void and the trial Judge made a finding issued an order to that effect and declared that the sharing out of the estate of the late Kirongo Marindich without the lawful approval of the Court was null and void and went ahead to issue an order directed to the Land Registrar Uasin Gishu District to cancel the registration of the suit property. The Judge further ordered the estate of the late Kirongo Marindich be determined in accordance with the Law of Succession Act Cap 160 Laws of Kenya.

This is an application for say of execution pending the hearing and determination of the intended appeal.

The principles upon which the Court acts in an application of this nature are now well settled. First the applicant has to demonstrate that the intended appeal is likely to succeed or that it is not frivolous. Secondly, the appellant has to show that the appeal would be rendered nugatory if the orders sought are not granted.

This is a protracted land dispute involving family members. The applicants have already filed an appeal against the decision of this Court to the Court of Appeal. This being a land dispute, and the applicants having expressed their desire to have their dispute heard by the highest Court of the land, they should not be denied the right to do so.

I exercise my discretion in favour of the applicants. I grant the application as prayed. Stay is granted pending the hearing and determination of the appeal.

Costs to follow the result of the appeal.

DELIVERED AND DATED AT ELDORET THIS 14TH DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE