

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 384 of 1994

IN THE MATTER OF THE ESTATE OF GITURU NGARI..... DCD

AND

1. GITONGA GACHUHI

2. GEORGE GACHUHI GITONGA.....PETITIONERS

VERSUS

1. NYIHA MURUATHIGA).....1ST OBJECTOR

2. GEORGE NDIRITU).....2ND OBJECTOR

3. WILLIAM GITURU).....3RD OBJECTOR

RULING

Judgment was delivered in this matter on 20th February 2008. George Gichuhi Gitonga being dissatisfied with that judgment filed a notice of appeal on 3rd March 2008. This ruling relates to two applications that were argued together. First is dated 12th May 2008 and the other 21st May 2008. I will begin by considering the one dated 12th May 2008. In my view if that application does succeed the other one cannot. The notice of motion dated 12th May 2008 seeks stay of execution of the judgment of 20th February 2008 pending appeal. The applicant George Gichuhi Gitonga deponed that the respondent had obtained a confirmed grant in terms of the judgment delivered herein and by an application before court were seeking that Form RL 7 and 19 be signed by an officer of the court. That in so doing they were intent on executing the judgment of the court. Further on obtaining the titles in their names they intended to sell the property. If that occurred and he was successful in his appeal he would suffer substantial loss. One of the respondents William Gituru Mugi swore an affidavit in reply. He deponed that the respondents have no intention of selling the property if the same was transferred in their name. Further that the applicant has not shown an arguable appeal. The respondent's learned counsel Mr. Karweru argued that the application before was incurable defective for having relied on order XLI of the Civil Procedure Rules. That that rule had not been adopted by the law of succession Act Cap 160. Further that Cap 160 does not have a pleading known as notice of motion. Learned counsel for the respondent Mr. Kebuka Wachira responded by saying that he relied on rule 73 of the Probate and Administration rules. That in bringing the application under notice of motion and under order XLI did not render the application defective. He said that the court should not be limited in form. Rule 63 of the Probate and Administration Rules provides:-

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”

It is indeed clear from that rule that order XLI was not made applicable to matters succession. In my view to quote order XLI in a succession matter does not itself render the application incompetent. It suffices if a respondent is able to determine the kind of application he is to face. To therefore quote the

wrong rule in a humble view does not defeat the application. The applicant was correct to say that the court can invoke rule 73 in such a situation. That rule provides the court with the opportunity to exercise its inherent discretion for the ends of justice. The respondent argued that the application is incompetent for having been brought under a notice of motion. That argument has merit. Rule 49 and 59 of the Probate and Administration rule show that any application in a succession matter must be brought under summons. The applicant was obligated to follow that form prescribed under those rules. Having failed to do so the application must fail. The application also will fail because in my view the applicant brought his application for stay after inordinate delay. Judgment having being delivered on 20th February 2008 the applicant in filing the stay application on 12th May 2008 did so after inordinate delay. That delay was not explained. I refused the respondents invitation to consider the merits of the appeal because in my view that is the sole province of the court of appeal. Having found that the application for stay does fail I now proceed to consider the summons filed by the respondent dated 21st May 2008. That application seeks an order for the court to authorize the deputy registrar to sign all the requisite documents to enable transfer of the property into the respondent's name. It is opposed on the basis that such transfer would change the status quo of the property to the prejudice of the applicant petitioner. The applicant stated that he is in exclusive occupation of that property and to allow the transfer to be done it would take away the substratum of the appeal. I have considered those arguments and the allegation that the respondents intend to sell the property on transfer. I am of the view that since there is no stay there is no reason to stop the respondents from enjoying the fruit of their judgment. I do however believe that there is need to restrict the respondents from transferring that land to a third party. This will ensure that the basis of the applicant's appeal will not disappear. I grant the following orders:-

1. *That the notice of motion dated 12th May 2008 is dismissed with costs to be borne by George Gachuhi Gitonga.*
2. *An order is hereby issued authorizing the Deputy Registrar of this court to sign all the requisite documents to enable the transfer of Aguthi/Gaki/725 in accordance with the judgment of this court of 20th February 2008.*
3. *Once such transfer as in No. 2 above are effected an inhibition be registered in respect of each resultant titles pending the proposed appeal by George Gachuhi Gitonga or pending further orders of this court.*
4. *There shall be no orders as to costs in respect of the summons dated 21st May 2008.*

Dated and delivered at Nyeri this 15th day of October 2008.

MARY KASANGO

JUDGE