



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELCA NO. E009 OF 2021**

**SIYAD AHMED HASSANA.....APPELLANT**

**-VERSUS-**

**YUSUF NDEGWA DAUDI.....RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. The material on record shows that the parties herein had a land dispute before the Kadhi's Court at Nyeri *in Succession Cause No. 5 of 2017 – In the matter of the Estate of Fatuma Ramadhan (deceased)* over Title No. Nyeri Municipality/Block 2 (Majengo) 534 (*the suit property*). The Respondent had sought distribution of the assets of the estate of the deceased but a dispute arose as to the ownership of the suit property. Whereas the Appellant contended that he was the sole proprietor of the suit property, the Respondent contended that he was only one of the beneficiaries thereof.

2. The record shows that the Hon. Kadhi referred the dispute as to ownership of the suit property to the Environment and Land Court for resolution before he could deal further with the succession matter before him. The material on record shows that the Respondent sued the Appellant in Nyeri *MCE&L No. 173 of 2018 – Yusuf Ndegwa Daudi v Siyad Ahmed Hassana*. The said suit was heard and vide a judgment dated and delivered on 25<sup>th</sup> February, 2021 the trial court found and held that the suit property rightfully belonged to Fatuma Ramadhan (*the deceased*) before it was fraudulently transferred to the Appellant. The trial court further directed cancellation of the Appellant's title for the suit property to revert to the original owner.

3. Being aggrieved by the judgment and decree of the trial court, the Appellant filed a memorandum of appeal dated 1<sup>st</sup> March, 2021 challenging the same on several grounds.

**B. THE APPELLANT'S APPLICATION**

4. Vide a notice of motion dated 5<sup>th</sup> March, 2021 brought under **Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules, 2010** (*the Rules*), **Section 63(e) of the Civil Procedure Act (Cap. 21)**, and **all other enabling provisions of the law**, the Appellant sought a stay of execution of the said judgment and decree dated 25<sup>th</sup> January, 2021 pending the hearing and determination of the appeal.

5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 5<sup>th</sup> March, 2021. The Appellant contended that unless the stay sought was granted the pending appeal against the judgment and decree of the trial court might be rendered nugatory if ultimately successful. It was further contended that if the decree was executed his family might be evicted from the suit property.

**C. THE RESPONDENT'S RESPONSE**

6. The Respondent filed a replying affidavit sworn on 30<sup>th</sup> March, 2021 in opposition to the application. It was contended that the application was misconceived since cancellation of the Appellant's title simply meant that the suit property reverted to the original owner for distribution amongst the beneficiaries in accordance with Islamic law. It was further contended that the Appellant was one of the beneficiaries of the estate of the deceased.

7. It was disputed that the Appellant had satisfied the requirements for the grant of an order for stay of execution pending appeal. It was contended that the application lacked merit hence the court was urged to dismiss it with costs.

#### **D. DIRECTIONS ON SUBMISSIONS**

8. When the application was listed for *inter partes* hearing on 4<sup>th</sup> May, 2021 it was directed that the application shall be canvassed through written submissions. The record shows that the Appellant filed his submissions on 25<sup>th</sup> May, 2021 whereas the Respondent filed his on 4<sup>th</sup> May, 2021.

#### **E. THE ISSUES FOR DETERMINATION**

9. The court has perused the Appellant's application dated 5<sup>th</sup> March, 2021, the Respondent's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Appellant has satisfied the requirements for grant of stay pending appeal.*

(b) *Who shall bear costs of the application.*

#### **F. ANALYSIS AND DETERMINATION**

##### **(a) Whether the Appellant has satisfied the requirements for grant of stay pending appeal**

10. The court has considered the submissions and material on record on this issue. The Appellant's application is essentially grounded upon the provisions of **Order 42 rule 6(2) of the Rules** which states as follows:

**“No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

11. The gist of the Appellant's application was that unless a stay was granted, there was a risk of the Respondent executing the decree with the consequence that the result of the pending appeal might be rendered nugatory if successful. The Appellant was also apprehensive that his family might be evicted from the suit property unless the application was allowed. In paragraph 6 of the supporting affidavit, the Appellant deposed that:

**“That execution of the judgment and subsequent orders thereto would render the appeal nugatory as cancellation of the title might lead to adverse action by the Respondent including but not limited to the interference of our quiet and peaceful possession and occupation as well as family unrest and conflict between the parties.”**

12. The court is inclined to accept that the risk of an appeal being rendered nugatory may indeed constitute substantial loss within the meaning of **Order 42 rule 6(2) of the Rules**. So, what are the orders of the trial court sought to be stayed? A perusal of the judgment of the trial court reveals that there were only two substantive orders made on 25<sup>th</sup> February, 2021. The first is an order declaring that the suit property rightfully belonged to the deceased and that it was fraudulently transferred to the Appellant. The second was an order cancelling the Appellant's registration for the suit property to revert to the deceased.

13. It is thus clear that there was no order for the eviction of the Appellant or his family from the suit property. It is also apparent that the judgment of the trial court did not vest the suit property upon the Respondent or any of the other beneficiaries. The issue of distribution of the assets of the deceased is still pending before the Kadhi's court. The court is, therefore, of the opinion that the Appellant's fears as expressed in paragraph 6 of the supporting affidavit are merely speculative and without any legal basis.

14. The court is far from satisfied that the trial court's declaration and finding the Appellant acquired the suit property fraudulently would render the pending nugatory unless stayed. The court is also not satisfied that the cancellation of the Appellant's registration is not reversible. In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter and 5 Others [2013] eKLR** the Court of Appeal considered the meaning of the term 'nugatory' as follows:

**“(ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.**

**(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages will reasonably compensate the aggrieved party.”**

15. The court is thus not satisfied that the Appellant has demonstrated what substantial loss, if any, he shall suffer unless the decree of the trial court is stayed. Moreover, the material on record shows that the Appellant is one of the beneficiaries of the estate of the deceased hence entitled to a share of the suit property. There is no evidence on record to demonstrate that it shall be impossible for the Appellant to recover the suit property should he ultimately succeed on appeal. Equally, there is no evidence to show that should the suit property become unavailable that damages shall not be an adequate remedy or that the Respondent shall be unable to meet any award of damages. Accordingly, the court is not inclined to grant the Appellant's prayer for stay of execution pending appeal.

***(b) Who shall bear costs of the application***

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly,

the Respondent shall be awarded costs of the application.

**G. CONCLUSION AND DISPOSAL**

16. The upshot of the forgoing is that the court finds no merit in the Appellant's application for stay. Accordingly, the Appellant's notice of motion dated 5<sup>th</sup> March, 2021 is hereby dismissed with costs to the Respondent.

It is so ordered.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 28TH DAY OF JULY 2021.**

In the presence of:

Ms Nanjala holding brief for Mr. Ombongi for the Appellant

The Respondent present in person

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**Y. M. ANGIMA**

**ELC JUDGE**