



IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.677 OF 2014

(CORAM: CHERERE-J)

IN THE MATTER OF THE ESTATE OF M'IKIARA M'NGUTAR1 (DECEASED)

BETWEEN

PATRICK MUTHOMI GATOBU.....1ST APPLICANT

FRANCIS KIRIMI KIARA.....2ND APPLICANT

NICHOLAS MURIUNGI KIARA.....3RD APPLICANT

AND

GEOFFREY MUGAMBI KIARA.....1ST RESPONDENT

PAUL GITONGA MUGO.....2ND RESPONDENT

RULING

1. By a ruling dated 15th October, 2020, the deceased's estate was distributed to the beneficiaries in equal shares as follows:

a) Land Parcel No. NKUENE/URUKU/52

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara
8. Estate of Esther Karai (deceased) her shares to go to her surviving children to share equally.

b) Yetu Sacco Account No. 25069

1. Julius Gitobu Kiara

2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara

c) Kathima Water Project Membership

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara

d) Cattle and Houses

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara

2. By summons dated 20th October, 2020 filed on 03rd November, 2020, the Applicants seek a stay of the ruling and an order of inhibition be registered on **LAND PARCEL NO. NKUENE/URUKU/52** to restrict any dealings on the said land pending the hearing and determination of an intended appeal.

3. The summons is supported by an affidavit sworn by **PATRICK MUTHOMI GATOBU (1st Applicant)** on 28th October, 2020 and on the grounds THAT:

1. Applicants are aggrieved by the ruling delivered on 15th October, 2020 and intend to appeal against it

2. Respondents have engaged a surveyor to commence execution of the orders on distribution of deceased's estate

4. The summons is opposed on the basis of replying affidavits sworn by 1st Respondent on 08th December, 2020 and by 2nd Respondent on 04th November, 2020. The Respondents contend that the distribution was made in strict compliance with the law and that this application is meant to delay the distribution as the Applicants continue to enjoy the benefits of the deceased's fast estate.

Analysis and Determination

5. I have considered the summons in the light of the affidavits on record and submissions filed on behalf of the Applicants and 1st Respondent and I have deduced the following issues for determination.

1. Whether the order of stay of execution of the impugned judgment ought to be granted

2. Whether an inhibition order on LAND PARCEL NO. NKUENE/URUKU/52 ought to issue

6. The ruling from which the Applicants propose to appeal against was delivered on 15th October, 2020.

7. There is no evidence that a notice of appeal and application for copies of proceedings and ruling were filed within time on 28th October, 2020.

8. The Plaintiffs/Applicants urge the court to exercise its discretion to grant a stay pending appeal and in support thereof relied on the Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 and Sister Sarah Adipo v Teachers Service Commission [2019] eKLR.

9. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned namely:

(a) that substantial loss may result to the applicant unless the order is made,

(b) that the application has been made without unreasonable delay, and

(c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See Antoine Ndiaye vs. African Virtual University [2015] eKLR.

11. In Butt vs. Rent Restriction Tribunal [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

12. As to what substantial loss is, it was observed in James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. In the instant case, the Applicants’ only complaint is that Respondents have engaged a surveyor to commence execution of the orders on distribution of deceased’s estate.

14. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution and the party seeking stay bears a specific burden regarding proof of substantial loss.

15. The Applicants have not demonstrated that the distribution of deceased’s estate as ordered by the court will occasion them any substantial loss in the event that the orders sought are not granted.

16. From the foregoing analysis therefore, the summons dated 20th October, 2020 filed on 03rd November, 2020, is found to have no merit.

17. Nevertheless, in order to preserve the subject matter, it is hereby ordered that beneficiaries shall not sell or dispose off their respective portions subdivided from Land Parcel No. NKUENE/URUKU/52 pending the hearing and determination of the intended appeal.

DATED THIS 15TH DAY OF APRIL ,2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For the Applicants - N/A for M/s. John Muthomi & Associates Advocates

For 1st Respondent -N/A for M/s. Gichunge Muthuri & Co. Advocates

For 2nd Respondent - Mr. Kithinji for M/s. Kithinji Kirigiah Muthuri & Co. Advocates