



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

FAMILY APPEAL NO. 05 OF 2019

IN THE MATTER OF THE ESTATE OF THE GEORGE NGEWA KILONZO (DECEASED)

JEREMIAH NGEWA

ROSE NDUKU NGEWA (*suing as legal representatives of*

LAELI NTHAMBI NGEWA..... **APPLICANTS**

-VERSUS-

KALEWA NGEWA KILONZO.....**1ST RESPONDENT**

CHRISTINA KAVINDU NGEWA.....**2ND RESPONDENT**

RULING

1. Before me is a Notice of Motion dated 10th September 2020 filed under Order 42, Rule 6(1), (2) and (3), and order 51 Rule 1 of the Civil Procedure Rules 2010, as well as Article 159 (2)(a) of the Constitution of Kenya 2010.

2. The application has four (4) prayers some of which have been spent as follows:

1. (spent)

2. (spent)

3. That this Honourable Court do grant stay of execution of the ruling/order reversing the title deeds for land parcels:

MBOONI/MUTITUNI/581,

MBOONI/MUTITUNI/601,

MBOONI/MUTITUNI/3520,

MBOONI/MUTITUNI/13513,

MBOONI/MUTITUNI/3537,

MBOONI/MUTITUNI/4379,

pending hearing and determination of the case.

4. That the costs of this application be provided for.

3. The application has grounds on the face of the Notice of Motion, mainly that the application has been brought without delay, that the court has jurisdiction to grant the orders sought, that the trial court declined a request for stay orders in order to preserve the subject matter of the appeal and that the applicant was willing to provide security and comply with the court's orders.

4. The application is opposed through a replying affidavit sworn by Christina Kavindu Ngewa in which it was deponed that the applicant was deliberately misleading this court, that ruling notice was served on them, that he was misleading the court that beneficiaries had agreed to the mode of distribution. The replying affidavit also questions the request for reverting the titles before determination of appeal as well as seeking for stay.

5. The application proceeded by filing written submissions. The applicants' counsel filed submissions on 17/2/2021 while the respondents' counsel Manthi Masika & company filed their submissions on 14/4/2021.

6. This is an application of stay of execution of a court's judgment or ruling pending appeal. Such applications are governed by Order 42 Rule 6(2) which provides 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”.

7. Having considered the application, documents filed on both sides, the submissions of the parties and the law, I am of the view that the application was filed without delay as the ruling of the trial court declining stay was delivered on 8th September 2020 and this application was filed on 11th September 2020.

8. Will the applicant suffer substantial loss if the stay herein is not granted? In my view, if the stay of execution of the decision is not granted, then the applicant is likely to suffer substantial loss, as land transactions are likely to take place which might be very difficult to reverse. Thus in order to preserve the subject matter, in my view, stay orders are justified. I also note that this court had granted stay orders pending determination of this application. I will thus grant stay of execution orders.

9. With regard to security, the applicant has said in the supporting affidavit that they are willing to provide security and abide by any orders that will be issued by this court. I thus find that the applicant has satisfied the requirement for providing security.

10. As for costs, since there is a pending Family Appeal No. 5 of 2020, costs will follow the determination of the appeal.

11. Consequently, I order as follows:

a) That there be a stay of execution of the ruling delivered on 20/9/2019, delivered by the trial magistrate L. K. Mwendwa reversing the title deeds for parcels:

MBOONI/MUTITUNI/581,

MBOONI/MUTITUNI/601,

MBOONI/MUTITUNI/3520,

MBOONI/MUTITUNI/13513,

MBOONI/MUTITUNI/3537,

MBOONI/MUTITUNI/4379,

and all consequential proceedings pending the hearing and determination of Makueni Family Appeal No. 5 of 2019.

(b) That the costs of this application will follow the decision in the appeal.

DATED SIGNED & DELIVERED, THIS 8TH DAY OF JUNE 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE