



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 58 OF 2019

BILIA WAMBETI JOTHAM.....APPELLANT/APPLICANT

VERSUS

JANET GACEKE NGUO.....RESPONDENT

RULING

A. Introduction

1. This is a ruling for the application dated 15th October 2019 in which the applicant seeks for orders for stay of execution of the ruling made in Embu Chief Magistrate's Succession Cause No. 312 of 2017 on the 16th September 2019 pending the hearing and determination of this appeal.
2. It is the appellant/applicant's case that she is a daughter of the deceased in the probate proceedings in Embu Succession Cause No. 312 of 2017 which were commenced without her knowledge and that she was not provided for whereas the respondent and her children were awarded the two suit lands belonging to the deceased i.e. Ngandori/Kirigi/6181 and 6182.
3. It is the appellant's case that she stands to suffer substantial loss if the orders sought are not granted as she resides on and has built a permanent three storied house on land parcel No. Ngandori/Kirigi/6181 that belonged to the deceased. The applicant further states that she has lived on the aforementioned parcel since 1996. Further it is the applicant's case that the respondent has began executing the decree.
4. The applicant further states that her appeal has a high chance of success and further that if the orders sought are not granted the appeal shall be rendered nugatory and finally that she is willing to abide with any orders as to cost.
5. In rejoinder, it is the respondent's case that the applicant is her stepdaughter and that before the probate proceedings in the trial court were commenced, she informed the applicant. The respondent further states that the applicant was given her portion by the deceased prior to his death, this is parcel number Ngandori/Kirigi/5385 and that the applicant has since grabbed land parcel number Ngandori/Kirigi/6181 instead of moving to her portion of land.
6. The respondent further states that the applicant is not truthful and should not be trusted as the alleged storey house stated by the applicant is not a 3 storey house but a 2 storey one and further that the instant appeal has no merit but is just a delaying tactic to avert execution of the lower court decree.

B. Analysis & Determination

7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 Rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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.
8. In **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
9. In this case the applicant claims that she is the daughter of the deceased in Embu Succession Cause No. 312 of 2017 and that the trial court's decision effectively disinherited her and that unless the stay is granted her appeal will be rendered nugatory in that she resides on and has built a permanent three storied house on land parcel number Ngando/Kirigi/6181 where she has lived on since 1996.

10. Conversely, the respondent objects to the application for stay of execution on the grounds that the applicant, who she admits is her stepdaughter, was given land by the deceased prior to his death namely LR. No. Ngandori/Kirigi/5385 and that the applicant has since grabbed land parcel No. Ngando/Kirigi/ 6181 instead of moving to her portion of land. The respondent further states that contrary to allegations by the applicant, she was well aware of the proceedings before the trial court.

11. The issue for determination is whether the Applicant has met the threshold for the grant of orders for a stay of execution pending appeal.

12. The principles in play when granting orders for stay of execution pending appeal are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. The conditions to be met by an Applicant are;

a) *THAT the Application has been made without unreasonable delay.*

b) *THAT substantial loss may result to the Applicants unless the order sought for is made.*

c) *THAT the Applicants provide security as may be ordered by court for the due performance of the decree or order.*

13. In our instant suit the Applicant proprietary claims to the parcel of land parcel number Ngando/Kirigi/6181. She states that she has developed the same and has resided therein since the year 1996. She states that her attempts to have the grant issued to the respondent revoked failed prompting the instant appeal.

14. It is clear from the record that the application herein has been made timeously specifically after 30 days after the delivery of the ruling.

15. As regards whether substantial loss would be occasioned should stay not be granted, I note that the subject land is as per orders of the trial court to transmit to beneficiaries who would be at liberty to deal with the land as they deem fit. There is therefore a real danger that should the appeal go in favour of the applicant there might be no land for the applicant to go to. The Respondent has not demonstrated that she and the other beneficiaries are persons of means who would be in a position to compensate the applicant.

16. In any event, the subject matter is land. Courts, and for good reason, have adopted a policy of maintenance of the status quo where land is the subject matter.

17. In the case of **Mugah v. Kunga (1988) KLR**, the *Court of Appeal* stated;

“The practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court, the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined.” (Emphasis added)

18. This position is further buttressed in the decision in **Hamisi Salim Mwaluimo v Julius Wambugu Mombasa H.C. CIVIL APPEAL NUMBER 9 OF 2003**, where the Court held;

“It is settled law that in possession suits a stay ought to be granted as otherwise a successful appeal will be rendered nugatory. In this case, the appellant has gone on to construct a house on the said land which may lead to its demolition if execution proceeds. As to security, the Respondent is in possession of the title document and therefore the applicant cannot transfer the same. However, I have noted that the issue of ownership was raised in the main trial. After considering all the arguments, I will grant the application on condition that the applicant maintains the land and building in their current state. There shall be no alteration in any manner of the same until the appeal is heard.” (Emphasis added)

19. And finally on this point, where the threat of eviction is real, a party stands to suffer substantial loss if he was to be evicted from a property the subject matter of an appeal. In the case of **Mukuma v Abuoga [1988] KLR 645** the *Court of Appeal* had this to say;

“Where a party is exercising his undoubted right of appeal the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. The granting of a stay of execution in the high court is governed by Order XLI Rule 4(2)....The discretion of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal rules is at large but 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. In the circumstances of this case, the applicant stood to suffer substantial loss if she was evicted from the land at this stage. Moreover, it could not be said that her intended appeal had no chances of success,” (Emphasis added).

20. I am persuaded that in the circumstances and facts of this case, substantial loss is likely to be visited on the applicant should a stay of execution not be granted.

21. The final condition to be met by the Applicant is the rendering of security. The rationale for this requirement is easy to see. A successful litigant is entitled to the fruits of his judgment and if he is kept away from these, there must be a guarantee of due performance of the decree or order.

22. In monetary decrees, the issue of security is always straightforward and invariably involves order for deposit of the decretal sum or a substantial party thereof.

23. Looking at the nature of the decree in our instant suit, I note the subject matter herein is land and I am of the persuasion that the adverse exposure that the Respondent and Beneficiaries would face would be loss of mesne profits and change of character of land and, in the extreme case, the disposal of the land.

24. The Court has within its powers the wherewithal to cushion the Respondents from all the 3. I find and hold that the rendering of security would be met by the Respondent meeting the following conditions.

25. It is important, in my view that inhibitions be registered against all the affected titles to preserve the estate even where the applicant has not made such prayer. In the case of **Nakuru Municipality Council v Murima Muturi & Another**, NAKURU H.C. CIVIL APPEAL NO. 41 OF 2009, the Court while preserving the subject matter which was land stated;

“So that no prejudice is caused to either party, in exercise of my inherent powers, I direct that a restriction shall be registered against the title to the suit land until the appeal is heard and determined.... and Mr. Murima Muturi shall within seven days of service of this order upon him deposit the title deed relating to that piece of land with the Deputy Registrar of this court to be kept in safe custody until this appeal is heard and determined. Mr. Muturi is also hereby restrained from carrying out any development on that piece of land until this appeal is determined”. (Emphasis added)

26. I find the application dated 15th October 2019 merited and allow it in the following terms: -

a) An inhibition be registered against each of the parcel numbers Ngando/Kirigi/6181 and 6182 pending the hearing and determination of the appeal.

b) Pending hearing and determination of the appeal, the orders made on 16th September, 2017 in Embu CM Succession Cause No. 312 of 2017 are hereby stayed.

c) Costs to abide the outcome of the appeal.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Osoro for Muriuki Muriithi for Applicant/Appellant

Respondent in person

Applicant in person