



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 302 OF 2012
IN THE MATTER OF THE ESTATE OF M'ITIRI KAMAKIA ALIAS ITIRAI KAMAKIA (DECEASED)

STEPHEN MARANGU M'ITIRAI.....PETITIONER/APPLICANT

VERSUS

SILVERIA NCECE M'IRURA..... 1ST OBJECTOR/RESPONDENT

SARAH NAITORE2ND OBJECTOR/RESPONDENT

MARIETA NDURU MWIRIGI3RD OBJECTOR/ RESPONDENT

BEATRICE MWARI 4TH OBJECTOR/RESPONDENT

ELIZABETH MUGURE5TH OBJECTOR/RESPONDENT

RULING

1. The significant orders sought in the Notice of Motion dated 19/6/2019 expressed to be brought under Order 42 Rule 6 (1) and (2), Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act is;

a. Stay of execution of the judgement/decree delivered on 2/5/2019 pending the hearing of the intended appeal; and

b. Costs.

2. The application is based on the grounds stated in the application and the supporting affidavit of Stephen Marangu M'Itirai. He deposed that upon being issued with a grant dated 3/10/2012 which was confirmed on 29/10/2013 he disposed of the following properties for the benefit of the estate;

a. He sold Abothuguchi/L-Kaongo/32 to:

Tarasion Kiambati M'Tamuga -1.00 acre

Karaene Primary school – 1.00 acre

Evangeline Gatura – 2.0 acres

b. He sold Abothuguchi/L-Kiija/68 to:

Paul Mwiti – 1.48 acres

Moses Muriithi Kiara – 0.40 Ha

Doris karimi Kaaria

Gatwiri Rose Kaaria

Fridah Mukiri Kaaria

Gilbert Murithi mucheke – 0.39 Ha

Muthuri John Mucheke – 0.21 Ha

Francis Munyua Mutua – 0.40 ha

3. He averred further that, on 4th October 2017 this court confirmed a second grant but material facts were not disclosed leading to great prejudice on the part of the purchasers who have made significant developments thereon. Those developments now lay to waste as the beneficiaries have set upon those respective parcels of land. He has filed in this court a notice of appeal with a very high chance of success. He stated further that, the appeal stands to be rendered nugatory if the stay of Judgement is not granted.

4. The application was opposed through the replying affidavit of Sarah Naitore dated 22/7/2019 where she contended that the applicant has no arguable appeal which explains why he did not attach any draft memorandum of appeal. It was her view that the applicant did not explain why he did not distribute the estate of the deceased since 12/11/2013 when he was granted the letters of administration intestate and he has not concisely provided the particulars of misrepresentation he is talking about. According to her, his application lacks merit and is an afterthought as the estate of the deceased is distributed equally to all the beneficiaries.

5. The grant of stay of execution could fall in either or both categories depending on the circumstances, by serving the ends of justice or preventing an abuse of the court process. Ordinarily, stay of execution pending appeal would be granted if sufficient cause has been shown. The applicant must show that substantial loss would occur unless stay is granted. What constitutes real substantial loss will be dictated by the nature of the subject matter. But, a working definition on substantial loss was formulated in the case of *Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005* (The High Court of Uganda at Kampala) as follows: -

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.

6. These standards are stated in **Rule 6 of Order 42 of the Civil Procedure Rules 2010**, thus: -

“1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except insofar 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 sub-rule (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. The major argument by the applicant is that, when the court confirmed a grant dated 4/10/2017 material facts were not disclosed and therefore the purchasers who had made significant developments were prejudiced. Gathering from his averments and submissions, the material facts he alleges were not disclosed to court were that the lands in question had been sold to third parties and that the third parties had extensively developed these lands. The court (Makau J.) in his judgement dated 30th April 2015 considered claims by the daughters who were applicants then, to the effect that the petitioner was dishing out the entire estate property to strangers. The petitioner denied that fact under oath in the Replying Affidavit by him dated 3rd March 2015. In the said judgment, the court observed and noted that the petitioner averred inter alia that he was not dishing out the estate property to strangers but he had only leased the estate property to the alleged strangers in order to raise money to file these proceedings. That is not all. In subsequent decisions of the court, the issue of purchasers was quite prominent, was discussed and determined by the court. In this mix of things, it is not defensible for him to allege that material facts about third parties were not disclosed to court when it made its determination. I even doubt the bona fides on the part of the petitioner in applying. The third parties on whose behalf he seems to be applying have not filed any appeal despite the fact that they were subject of discussion by the court in an application for joinder herein. These matters do not create an impression of a bona fide suitor. One needs to come to court with clean hands especially when they are seeking discretionary remedies such as stay of execution. Therefore, I find the application herein to be an afterthought and an attempt to prevent due administration of this estate. I do not see any substantial loss that he will suffer in the sense of the law. I am aware that humans may be tempted to seek self-preservation especially in a situation where claims by third parties may be a source of pressure to them. Nonetheless, the less I say about this matter the better.

8. Consequently, I find the motion dated 19/6/2019 to be without merit and is hereby dismissed with costs.

Dated, signed and delivered in open court this 19th day of February, 2020

F. GIKONYO

JUDGE

IN PRESENCE OF

Maheli for Riungu for respondent

Kiautha for applicant

F. GIKONYO

JUDGE