



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 15 OF 2007

In the matter of the Estate of Justus M'Murithi M'Bagiri (Deceased)

JEMA KARIMIOBJECTOR/ APPLICANT

VERSUS

MWAKITHI M'MURITHIPETITIONER

JAMES KUBAI 2ND RESPONDENT

ISAAC NTONGAI SAMWEL.....3RD RESPONDENT

RULING

1. Before me is a Summons dated 14/1/2020 expressed to be brought under order 46 rule 6, order 51 Civil Procedure Rules, Section 1A, 1B, 3, 9, 3 Civil Procedure Act, Section 47 of the Laws of Succession Act, Rule 49, 63 & 75 of the P & A Rules and Article 159 of the Constitution seeking for orders of;

a. Stay of execution and/or enforcement of the Judgement/Decree of the court dated and delivered on 18th December 2019 pending the hearing and determination of the applicants intended appeal

b. Inhibition on LR No. Nyaki/Mulanthakari/589, Ntima/Igoki/1227, Nyaki/Mulanthakari/1274 until the intended appeal is heard and determined.

c. Costs of this application.

2. The application was premised on the grounds set out in the application as well as the supporting affidavit of Teresia Mwakithi. The deponent stated that the judgement in this matter was delivered on 18/12/2019 and immediately the objector and his family issued threats to evict her and her family from the suit land. The objector is in the process of executing the judgment and plans to sell off part of the estate which would render her homeless and her intended appeal nugatory. She has filed a timely notice of appeal against the said judgement in the court of appeal. Unless the stay orders are issued the appeal will be rendered nugatory. Therefore, in the interest of justice the status quo should be maintained to await the outcome of the appeal.

3. The application was opposed by the replying affidavit of Jema Karimi who stated that there is nothing to stay since the orders issued by the court on 18/12/2019 are in the nature of negative orders incapable of execution since the court did not order any of the parties to do anything or refrain from doing anything. It was deposed further that the application contains falsehoods that are meant to mislead the court as she has never issued threats to evict the petitioner/applicant. Also the claim that she is in the processes of disposing part of the estate is false. According to her, filing of an appeal does not ipso facto guarantee stay of execution of the court orders and this court cannot be invited to look at the merits of the intended appeal as that would amount to inviting this court to sit on its own appeal. She urged that it has now been over 40 days since the delivery of the judgement and the applicant has not exhibited any evidence to show that she has taken steps towards progressing the appeal and this is a fairly old matter which is over 10 years old and the instant application is meant to further delay it.

4. The Respondent argued that the court has already made a finding that the applicant is a stranger on the estate of the deceased and during the pendency of the suit the applicant and her accomplice James Kubai put up temporary structures on the estate of the deceased from which they have been deriving rental income of Kshs. 133,500 per month and is delaying the implementation of the grant for as long as possible in order to continue deriving benefits from the estate.

ANALYSIS AND DETERMINATION

5. Two significant orders have been sought; stay of execution pending appeal and inhibition upon the estate property. Are these prayers

merited? I will carefully consider the application, affidavits and the record.

6. In accordance with Order 42 Rule 6 of the Civil Procedure Code;

(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.

Application filed without delay

7. I note the application was made without unreasonable delay, as judgment on this matter was delivered on 18/12/2019 and this application was filed on 14/1/2020. Nonetheless, let me consider the merit of the application.

Substantial loss occurring

8. The cornerstone of the jurisdiction in 42 rule 6 of the CPR is to prevent *substantial loss from occurring to the Applicant*.

9. Substantial loss has been described in the case of **Sewankambo Dickson vs. Ziwa Abby HCT-00-CC MA 0178 of 2005**, High Court of Uganda at Kampala as follows: -

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

10. As was stated in the case of **Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto**:

“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. This is what substantial loss would entail...”

11. Therefore, loss of real value rather than nominal one must be established such as appeal will be rendered nugatory. The applicant in her affidavit has made two significant claims that; (1) immediately the judgment was delivered, the objector and his family issued threats to evict her and her family from the suit land; and (2) the objector is in the process of executing the judgment and plans to sell off part of the estate which would render her homeless and her intended appeal nugatory.

12. The objector has denied these claims. Instead, she claims that the petitioner and John Kubai erected structures in the estate from which they continue to receive rent- and that they intend to sustain collection of rent for as long as possible through this application.

13. The petitioner made quite specific and serious allegations and should accordingly supported. In **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**, it was held that;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

14. I do note that the applicant made mere allegations without providing any substantiation thereof. The foregoing notwithstanding, I do note that the OBEJECTOR deposed that she neither made threats to evict the objector and her family nor intends to sell any part of the estate, I do not therefore see how the appellant will suffer substantial loss of eviction or her appeal being rendered nugatory. The application dated 14/1/2020 is therefore without a foot on which to stand and is hereby dismissed.

15. Be that as it may, I take the averment by the objector to be an undertaking not to evict the applicant from the estate property or sell any part of the estate as the applicant pursues her appeal. This is sufficient comfort for the petitioner.

16. The only perturbing thing is the Objector’s claim that the applicant and John Kubai still receive rents from the estate property. I will re-state the law. The court duly appointed and confirmed an administrator to the estate of the deceased. The property of the deceased vests in the administrator for purposes of administration of the estate. See section 79 of the Law of Succession Act below: -

79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

17. Accordingly, only the administrator should collect and receive all income from the estate for purposes of administration of the estate. See the powers and duties of the personal representative in sections 82 and 83 of the Law of Succession Act. In light thereof, collection of rent from the estate by the applicant and John Kubai is in violation of the law and should be stopped forthwith. These circumstances forces the court to draw from the powers under section 47 of the Law of Succession Act as well as the inherent jurisdiction of the court under rule 73 of the Probate and Administration Rules to make such orders as are necessary to meet the ends of justice. And, I order that all rents and income from the estate shall be collected only by the administrator of the estate. She shall then account for rents and income received as required by law. For the avoidance of doubt, the applicant and John Kubai are restrained from receiving any rents from the estate property. It is the duty of the court to prevent intermeddling with the estate of the deceased and also preserve the estate even as the applicant pursues her appeal. There is also need to avert the objector's fear that the applicant is buying time in order to continue receiving the rents from the estate.

18. It is so ordered

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

1. MAITAI RIMITA AND COMPANY ADVOCATES for the Applixcant

2. MITHEGA & KARIUKI ADVOCATES for the Respondent