



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

MISCELLANEOUS CIVIL APPLICATION CASE NO. 01 OF 2020

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

BENARD MACHEAL NGICURU.....1ST APPLICANT

THE ESTATE OF THE LATE DAVID MBITI KIGANUU.....2ND APPLICANT

VERSUS

M'KABETE NJECU KIRUUJA.....RESPONDENT

Being an application for staying of execution of the ruling herein pending appeal against the Ruling and Order of Deputy County Commissioner Meru South Sub County (M'Mbetsa O. Beja) undated in the Minister Case No. 56 of 2007)

BETWEEN

M'KABETE NJECU KIRUJA.....APPELLANT

VERSUS

DAVID MBITI KIGANUU.....RESPONDENT

RULING

1. This application which is dated **17.1.2020** states that it has been brought to court under section 3A of the Civil Procedure Act, Order 22 Rule 52, Order 42 Rule 6(2) a of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks the following orders:

1. That this application be dispensed with in the first instance and be certified as urgent.
2. That there be a stay of execution of the undated Ruling issued by the Deputy County Commissioner Meru South Sub County in Minister Case No. 56 of 2007 M'Kabete Njecu Kiruja versus David Mbiti Kiganuu pending confirmation of grant in the estate of the late David Mbiti Kiganuu and pending hearing and disposal of the intended appeal.
3. That the honourable court do grant restraining orders against the respondent by either himself, his servants, employees and/or agents from harassing the family of the late David Mbiti Kiganuu and/or interfering in any other way with the possession of the suit property pending the determination of the intended appeal.
4. That the Deputy County Commissioner Meru South Sub County and officer in Charge of Station Kathwana Police Station do ensure compliance of these orders.
5. That an order that the costs of this application do abide the result of the intended appeal.

2. The application has the following grounds:

- a) That the 1st applicant is an interested party in the suit property.

b) That the late David Mbiti Kiganuu's family is in the process of applying for letters of administration.

c) That the enforcement of orders given in Minister Case 56 of 2007 will prejudice against the 1st applicant who will suffer mental, emotional and financial loss as he is an interested party in the suit property and the 2nd applicant, widow of the late David Mbiti Kiganuu, and her family will suffer mental, emotional and financial torture as the respondent wants to fraudulently acquire their home.

d) That it is in the interest of justice that the orders be granted.

3. The application is supported by the affidavit of Benard Macheah Ngicuru, the 1st applicant which states as follows:-

I, BENARD MACHEAH NGICURU, of P. O. Box 19718-00202 Nairobi in the Republic of Kenya do hereby make oath and state as follows:

1. That I am an adult male of sound mind and therefore competent to swear this affidavit.

2. That on 4th May, 2011, I entered into an agreement for sale with the late David Mbiti Kiganuu for the purchase of 2 Acres of land to be hived off Plot No. 426 Kathwana Adj. Section. Annexed hereto and marked as "BMN 1" is a copy of the Agreement for sale.

3. That I am informed by the Registrar of Lands at Chuka, which information I verily believe to be true that on 4th July, 2011 a caution was placed on the title of Plot No. 426 Kathwana Adjudication Section restricting any dealings on the suit property. Annexed hereto and marked as "BMN 2" is a copy of certificate of official search.

4. That sometime in 2011 the vendor, the late David Mbiti Kiganuu, due to financial strain asked that I educate his issues, Beth Murugi Mbiti, Alex Mutugi Mbiti and Caroline Makena Mbiti, in exchange for a further part of plot No. 426 Kathwana Adj. Section. A fact known to his surviving family.

5. That on 13th December, 2019 while at Nkubu Mission Hospital the vendor, the late David Mbiti Kiganuu, passed on.

6. That I recently became aware of an undated Ruling delivered by Deputy County Commissioner Meru South Sub County in Minister Case No. 56 of 2007, where the Deputy Commissioner ordered that the deceased's land be divided into two between the deceased and one M'Kabete Njecu Kiruja. Annexed hereto and marked as BMN 3 is a copy of said Ruling.

7. That it is in my interest, that of the deceased's family and in the interest of justice that I swear this affidavit in support of application filed herewith for stay of execution orders.

8. That the facts deponed herein are true to the best of my knowledge, information and belief except the sources which have been disclosed.

4. The application was heard interpartes orally on **17th February, 2020**.

5. Mr. Muriithi, the applicant's advocate, told the court that he sought stay of execution of the minister's decision in minister's case No. 56 of 2007 and also restraining orders for the respondents not to interfere with the applicant's possession of the suit property.

He went on to tell the court that the 2nd respondent, David Mbiti passed away at Nkubu Mission hospital on **13.12.2019** and that the family was in the process of applying for Letters of Administration apposite to his estate. This will enable them to file an appeal against the minister's decision.

6. M/s Muthoni, the respondent's advocate, opposed the application. She told the court that the applicants had not demonstrated satisfaction for any of the conditions imposed by order 42 Rule 6 subrule 2 of the Civil Procedure Rules regarding evidence of substantial loss to be suffered if stay orders were not granted and offering of security for due performance of such decree or order as may ultimately be binding on the applicant should the application not eventually succeed.

7. M/s Muthoni told the court that the impugned decision was delivered in **2007** and the applicants had not explained the delay in filing this application many years later. She also said that in accordance with the impugned decision, the 1st applicant should stake his claim against the 2nd applicant. She further told the court that the 1st applicant had not been enjoined in the proceedings before the minister and was therefore a stranger in this matter. She also told the court that since the applicants had not enjoined the District Land and Settlement Officer, who is the only person who can implement orders sought in this application, this application should be deemed fatally defective.

8. Mr. Muriithi, the plaintiff's advocate, disputed the statement by the respondent's counsel that the impugned decision was made in **2007**. He referred the court to the proceedings in the Appeal to the Minister Case No. 56 of 2007 which clearly indicate that the hearing took place on **4.4.2019**. The court hereby confirms the veracity of this assertion.

9. I have carefully considered the pleadings filed by the parties in support of their veritably incongruent assertions. On a balance of probability and in the general interest of justice, I find that the application evinces merit. However, it would not be in the interest of justice for the court to give open ended orders as prayed for by the applicant. It is necessary that there be a sunset provision that the orders granted herein do subsist for six months only pending the hearing of the applicants' intended appeal.

10. Consequently, the following orders are issued:-

(1) Prayers 2 and 3 are granted for six months only during which time the applicants are expected to file their intended Appeal apposite to Minister Case No. 56 of 2007 M'Kabete Njecu Kiruja versus David Mbiti Kiganuu (Before Deputy Commissioner, Meru South Sub County) FAILING which the orders granted herein will automatically lapse.

(2) The applicant to deposit with court as security for cost the sum of Kshs.300,000/= within the next 21 days failing which the orders granted herein will automatically lapse.

(3) Costs to abide the result of the intended appeal.

Delivered in open Court at Chuka this 24th day of February, 2020 in the presence of:

CA: Ndegwa

Mutani present for Applicant

P. M. NJOROGI,

JUDGE.