



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 138 OF 2020**

**NJERI KIHARA MUTHIORA.....APPLICANT**

**VERSUS**

**DAVID MACHUA KIHARA.....1<sup>ST</sup> RESPONDENT**

**MACHUA MUNYUA JAMES.....2<sup>ND</sup> RESPONDENT**

**MUTHIORA MACHUA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application being considered by this Ruling is a Notice of Motion dated 5<sup>th</sup> November 2020. That application is filed by **David Machua Kihara, Machua Munyua James** and **Muthiora Machua** (hereinafter the applicants). They seek the following prayers:

*a. THAT pending the hearing and determination of this application status quo be maintained.*

*b. THAT pending the filing of the appeal there be a stay of the orders emanating from the Ruling of Hon R. Orora dated the 3<sup>rd</sup> day of November 2020.*

2. The back ground of this matter is some-what revealed by the orders sought through the applicant's application.

3. It is deponed through the affidavit of Machua James Munyua, sworn on 5<sup>th</sup> November 2020, that the Hon. R. Orora, the Magistrate in the trial court, granted orders of injunction permitting **Njeri Kihara Muthiora** (herein after the respondent) to proceed with the interment of her husband Kihara Muthiora deceased on the parcel of land NDUMBERI/TING'ANG'A/2635 (the property) when the deceased title of the property was obtained by fraud, and in so doing the trial court failed to consider the applicant's replying affidavit. That the property is a sub-division of parcel NDUMBERI/TING'ANG'A/347 whose title the deceased obtained through fraud since his claim over the same was unsuccessful in various court cases, namely SRM Kiambu Succession No. 59 of 1997, HCCC Nairobi Civil case No. 275 of 1987, SRM Kiambu case NO. 57 of 1972, and which decisions were not appealed against. That the applicants with 40 other families continue to reside on the said property and accordingly there is the possibility of breach of peace if the trial court's orders are implemented. Further that the implementation of the trial court's order will lead to the demolition of structures thereon. The main thrust of the applicants' application is that the orders made by the trial court were made in a miscellaneous file and yet the orders are final in nature

4. The applicants attached various copies of court orders made by other courts in respect of the subject of the property.

5. The application is opposed by the respondent.

6. The respondent deponed through her affidavit sworn on 9<sup>th</sup> November 2020 that the trial court had the requisite jurisdiction to grant the order for the interment of the deceased on the property, that the applicant failed to raise a preliminary objection on to jurisdiction of the trial court and should therefore be barred from raising it here. Further that the issue of ownership of the suit property was the subject of the decision of Hon Mulekyo SPM, Hon. Kabucho RM, and Hon P. Gichohi CM which decisions upheld the deceased's ownership of the property. That other than stating so in the present application the applicants had no evidence that the title of the property is under investigation. That the deceased obtained registration in his name of the title to the property and to date the applicants have not filed an appeal against the award of that title to the deceased. That Hon P. Gichohi CM determined by the decision of 18<sup>th</sup> December 2017 that the occupation by the applicants of the property was trespass with no right.

**ANALYSIS AND DETERMINATION**

7. I have considered the affidavit evidence of both the applicants and the respondent and the submissions of the learned counsels. From this initial stage I wish to consider a question which I posed to the applicant's learned counsel, **Mr. Kamuiru**, which question did not receive the required answer. The question was whether an application such as the one filed herein could be considered in the absence of filing an appeal.

8. Stay pending appeal is entertained under Order 42 Rule 6 (1) of the **Civil Procedure Rules**. That Rule provides:

*6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far 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.*

9. It is clear from the above provisions that stay of a judgment is granted by the court appealed to when there exists an appeal. In this case the applicants have not filed an appeal. They have simply filed the application which is under consideration and the obvious question which ought to be answered is: the stay now sought by the applicants will be pending what since there is no appeal in existence. The applicants filed, as an exhibit, a Memorandum of appeal which their learned counsel referred to as a draft.

10. On the ground that the prayers sought are not supported by an appeal the application is incompetent and it fails. It fails even though the applicants argued that the trial court ought not to have granted the orders on a miscellaneous file.

11. Also the applicants failed to annexe any pleadings to the present application that were before the trial court. This failure, needless to say, is fatal to the application which seeks to stay the orders made by the trial court. This court in the absence of those pleadings is unable to confirm the correctness of what is submitted by the applicants.

12. The applicants, as correctly argued by the respondent's learned counsel **Ms Njihia**, did not prove their entitlement to the property since they did not show that they are registered owners of the property. Rather the only evidence before court is that the property is registered in the deceased name.

13. On the whole I find no merit in the Notice of Motion dated 5<sup>th</sup> November 2020. It is dismissed with costs.

14. For the avoidance of doubt I wish to restate that the **lawful orders which remain in place and are upheld by this court** are as ordered by the trial court, that is:

*a. THAT **Njeri Kihara Muthiora** herein be and is hereby allowed to intern the remains of her husband **KIHARA MUTHIORA deceased** on land parcels No: **NDUMBERI/TING'ANG'A/2635**.*

*b. THAT an order for temporary injunctions be and is hereby issued restraining **David Machua Kihara, Machua Munyua James, Muthiora Machua and Esther Njeri Machua** their servants, agents and/or nominees from interfering and denying **Njeri Kihara Muthiora** the right to bury her deceased husband **Kihara Muthiora deceased** on land parcel No: **NDUMBERI/TING'ANG'A/2635**.*

*c. THAT the **Officer Commanding Kiambu Police Division Headquarters** to offer security for the purpose of enforcement of these orders by the court bailiff.*

**SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>th</sup> DAY OF NOVEMBER 2020.**

**MARY KASANGO**

**JUDGE**

11<sup>th</sup> November 2020

Before Justice Mary Kasango

C/A.....

For the Applicants.....

For the Respondent.....

**COURT**

Ruling virtually delivered in their presence.

**MARY KASANGO**

JUDGE