



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 48 OF 2018

JOHN NGUGI KABOGO.....1ST APPELLANT

JANE NJERI.....2ND APPELLANT

MARGARET MWIHAKI.....3RD APPELLANT

ROSEMARY WAITHIRA.....4TH APPELLANT

VERSUS

MARY NYAGUTHII MBUGUA.....RESPONDENT

RULING

1. The appellants pray for *stay* of the order of the lower court pending the hearing and determination of this appeal.
2. The impugned *order* was made on 20th September 2018 in *Kandara Resident Magistrates Court Civil Case 236 of 2018*. The subordinate court allowed the *respondent* to inter the remains of *her* husband (a brother to the 1st appellant) on land reference Loc 5/Kagumo-ini/755. The disputed land is registered in the name of the 1st appellant's father *Julius Kibuthu Kabogo* (also deceased).
3. The appellants' notice of motion is dated 21st September 2018. They aver that the appeal is *arguable*; and, that the respondent will *not* suffer prejudice from the stay.
4. The appellants contend that the respondent went ahead with the burial despite the pending appeal. The 1st appellant cites his father's written *will*; and, documents dated 11th July 1982 and 20th August 2015. The appellants' case is that the late *Clement Mbugua Kibuthu* (the respondent's husband) should be buried in a different parcel of land at Mutoho known as Loc 5/Kagumo-ini/1338.
5. The appellants also submitted that the learned trial magistrate erred by ordering the family "*to set aside a reasonable size of land in the area where the late Julius Kibuthu is buried as a grave yard for the family*". No such prayer was sought by the respondent.
6. It was also submitted that the respondent lacked *locus* in the lower court as the *limited grant of letters of administration* in her favour was "recalled".
7. The motion is contested. There is the replying affidavit sworn by the respondent on 10th December 2018. The respondent claims that the alleged will has not been proved. She also rubbishes the agreement dated 20th August 2015.
8. Her submissions are four-pronged: that the application is overtaken by events; that the suit land belongs to her late father in law; that the appellant is not the administrator of the estate; and, that he is trying to forcibly evict her from land she has occupied for thirty years.
9. Learned counsel for all parties filed written submissions on 9th January 2019; and, 15th January 2019 respectively.
10. The motion is brought under the *wrong* provisions of the law. It is expressed to be brought under Order 40 Rules 2, 3 and 9 of the Civil Procedure Rules. That is a poor foundation for the prayers for *stay*.
11. However, the court is enjoined by **Article 159 (2) (d)** of the **Constitution** to do *substantial justice* to the disputants. **Edward Steven Mwitii v Peter Irungu & 2 others (No. 2)** Nairobi High Court ELC 105 of 2011 [2012] eKLR. The court should also maintain "*equality of arms and as far as it is practicable to place the parties on equal footing*". **Harit Sheth Advocate v Shamas Charania** Nairobi, Court of

12. In **Butt v Rent Restriction Tribunal** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Brett LJ in **Wilson v Church (No 2)** 12 Ch. D [1879] 454 at 459-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

13. The suit land is still registered in the name of *Julius Kibuthu Kabogo*. He died way back on 19th October 1987. Succession proceedings were only initiated last year in *Murang’a High Court Succession Causes 15 and 16 of 2018*. Clearly, the *will* has not been proved; and, *distribution* has not taken place. The *validity* of the documents dated 11th July 1982 and 20th August 2015 will no doubt be the subject of the proceedings in the High Court.

14. Granted those circumstances, I cannot say at this *stage* that the 1st appellant is *exclusively* entitled to Loc 5/Kagumo-ini/755; or, that the respondent should move to the Mutoho land known as Loc 5/Kagumo-ini/1338.

15. The parties admit that the remains of *Clement Mbugua Kibuthu* (the respondent’s husband) were interred on the disputed land. To that extent, the stay sought is *overtaken* by events. If the appellants succeed in the appeal, power still reposes in the High Court to order the remains to be exhumed. I find no merit in that prayer.

16. The appeal remains unheard. But from the materials before me, the learned trial magistrate meandered beyond the boundaries of the application before her. She ordered the family “*to set aside a reasonable size of land in the area where the late Julius Kibuthu is buried as a grave yard for the family*”. No such prayer was sought by the respondent. The *interlocutory order* is also couched in *final terms* before hearing the parties on tested evidence. I will grant a stay of that part of the order pending the hearing of the appeal.

17. The upshot is that the appellants’ notice of motion dated 21st September 2018 *partially* succeeds. I order as follows-

a. That there shall be a *stay of part* of the order of the lower court dated 20th September 2018 requiring the family “*to set aside a reasonable size of land in the area where the late Julius Kibuthu is buried as a grave yard for the family*”.

b. That the other prayers in the appellants’ notice of motion dated 21st September 2018 are *dismissed*.

c. That costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 7th day of February 2019

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Chege for the appellants instructed by Kiiru Chege & Associates Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.