REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 97 OF 2011

IN THE MATTER OD THE ESATTE OF THE LATE M'NDATHO M'NABEA alias NDATHO NABEA alias JOSEPH M'NDATHO M'NABEA (DECEASED)

CECILIA MUKOMUGA.....1ST APPLICANT

PENINAH KARURU.....2ND APPLICANT

DORIS KAGENDO NDATHO.....3RD APPLICANT

DOUGLAS MURUNGI .....4TH APPLICANT

VERSUS

GEOFFREY MUTHAMIA KIAMB.....1ST RESPONDENT

PETER MUTUA RUTERE.....2ND RESPONDENT

JUSTUS MURERWA M'AJOGI.....3RD RESPONDENT

PHYLLIS GAKII.....4TH RESPONDENT

RULING

[1] Before me is Summons dated 9th April 2019 expressed to be are brought pursuant to **Section 68 of the Land Registration Act, Rule 44, 67 – 73 of the Probate and Administration Rules, Section 76 of the Law of Succession Act (CAP 160) and all other enabling provisions of the law**. The applicant seeks among other orders: stay of the ruling dated 6th February 2019, order dated 3rd July 2013 and order issued on 4th April 2016 as well as inhibition orders preventing any dealings on the Nyaki/Thuura/2243 and any other resultant subdivisions pending the hearing of the intended appeal.

[2] The application is supported by the grounds on the face of the application, the supporting and further supporting affidavit of Cecilia Mukomuga sworn on 9th April and 10th May 2019 respectively. She asserted that being aggrieved by the orders stated in the application, the applicants filed a notice of appeal. They argued that if the orders are enforced they will lose their land since the respondents are processing the titles. According to them, the respondents will not suffer any loss or prejudice. Accordingly, they stated that it is in the interest of justice to stay the orders until their appeal is heard and determined. The applicant averred that is ready to offer any security that the court may order in the circumstances.

[3] She claimed that when she was asked to consent to confirmation she did not understand what was going on as she was a drunkard, a person with confused mind, careless and did not understand the process and procedures of the court; the respondents took advantage of her condition to her detriment. She termed the respondents to be fraudsters as in the entire proceedings they never produced any agreement of sale. She prays that the land be preserved in its status quo on the registers to prevent any unscrupulous dealings.

[4] The application was opposed by the respondents vide the replying affidavit Peter Mutua Rutere sworn on 6th May 2019 and on behalf of the respondents. He took the view that the court is incapable of staying its orders of 6th February 2019 as they are negative orders; dismissal of the applicant's application dated 20th September 2018. To them, the applicants never set aside or challenged the certificate of confirmed grant issued on 3rd July 2013 and therefore have no basis to seek the implementation of the said grant to be stayed. The orders issued on 4th April 2016 on execution of transfer documents by the court were issued after the court was satisfied that the petitioner was out to delay the transmission process especially in their favour. Besides, the applicants never challenged the orders of 3rd July 2013 and 4th April 2016 within the set timeframes but they now attempt to challenge them several years down the line. They claimed that there is no notice of appeal

or appeal filed against the orders. Therefore prayers No 3 and 4 have been sought in a vacuum. In addition, the inhibitory orders are sought in bad faith as the applicants are only out to frustrate the transmission process herein. The applicants had a chance to challenge the distribution of the estate but have failed to do so appropriately and have not even moved on appeal.

[5] This matter was canvassed by way of written submissions to which due consideration has been given. The applicant reiterating what she had stated. She affirmed that the intended appeal has high chances of success and it would be in the interest of justice that stay is granted as there are serious issues to be canvassed in the appeal. The respondents submitted by affirming that the applicant has not met the requirements. Furthermore they have not shown that they shall suffer any loss or prejudice if the orders are not granted.

ANALYSIS AND DETERMINATION

[6] Is there any sufficient reason to stay orders arising from the ruling dated 6th February 2019, order dated 3rd July 2013 and order issued on 4th April 2016 pending appeal? In addition, is inhibition to prevent any dealings on the Nyaki/Thuura/2243 and any other resultant subdivisions merited?

[7] In determining whether sufficient reason has been established to warrant stay of execution pending appeal, the court should ask the traditional questions set out in **Order 42 Rule 6(2) of the Civil Procedure Rules** which are:

(i) Was the Application made without unreasonable delay?

(ii) Will substantial loss result to the Applicant unless the order of stay is granted? and

(iii) What security should the Applicant provide for the due performance of the decree or order?

[8] In the ruling dated 6th February 2019, the court dismissed the notice of motion dated 20th September 2017 as it was without merit. Evidently, the ruling did not order any party to do or refrain from doing anything capable of being stopped. It is trite law that negative orders are incapable of execution hence they cannot be stayed. This was so stated in the case of **Kanwal Sarjit Singh Dhiman –Vs- Keshavji Jivraj Shah [2008] eKLR**, where the Court of Appeal held as follows:

> **"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only(see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).**" [Emphasis added]

Accordingly, the order in the ruling dated 6th February 2019 is a negative order which is incapable of execution or stay.

[9] The applicant sought for a stay of the order of 3rd July 2013 on implementation of the confirmed grant. The grant was confirmed in 2013 and has not been revoked. It's been over five years now and from the record the applicant has been engaged in circumlocutions and placing impediments on the way of administration of this estate in one way or other. The record bears me witness that the applicant has consistently disobeyed court orders and has deliberately failed to discharge her statutory obligation under the overriding objective of the court to assist the court in attaining proportionate, just and expeditious disposal of this cause. By merely filing appeal does not guarantee one a stay of execution pending the appeal. The applicants allege that the grant was issued where material facts were concealed, the same was obtained by fraud and making of false statements which lead to the grant being lead to the grant being confirmed out of misrepresentation of facts. This is because the petitioner was a drunkard and not in her right mind. However, I see no evidentiary backing of these allegations. This is an important consideration in this application.

[10] I revisit the fact that, the applicant's failure to comply with the courts directions led to the order issued on 4th April 2016 to facilitate execution of documents to effect survey, subdivision of Nyaki/Thuura/2243 and transfer of the shares identified to beneficiaries.

[11] The applicants have been in this cause but decided to keep mum when the orders were issued and implemented. They were all present when the surveyor visited the land pursuant to the directions of the court. Instead of complying with court orders, the applicant created road blocks until police security was ordered. When the matter was stated to be closed in the ruling 6th February 2019 that is when the applicants woke up from slumber. I consider that the court was previously seeking the petitioner's attendance and involvement but in vain. In all fairness, mala fides may be imputed on the applicant. This again is an important consideration. Nothing has been explained by the applicant. The application is tinctured by mala fides. Consequently, the stay of execution may not be granted against the order of 3rd May 2013 and 4th April 2016 as it has not met the required conditions.

[12] Lastly, the applicant seeks inhibitory orders preventing any dealings on the register of parcel No. Nyaki/Thuura/2243 and any other resultant subdivisions pending the hearing and determination of the appeal. A court of law may order inhibition upon a property. This power is provided for in section 68 of the Land Registration Act. See the section below:-

68. Power of the court to inhibit registered dealings

(1) The court may make an order (hereinafter referred to as inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until a further a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge effected, shall be sent to the registrar, who shall register it in the appropriate register it in the appropriate register

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

[13] Inhibition is directed at the property and takes effect upon registration. It is ordinarily issued as an intermediate order to preserve the property in question for purposes of a pending judicial proceeding. It is therefore a kind of preservatory order. It is not therefore a temporary injunction. Except, however, the threshold in **Giella vs Cassman Brown [1973] EA 358** at page 360 by Spry VP should guide the court in issuing an inhibition, that is to say:

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"**

I should however add that the court should weigh prejudice that an inhibition may cause to the Respondent before making an order of inhibition.

[14] From the foregoing, without pre-empting the outcome of the appeal and reading the ruling being appealed against I am not convinced the applicant has established prima facie case with probability of success. She has made bare statements devoid of any substantive evidentiary support. Besides, the applicant's conduct in this cause has been one that seeks to frustrate the respondents. Therefore, the balance of convenience lies in dismissal of the application. The applicant has failed to show that they have met the requirements laid down for them to be granted the inhibitory orders.

[15] Accordingly, the application has no merit and is dismissed. No orders as to costs.

Dated Signed and delivered in open court this 22nd May, 2019

F. GIKONYO

JUDGE

In presence of

M/s Gachago for petitioner/Applicant

M/S Nyagah for respondents

4th respondent and 4th applicant – present

F. GIKONYO

JUDGE