



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 353 OF 2004

IN THE MATTER OF THE ESTATE OF M'IMARA MARIMBA ALIAS MARIA MARIMBA (DECEASED)

JULIA NCULUBI IMARIA.....1<sup>ST</sup> RESPONDENT

GRACE KANINI IMARIA.....2<sup>ND</sup> RESPONDENT

MARY AKUI IMARIA.....3<sup>RD</sup> RESPONDENT

ESTHER KAINDA IMARIA.....4<sup>TH</sup> RESPONDENT

Versus

JOYCE KANGAI MURUNGI (The widow & legal administrator of the estate of JACKSON

MURUNGI IMARIA).....5<sup>TH</sup> RESPONDENT

AND

MOSES MUTUMA KITHURE & 8 OTHERS....INTERESTED PARTIES/APPLICANTS

RULING

1. By an application filed on 5<sup>th</sup> November 2018, the applicant seeks for an Order of stay of execution of the judgement and decree of this Honourable Court dated 1<sup>st</sup> November 2018. Doubtless, the application was filed in good time. The only question is whether the application is tenable in law.

2. **MARY AKUI AMARIA** in her Replying affidavit dated 29<sup>th</sup> November 2018 avers that the legal counsel who has filed the application is not properly on record and there is no demonstration of the appeal having any chances of success.

3. On 6<sup>th</sup> December 2018 this Honourable Court directed the parties to file their respective Submissions.

**Analysis and Determination**

4. From the submission of parties, two issues emerge, namely;

**a. Competency of the Application; and**

**b. Prospects of grant of the Orders Sought**

**Competency of the Application**

5. This Honourable Court made its determination on 1<sup>st</sup> November 2018. The Firm of **Okubasu & Munene Advocates** filed a Notice of Appeal on 5<sup>th</sup> November 2018. They also filed a notice of appointment and a Change of advocates on the same day and the substantive application seeking an Order of stay of execution of the judgement and decree.

6. The application was amended on 19<sup>th</sup> November 2018 by the firm of **J.M.Njengo & Co. Advocates** who equally filed a Notice of Change. They also sought a stay of the Order directing the Land Registrar to cancel the interested parties' titles derived from the subdivision of

7. In light of the foregoing, the firm of Okubasu & Munene Advocates were properly on record as they filed a notice of appointment filed in the court record and a notice of change of advocates on the same date they filed the application. Notably, **Order 9 Rule 9** is not one of the provisions that apply to the Law of Succession Act by dint of **Rule 63 (1) of Probate and Administration Rules**. See also the case of **Jackson M. Miyogo v Simeon Mose Omiti [2016] eKLR**. Nothing turns on that objection. .

8. Similarly, the firm of J.M. Njengo & Co. Advocates filed a notice of change of advocates on 19<sup>th</sup> November 2018. They amended the said notice of motion albeit without leave of the Court. The amendment was done within 14 days of filing of the motion which is reasonable time. The amendment causes no prejudice to any party as the respondents will have ample opportunity to respond to the amended motion. Even In any case, procedural shortcoming of the application would be excused by the court under **Article 159 of the Constitution of Kenya** and **Section 73 of the Law of Succession Act**. See **Nyakundi. J. In re Estate of Lesinko Sokorte Kirayio (Deceased) [2017] Eklr** where he stated;

**“.....The failure by the respondent not to seek leave of the court after the expiry of 30 days is a procedural irregularity which cannot vitiate the proceedings unless a miscarriage of justice is thereby alleged and proved.**

#### **Potency of Orders Sought**

9. I now turn to the thrust of the application. The Application is premised on **Order 42 Rule 6 of the Civil Procedure Code** which provides;

**(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.**

10. In order for the court to allow the application for stay of execution pending appeal, the court must satisfy itself that:

**a. Substantial loss may result to the Applicant unless the order is made;**

**b. The application has been made without unreasonable delay and;**

**c. The applicant has furnished security for the due performance of the decree being appealed from.**

See **Antoine Ndiaye v African Virtual University [2015] eKLR**

#### **Substantial loss**

11. An applicant relying on order 42 of the CPR should first establish that substantial loss would occur if stay of execution is not granted. The applicants' claim in the estate of the deceased was that of innocent purchasers for value. The Courts determination was that they cannot be protected by **Section 93 of the Law of Succession Act**. Of significance also was that the court also determined that the grant of representation was obtained through concealment of material facts and with the intent of disinherit the Respondents herein. It therefore invoke the provisions of **Article 40 (6) of the Constitution** and ordered the Original title in Lr.No. 510/Nyambene/Antubetwe to revert. It also held that the remedy of the interested party does not lie in the estate subject of these proceedings but against the person who sold them the land. Accordingly, the correct forum to establish their claim is ELC.

12. The interested parties claim that substantial loss and irreparable harm will be suffered is on the basis that; (1) the lands were bought for valuable consideration; (2) they have been on the premises for over ten (10) years; (3) they have made considerable developments in the premises; and (4) they have entered into contracts with 3<sup>rd</sup> parties which was pivotal to running of businesses and contracts.

13. On the other hand, the Respondent claim has been denied their interest in the property for over Thirty seven (37) years. It therefore becomes a matter of balancing these claims and rights in order to determine substantial loss. .

14. Other than saying that they have made contracts with 3<sup>rd</sup> parties, no real evidence has been provided to establish the loss to be prevented through a stay of execution. The court was aware of the developments that they have made in the properties and that aspect of their claim was considered by the court. In the circumstances of this case, a stay is not merited. Be it known that a stay herein would impede administration of the estate and as a matter of law, administration of the estate should only be stopped in the presence of cogent and real evidence that show that the applicant will suffer prejudice unless stay is granted. Given the position of the applicants, they have not shown the prejudice they will suffer. In my considered impression arising from the circumstances of the case, a stay would cause prejudice upon the estate.

#### **Security**

15. The Applicants herein have not provided any security that would mitigate the loss that may ensue to the estate. They instead argued that it is not mandatory for a court to issue security for costs. It bears repeating that, in spite of these arguments, no amount of security will justify

a stay order in this case.

16. It is therefore my finding that the Applicants amended application dated 19th November 2018 lacks merit and is dismissed with costs to the Respondents.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of May 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

M/S Alogo for Njenga for interested party

Mbogo and Muriuki for applicant – absent

Okubasu for respondent absent.

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**F. GIKONYO**

**JUDGE**