



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 214 OF 2013

IN THE MATTER OF THE ESTATE OF JUDY KORI NYAGA (DCD)

(Formerly Embu Succ No. 134 OF 2010)

LUCY WARUGURU.....PETITIONER

V E R S U S

SOFIA MUCIKU JOTHAM.....1ST PROTESTOR

MARY WANJIKU ELISHA.....2ND PROTESTOR

RULING

1. This is the ruling on a summons (General Form) dated 6/6/2018 and seeks orders that these proceedings be stayed pending the hearing and determination of **Kerugoya ELC No. 32/2018 (OS) Sofia Muciku Jotham –v- Lucy Waruguru**. In the alternative it seeks orders that the court be pleased to confirm the grant as proposed in Para 4(b) and (c) of the affidavit in support of the summons for confirmation of grant dated 14/3/2012 pending hearing and determination with respect to ownership/beneficiary of parcel No. Baragwi/Raimu/1532 by Kerugoya Environment and Land Court in ELC No. 32/2018 as stated in prayer (a) above.

2. The application is supported by the affidavit of Sofia Muciku Jotham sworn on 6/6/18 where she depones that she is the administratrix of the estate of her husband Jotham Gikunju Karu who was purchasing Two acres out of land parcel No. LR Baragwi/Raimu/794. The said parcel has since been sub-divided to land parcel No. Baragwe/Raimu/1532, 1533 and 1534. She has occupied the portion which is now Baragwe/Raimu/1532 since 1994. Consent of the Land Control Board for transfer of the parcel was not obtained. That the court with jurisdiction to determine her ownership of the parcel is the Environment and Land Court and she has filed the suit No. 32/2015. That upon determination of the suit she will not have to file a protest.

3. The applicant annexed the Originating Summons in ELC case No. 32/12018 which shows that she is seeking a determination whether she has acquired title by way of adverse possession.

4. The application was opposed by Mary Wanjiku Elisha in an affidavit sworn on 18/12/18. She prays that application be dismissed.

5. Lucy Waruguru who is the petitioner also opposed the application and filed an affidavit sworn on 25/2/2019. She depones that this cause was filed in order to distribute the estate of the deceased and the application is meant to delay the proceedings. That the court had ruled that the applicant has no Locus Standi to file the petition in the estate of the deceased and she should not be allowed to stand as a buffer to the beneficiaries of the deceased. It is also submitted that the interest of the applicant will not be diminished by conclusion of these proceedings. That the applicant will not suffer any prejudice and she can pursue her affidavit of protest filed in this cause.

6. The parties agreed to dispose off the application by way of written submissions. For the 2nd protestor submissions were filed by R. Muthike Makworo. She submits that the applicant has not explained why she never took action to be registered in he lifetime of the deceased though the deceased passed on Eight years after they entered the agreement. That the alleged agreement has not been annexed. The land parcel No. Baragwe/Raimu/9 was subdivided before the death of the deceased and the applicant never laid any claim.

7. For the applicant submissions were filed by Maina Kagio Advocate. He relies on the decision of this court in **Lucy Muthoni Muchira – v- Priscilla Muthoni, H. C Ker 339/2012** where the court stated that where the claim is of a Civil nature it must form the subject matter of a separate suit or proceedings. Depending on the outcome of such suit, the party would then move to the succession court and seek appropriate orders. That is what the applicant is seeking. It is further submitted that the 2nd protestor has no basis of filing a protest as she entered an agreement over the estate of the deceased before the grant was confirmed which contrary to **Section 82(ii) of the Law of Succession Act**.

8. I have considered the application. The issue which arises for determination is stay of proceedings. In **Global Tours and Travels Limited H.C Winding Up Cause No. 43/2000, Nairobi**, Rungera J stated:-

“As I understand the Law whether or not to grant a stay of proceedings on a decree or order appealed from is a matter of Judicial discretion to be exercised in the interest of justice ----- the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order and in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

9. The applicants seeks the exercise of discretion by this court. I am persuaded by the above decision as it lays down the test to be applied in determining whether to grant a stay. Applying this test the question is whether it would be expedient to order a stay of proceedings pending hearing of the ELC 32/2018. What the court has to consider is whether –

- a) The applicant has an arguable case.
- b) The application was filed timeously.
- c) The applicant has established sufficient cause to the satisfaction of the court that it would be in the interest of justice to exercise discretion in her favour.

10. The applicant has contended that she has filed a case in the ELC Court seeking adverse possession over a parcel of land which is in the name of the deceased. The claim filed in ELC is based on contract and at the same time on adverse possession. Though I would not wish to pre-empt the decision in ELC court and the protest, having considered the pleadings and the averments in the affidavit, I see no good reason to stay the succession cause. Stay of proceedings is a serious judicial order which interferes with the right of a party to conduct his case and have it determined on merits. It impedes the right to access justice, to be heard without delay and right to fair trial. It would be most important to order a stay of proceeding as it would go against the rule of expeditious disposal of matters. The applicant having appreciated that this is a succession matter cannot turn around and challenge the jurisdiction of this court.

11. The case which the applicant relies on, succession cause No. 339/2012 is distinguishable to the present case as the dispute was based on trust. The applicant claim is not based on trust. From her pleadings, she is laying a claim on the estate of the deceased.

Determination:-

The applicant lacks locus standi to bring this application for stay of proceedings. The High Court sitting in Embu, Justice Wanjiru Karanja (as she then was) in a ruling dated 22/7/10 ruled that the applicant had no basis or basis at all to deal with the property of the deceased. That she cannot therefore harass the applicant (now the petitioner) and her family who are the legitimate beneficiaries of the deceased.

12. The court noted that she had given the names of her children who had survived the deceased. She had not disclosed her capacity in which she filed the petition.

13. The applicant did not file an appeal. Eight years later she has filed a suit in ELC court based on contract and adverse possession. The suit is not filed in good faith but with the sole intention of delaying the matter herein. She has not come to court in clean hands having filed a petition in this court through mis representation of facts only to turn around and claim that her deceased husband had entered an agreement. She filed a protest in this court and has now moved to ELC Court. She is clearly abusing the court process. This cannot be allowed.

14. This court has jurisdiction to hear and determine the cause. **Section 47 of the Law of Succession Act** provides:-

“The High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient -----“.

15. Where the court has jurisdiction it cannot be fettered unless for good reason, in which case it will exercise discretion to order a stay. The application for stay has not been made in good faith. She applicant is guilty of laches as she has filed the suit in ELC Eight years after the court ruled she has no locus. She has filed a protest in this court which she has not withdrawn and is pending determination by this court. This court cannot exercise discretion in her favour.

In Conclusion.

- 1) The application lacks merits.
- 2) It is dismissed with costs.

Dated at Kerugoya this 14th day of November 2019.

L. W. GITARI

JUDGE