



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 14 OF 2019

GICOVI MUGO.....APPLICANT/APPELLANT

VERSUS

GLADYS CIOMWARI MUGO.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the application dated 25th September 2019 in which the applicant seeks for orders for stay of execution of the grant issued pursuant to the ruling delivered on 28th February 2019 in Runyenjes Succession No. 288 of 2018 pending the hearing and determination of this appeal.
2. It is the applicant's case that he has an arguable appeal with high chances of success considering that he and some of the beneficiaries of the deceased were left out of the deceased's estate. The applicant further states that in case the grant is implemented, he and the other beneficiaries left out of the distribution are threatened with eviction from land parcel No. Kagaari/Kanja/2704. The applicant further states that no prejudice will be suffered by the respondent if the application is allowed.
3. In rejoinder, it is the applicant's case that the instant application is an abuse of court process and ought to be dismissed, further that it is overtaken by events as the court in Runyenjes dismissed the same application.
4. It is the respondent's case that the applicant has no authority to plead on behalf of other beneficiaries and further that he has not come to court with clean hands as contrary to his allegations, he is included in the certificate of confirmation of grant under the name Joseph Gichovi Mugo a fact he fails to disclose to this court where he goes by the name Gichovi Mugo.
5. It is the respondent's case that the appellant/applicant is misleading the court that the said Martin Muriithi Njogu and Cecilia Mwari Njeru (husband & wife) have not been provided for whereas their share is held by Charity Igandu Kariuki, the widow of the deceased Nicasi Njogu who was the father of Martin Muriithi Njogu.
6. The parties agreed that their affidavits be used to dispose of the matter.

B. Analysis & Determination

7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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.
8. In **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
9. In this case the applicant claims that unless the stay is granted his appeal will be rendered nugatory in that there is a possibility that he will be evicted from land parcel no. Kagaari/Kanja/2704, the deceased's estate where he lives. It is also his case that that in case the grant is implemented he and the other beneficiaries will be left out and may be disinherited.
10. It is the respondent's case that the applicant has not come to court with clean hands as contrary to his allegations, he is included in the certificate of confirmation of grant under the name Joseph Gichovi Mugo a fact he fails to disclose to this court where he goes by the name

Gichovi Mugo. Further, the respondent states that the appellant/applicant is misleading the court that the said Martin Muriithi Njogu and Cecilia Mwari Njeru (husband & wife) have not been provided for as their share is held by Charity Igandu Kariuki, the wife of the deceased Nicasi Njogu who was the father of Martin Muriithi Njogu.

11. Indeed, it is not rebutted by the applicant that he he is included in the certificate of confirmation of grant under the name Joseph Gichovi Mugo. The applicant also fails to disclose which other beneficiaries have been left out of the deceased's estate. The position of Martin Muriithi Njogu and Cecilia Mwari Njeru (husband & wife) is that they are grandchildren of the deceased and as such they are normally direct heirs to the estate of the grandparent only in the event that their parent predeceased the deceased. This is not the case herein and I do note that they are provided for as their share is held by Charity Igandu Kariuki, the wife of the deceased Nicasi Njogu who was the father of Martin Muriithi Njogu.

12. The applicant has in my view failed to demonstrate what substantial loss he is likely to incur if the grant is implemented as is considering he is a beneficiary and entitled to $\frac{3}{4}$ of an acre from the deceased's estate.

13. The applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under **Order 42 Rule 6 Civil Procedure Rules (supra)**. The law does not require this Court to determine the application based on the merits or otherwise of the appeal.

14. The other consideration is whether there was undue delay in bringing the instant application. The judgment was delivered on 28th February 2019 and the memorandum of appeal was filed on 14th March 2019. The appeal was filed timeously in less than a month later. There is no doubt that the appeal was filed without undue delay. The application for stay was filed after six months later on the 25th September 2019. The applicant has in my considered view not explained the delay thus failing to establish this prerequisite condition under Order 42 Rule 6 of the Civil Procedure Rules.

15. The applicant argues that his appeal has high chances of success. I note that he has not annexed the ruling of the learned magistrate which would have assisted this court to gauge to some extent the success of this appeal. I have looked at the grant and noted that most of the beneficiaries got shares equivalent to that to the applicant. It is also noted that the acreage of the deceased's only asset. LR. Kagaari/Kanja/2704 is limited and may not allow for bigger shares for the beneficiaries that what they already have.

16. The applicant has not named the other beneficiaries he is fighting for as having been left out of the grant. This leads me to a conclusion that there may not be any other beneficiary who is dissatisfied with the grant.

17. It is my considered view that the applicant has not demonstrated that his appeal has good chances of success.

18. The applicant having failed to satisfy this court on conditions set out under Order 46 Rule 2, this application must fail.

19. I find no merit in this application and it is hereby dismissed with costs.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Applicant present

Respondent present