



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 152 OF 2014**

**CATHOLIC DIOCESE OF MURANGA.....PLAINTIFF**

**VERSUS**

**MANASSES DUNCAN WACHIRA.....1<sup>ST</sup> DEFENDANT**

**JACINTA WAIRIMU MUBARI.....2<sup>ND</sup> DEFENDANT**

**KIRINYAGA COUNTY COUNCIL.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 20<sup>th</sup> August 2018 brought under **Order 42 Rule 6, Order 51 Rule 1 CPR, Section 1A, 1B and 3A CPA**. It seeks the following orders:

- (1) That there be a stay of proceedings in this matter pending inter-parties hearing and determination of this application.***
- (2) That there be a stay of proceedings in this matter pending hearing and determination of the High Court Succession Cause No. 549 of 2013 at Kerugoya.***
- (3) That costs of this application be provided for.***

The application is premised on five grounds apparent on the face thereof and an affidavit sworn by one Rev. Fr. Elias Maina Kibutu the same date. The supporting affidavit is further supported by numerous annexures.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a replying affidavit in opposition to the said application sworn by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> December 2018.

**APPLICANT'S CASE**

The Plaintiff/Applicant through Rev. Fr. Elias Maina Kabutu who is its Priest and Financial Administrator stated that she filed this suit claiming adverse possession of the suit property L.R. No. MWERUA/KAGIO/128 measuring 4.625. He stated that he has established that the 1<sup>st</sup> defendant herein was issued with a grant of letters of administration in Succession Cause No. 70 of 1986 which was confirmed on 29<sup>th</sup> March 1988. He stated that there is now a pending suit in Succession Cause No. 549 of 2013 seeking to revoke the said grant. The Applicant contends that he sought and was granted leave to be enjoined in the said succession cause as he was never notified of the succession cause yet he was in possession of the suit land since 1974. The Applicant further stated that the High Court Succession Cause No. 549 of 2013 came up for mention on 18<sup>th</sup> October 2018 to take a hearing date. The Applicant also contends that the outcome of the succession cause No. 549 of 2013 will determine in it's entirety the issues in this suit.

**1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS CASE**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the application dated 20<sup>th</sup> August 2018 is an abuse of the Court process as there is a similar application dated 15<sup>th</sup> January 2018 which is pending. The Respondents stated that they are the registered proprietors of the suit property holding shares of  $\frac{1}{4}$  and  $\frac{3}{4}$  respectively. The Respondents further stated that the application is brought under the provisions of **Order 42 Rule 6 CPR** but no evidence has been provided showing that there is an appeal pending.

ANALYSIS AND DECISION

I have considered the application dated 20<sup>th</sup> August 2018, the affidavit evidence and the applicable law. I have also considered the submissions by the counsels. The application has been brought under **Order 42 Rule 6, Order 51 Rule 1 CPR, Section 1A, 1B and 3A CPA**. Order **42 Rule 6 (1)** provides as follows:

**“1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on an application being made, to consider such application and make such order thereon as may to it deem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.**

**2. No order of stay 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 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”.**

There is no decree and/or order which has been issued by this Honourable Court capable of being executed against the Applicant or any of the parties. The Applicant is seeking stay of proceedings in respect of this case pending the hearing of some application which he had made in respect of a succession cause. I doubt whether the provisions of *Order 42 Rule 6* is applicable. *Sections 1A, 1B and 3A CPA* are the other provisions cited by the Applicant in this application. To my mind, those sections cannot aid the Applicant. Those sections relate to the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes in the Courts. The application by the Applicant is not seeking to promote those objectives but rather to obstruct the same. This suit was filed in 1997 and is now more than 23 years in the corridors of justice. The Applicant has not given material that the issues being raised can adequately be determined by the Succession Court and not the ELC Court. Issues of constructive trust in my view cannot be determined under the Probate Court. A similar issue arose before **Justice Musyoka** in the matter of the ***Estate of Mbai Wainaina (deceased) Succession Cause No. 864 of 1996 (Nairobi) and reported in (2015) e K.L.R*** where he observed as follows:

**“7. In their submissions, the applicants assert that they were born in the subject land and cultivated on it and state that the respondents have not denied it. It is also submitted that the respondents have not explained how the deceased acquired the property. They submit that the respondents hold the property in trust for them, and it is on that basis that they claim a stake in the estate of the deceased. They found their claim on a Kikuyu customary trust. They argue that the non-disclosure that the deceased held the property in trust for them was good ground for revocation of the grant.**

**8. On their part, the respondents submit that Kiganjo/Gachika/460 being claimed by the applicant is non-existence since it has since been sub-divided. It is also submitted that the claim by the applicants is remote, for as brothers of the deceased, their right to inherit the deceased’s property is lesser to that of the respondents. They argue that the applicants’ claim of a customary trust can only be entertained in a substantive suit. Furthermore, they are entitled to access their father through Thika CMC Succ. No. 411 of 2011.**

**17. Whether the deceased held Kiganjo/Gachika/460 in trust .....**

**18. Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the Probate Court. The mandate of the Probate Court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the Probate Court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant Subsidiary Legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court”.**

I agree with the wisdom by the learned Judge. The order for stay by the Applicant will only delay the expeditious determination of this suit. The application dated 20<sup>th</sup> August 2018 lacks merit and the same is hereby dismissed with costs to the Respondents.

**READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 29TH DAY OF MAY, 2020.**

.....  
**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Ms Kinyua holding brief for Beaco for the Plaintiff and the 3<sup>rd</sup> Defendant

2. 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Advocate – absent

3. Mbogo, Court clerk – present