



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO. 176 OF 2011

**IN THE MATTER OF THE ESTATE OF JEREMIAH MACHARIA MUCHOGO ALIAS
NGUCHUGA MACHARIA (DECEASED)**

CECIDA WAIRIMU MACHARIA.....APPLICANT

-VERSUS-

JUSTIS NDUNG’U MACHARIA.....RESPONDENT

RULING

Before me is the Chamber Summons dated 11th July 2017. It is supported by the affidavit of Cecida Wairimu Macharia sworn on the same date. She seeks an order of injunction against the respondent from interfering with her portion of the L.R NYERI/ENDARASHA/482 pending the hearing and determination of her intended appeal.

The application appears to stem from the aftermath of the judgment delivered by Mativo J on the 18th February 2016 distributing the Estate of the deceased JEREMIAH MACHARIA MICHOGO to his heirs.

In the proceedings leading to that judgment, the respondent herein was the protester.

The applicant herein has filed notice of appeal in the Court of Appeal on 26th February and the same was lodged on the 4th March 2016.

Apparently from the affidavit in support of her chamber summons, the respondent herein went on to enter her portion of the land where she has lived since colonial times, and the life time of the deceased, and has interfered with her use of that land.

The respondent in his replying affidavit sworn on the 4th October 2017 denies doing any of the things alleged by the applicant. He avers that the application is only intended to interfere with his proprietary rights over that said parcel of land. That despite the court’s judgment in which the applicant was given 5 acres out of the said estate, the family was yet to subdivide but because of the applicant’s notice of appeal and the caution she had placed on the titled, the family could not do so.

He raised no objection to the maintenance of the *status quo* pending the hearing and determination of the appeal.

During the *interpartes* hearing on the 18th December 2017, the applicant who was an elderly lady, and unrepresented, at some point went off tangent and began to make arguments that could only be tenable in the appeal as she appeared to attack this court’s judgment.

What was relevant to her application was that the court had given her the land to cultivate but the respondent had entered the land in violation of those orders. That the respondent had removed or caused to be removed the doors and windows to her house on that land and put cows to sleep in that house causing a serious cow dung mess inside, which obviously was very upsetting to her.

Ms. Mwai appearing for the respondent argued that it was only the Court of Appeal that could issue an injunction following the filing of the notice of appeal. That there was no provision for an injunction in the law of Succession Act, and that the court could only issue a stay of execution pending the hearing of the appeal.

I have perused the judgment. What stands out from the judgment is that the respondent herein was not given any share from the deceased's estate. He was not among the listed beneficiaries in the confirmed certificate of grant dated 18th February 2016. His alleged proprietary rights are not mentioned in the judgment and he is not the one who has filed the appeal. Clearly therefore he does not seem to have established his claim as a protester. This set of facts supports that applicant's position that the respondent needs to be restrained from interfering with her use of the portion she had occupied even before the judgment.

I have perused the provisions of order 42 rule 6 of the Civil Procedure Rules (2010). At sub rule (1) it provides that no appeal shall operate as a stay of execution except in so far as the court appealed from may order.

It appears to me that the applicant is in order to seek orders from this court that will secure the status quo as she pursues her appeal.

Yes, she has come by way of seeking an injunction, which is not available to her. But for all intents and purposes all she wants is for the *status quo* to be maintained so that she can pursue her appeal. The respondent is not opposed to this position.

The court also has inherent powers to do what it must to ensure the interests of justice and prevent abuse of its processes. That is the import of rule 73 of the P&A rules which provides;

73. Saving of inherent powers of court

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

It is in the best interests of justice that the status quo be maintained. That means that anything that the respondent may be doing post the judgment of 18th February 2016 with regard to the applicant's portion of land that she occupied before the Judgment, must stop,

I allow the application and grant an order of stay of execution of the Judgment pending the hearing of the appeal.

The status quo be maintained.

Each party to bear its own costs

Dated, delivered and signed at Nyeri this 2nd day of February 2018

TERESIA M MATHEKA

JUDGE

In the presence of;

Court Assistant Harriet

Applicant present in person

Ms. Mwai present for respondent