



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 7 OF 2018**

**JENNIFER GICUKU NJAGI.....1<sup>ST</sup> APPELLANT**

**JANE KINA NJAGI.....2<sup>ND</sup> APPELLANT**

**EDWARD NYAGA NJAGI.....3<sup>RD</sup> APPELLANT**

**ALBERT MUTHUNGU NJAGI .....4<sup>TH</sup> APPELLANT**

**PRICILLA NDIA.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**NJOKA M.MBARIO.....1<sup>ST</sup> RESPONDENT**

**KORIA NJAGI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling on an application dated 1<sup>st</sup> March 2018 as seeking for orders for stay of the ruling, orders and any consequential proceedings and suing from Runyenjes court in Succession Cause No.226/2017 issued on 15/2/2018 until the hearing and determination of the Appeal.

2. The grounds supporting the application are that the Runyenjes court had an application for revocation of grant by the Applicant which was dismissed. The applicant was aggrieved by the decision and has now lodged this appeal. The Applicant fears that the respondent may start distributing the estate of the deceased using that ruling which may result in his appeal being rendered nugatory. It is only fair and just that any activity pursuant to that grant or ensuing from the decision of the lower court be stayed until the hearing and determination of the appeal.

3. The respondent in his replying affidavit opposed the application stating that there is nothing to be stayed. He further stated that what the court did was to dismiss the application for revocation/annulment of grant. According to the respondent the grant has already been fully implemented. Until the grant is revoked or set aside the title deeds resulting from the implementation of the grant entitles the owners to enjoy all the proprietary rights.

4. It was further argued that the applicant requires to show that he will suffer substantial loss if the orders sought in the application are not granted. The applicants were properly provided for in the grant and they cannot therefore claim to suffer any substantial loss in the event that stay is not granted.

5. The applicant filed submissions and argued that there is no contention that an Appeal lies as a matter of right against the decision of the magistrate. He states that the subject matter of land is emotive and may cause confrontation between the parties on the ground in the event that the orders for stay are not granted. It is said that shortly after the ruling of the court, there was a major physical fight where three of the parties were hospitalized for considerable periods with severe injuries. The injured later recovered but were charged with the offence of affray before Runyenjes court in Criminal Case No.287/2018. This is a demonstration that the parties may not live in peace and that the status quo may not be maintained unless the stay orders are granted.

6. It is further claimed that there are five beneficiaries who are disgruntled while only one was satisfied with the decision. The applicant refers this court to Section 47-50 and cites Section 48 which reads:-

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of

which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.

(2) For the avoidance of doubt it is hereby declared that the Kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.

7. The applicant argues that the grant in the Succession cause was given by a magistrate who lacked jurisdiction since the assets of the deceased were valued over Ksh.100,000/- which was the limit of a magistrate's jurisdiction at that time. The granting of the orders for stay will not inconvenience the respondents in any way. The parties are in occupation of the parcels that they have always occupied and cultivated. However, it is important to preserve the estate pending the determination of the appeal.

8. The court has considered the grounds raised in support and in opposition of this application. The purpose of an application for stay pending appeal is to preserve the subject matter in dispute so that the applicant is allowed to exercise his right of appeal. The court has a duty to weigh this right as against the success of the respondent who should not be deprived of the fruits of his judgment. However, it is imperative to ensure that the respondent does not suffer any prejudice should the orders be granted which cannot be compensated by way of costs.

9. Order 42 of the Civil Procedure Rules sets out conditions that must be satisfied by an applicant seeking orders for stay. Firstly the application must be filed without undue delay. The ruling of the court in Runyenjes Succession Cause No.226/17 was delivered on 15/2/2018. This application was filed on 1/3/2018 which was about two weeks later. The application was therefore filed without delay.

10. The second requirement is that the applicant must show that he is likely to suffer substantial loss should the application be refused. The nature of a Succession Cause where the grant has been confirmed is such that the parties may proceed to sub divide the land or even to dispose of their respective portions during the pendency of the appeal. If this happens, the applicant is likely to be deprived of his right of appeal in the event that it will be successful. Consequently, the appeal may be rendered nugatory. It has not been denied that there has been violence between the parties that has led to some parties being severely injured to an extent that some were admitted in hospital. This resulted in criminal charges against some of the parties. Am satisfied that with the material presented before this court, the applicant has satisfied the court that he is likely to suffer substantial loss.

11. The third requirement is mostly applicable in civil cases whereas the applicant is required to give an offer of security for the due performance of the decree. This being a succession cause with no monetary decree, this requirement does not apply.

12. It is my considered view that the respondent will not suffer any prejudice in the event that orders for stay are granted. It is not in dispute that all the beneficiaries are in occupation of their portions where they have been for a long time and that the only dispute among them is the shares allotted to them during distribution of the estate.

13. It is my considered opinion that there is need to preserve the estate of the deceased pending hearing and determination of the appeal. The applicant has satisfied this court as to the necessary requirements.

14. I find the application merited and allow it as prayed and it is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JULY, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Ngige for Muthoni for Respondent**

**Mr. Ogwen for Gitau for Applicants**