



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS  
APPELLATE SIDE  
(Coram: Odunga, J)

CIVIL APPEAL NO.61 OF 2018  
IN THE MATTER OF THE ESTATE OF ZAKAYO MULEI (DECEASED)

GEORGE KIOKO MUKEL.....APPELLANT  
VERSUS  
JOHN MUTUA Z. MULEI.....1<sup>ST</sup> RESPONDENT  
BONIFENTURE PETER NZIOKI .....2<sup>ND</sup> RESPONDENT

RULING

1. By an application dated 20<sup>th</sup> June, 2018, the appellant/applicant herein, **George Kioko Mukei**, seeks the following orders:
2. According to the appellant, he filed a protest to the confirmation in Kangundo Law Courts and vide a ruling dated 23<sup>rd</sup> May, 2018 the same was dismissed. Being aggrieved by the said decision, he preferred this appeal contemporaneously with an application for stay of proceedings at Kangundo Senior Principal Magistrate's Court.
3. According to the appellant, it has come to his knowledge that the said Court confirmed the grant of representation without his knowledge, appearance and consent of the beneficiaries and that the respondents have transferred the plot to third parties namely **Jones Maithya** and **Raphael Muli** who have commenced the clearing of the said plot with a view of immediately starting construction on the said property.
4. The appellant averred that since the application for stay has already been overtaken by events, it in the interest of justice that orders of restriction do issue restraining the respondent or third parties from developing the said plot until the appeal is heard and determined. He disclosed that he was ready and willing to abide by any conditions that this Court may impose on granting of the restriction.
5. It was submitted on behalf of the appellant that According
6. The application was however opposed by the 1<sup>st</sup> Respondent herein **Bonifenture Peter Nzioki**. According to him, he is one of the administrators in Kangundo Succession Cause No. 46 of 2016 while the Appellant and the 2<sup>nd</sup> Respondent are his co-administrators. He further disclosed that the 2<sup>nd</sup> Respondent and the Appellant are his step brother and nephew respectively. He explained that his father, the deceased in these proceedings had three wives and while he was the deceased's son from his first wife, the 2<sup>nd</sup> Respondent was a son from the second wife while the appellant's father was a son from the 3<sup>rd</sup> wife.
7. It was the 1<sup>st</sup> Respondent's position that the Succession proceedings in Kangundo court were conducted openly and fairly with the participation of the beneficiaries from each of the three wives and outlined the chronology of the events. It was averred that following the filing of summons for confirmation of grant by the 2<sup>nd</sup> Respondent, the appellant filed an affidavit of protest thereto which after being heard was dismissed and a certificate of confirmation was issued on 24<sup>th</sup> May, 2018. It was the 1<sup>st</sup> Respondent's case that the appellant's advocate a **Mr Munguti** was present at the delivery of the ruling on 23<sup>rd</sup> May, 2018 contrary to the appellant's contention.

8. The 1<sup>st</sup> Respondent further disputed the allegation that the Grant was obtained without the consent of the beneficiaries as each administrator represented the interest of their respective house and acted at their behest. It was the 1<sup>st</sup> Respondent's position that he had the consent of his siblings and so did the second Respondent while the appellant represented his house as deposited to by the appellant. It was therefore contended that the transfer upon transmission was done in accordance with the Grant. It was therefore the 1<sup>st</sup> Respondent's case that the proceedings at Kangundo Court had come to an end and all that the administrators are doing is to execute the contents of the Certificate of Confirmation of Grant an exercise which is supposed to be completed within six months from the date of confirmation.
9. The 1<sup>st</sup> Respondent therefore averred that there was no need to issue the restraining order as the appeal has no chance of success.

#### **Determination**

10. I have considered the issues raised in this matter.
11. The appellant herein seeks an order to the effect that
12. Sections 76(1) of the *Land Registration Act*, 2012 which provides that:

*For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.*

*(2) A restriction may be expressed to endure—*

*(a) for a particular period;*

*(b) until the occurrence of a particular event; or*

*(c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.*

*(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.*

13. In **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR** it was held that:

**“I would like to observe that the registration of a caution alone cannot create a registrable interest where there was none. The essence of registering a caution or a caveat is to act as a stop gap measure to enable the cautioner or caveatee to initiate action to establish his or her interest.”**

14. Apart from that in **David Macharia Kinyuru vs. District Land Registrar, Naivasha & another [2017] eKLR**, it was held that:

**“It will be noted from the above, that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute.”**

15. In this case the appellant seeks an order placing a restriction on Plot number 86 Kangundo Market pending the hearing and determination of this appeal. The basis for doing so is that the confirmation of grant was done without the consent of other beneficiaries of the estate. However in the certificate of the confirmation of grant, the subject of challenge in this appeal, three properties are mentioned therein, these being Kagundo Plot 86 to be shared between the respondents herein equally. The said respondents however contend that the same is to be held for the benefit of their respective houses. Apart from Plot 86 there was Motor Vehicle Registration KPK 511 which was to be registered in the name of the appellant while Kangundo/Muisuni/515 was to be shared between 9 people.
16. In this application, the appellant seems to be concerned only with the property that was confirmed to the Respondents and not to the other persons. The decision whether or not to grant an order for stay of execution is discretionary. In my view, the Court in deciding

whether or not to grant the stay is now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions. According to section 1A(2) of the **Civil Procedure Act** “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

17. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

**“At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court.”**

18. In this case the appellant seeks that the Court places a restriction on the property which was confirmed to the Respondents while the other properties are left free. In my view to grant the stay in the manner sought will be inequitable.
19. In the premises I find that this application is unmerited. The same is hereby dismissed.
20. As regards costs of this application, as the parties herein are father and sons respectively, there will be no order as to the costs.
21. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 12<sup>th</sup> day of October, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mrs King’oo Wanjau for the Respondent**

**Mr Babu for Miss Mutua for the Applicant**

**CA Geoffrey**