



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 364 OF 1993

IN THE MATTER OF THE ESTATE OF THUO GATHURU (DECEASED)

GEORGE GATHURO THUO.....1ST APPLICANT

MARY WANJIKU THUO.....2ND APPLICANT

GODFREY WANG'ANG'A THUO.....3RD APPLICANT

VERSUS

GEORGE GATHURU KARANJA.....RESPONDENT

RULING

1. The deceased Thuo Gathuru died intestate on 9th April 1990. A grant of letters of administration was issued to George Gathuru Karanja (the respondent) and Godfrey Wanganga (the 3rd applicant), and confirmed on 24th March 1994. The grant was later amended on 30th July 2003. On 2nd October 2014 the applicants filed summons for the revocation of the grant on the grounds that the grant had been obtained by the respondent who failed to disclose material facts. The application was opposed by the respondent through his replying affidavit dated 17th April 2015. In its judgment of 2nd October 2017, the court found that 1st applicant was a son to the deceased and ought to have been included in the subsequent application; that the 1st applicant being the deceased's son was entitled to the properties left in the deceased's name; and that the respondent held the deceased's properties in trust for the deceased's beneficiaries. The court directed that the grant be amended to appoint the 1st applicant as a co-administrator to the respondent and the 3rd applicant. The respondent was directed to transfer the properties in his name which belonged to the deceased to the 1st applicant. Parcel No. T.251 was also awarded to the 1st applicant. Being dissatisfied with the judgment, the respondent lodged his appeal on 8th March 2018.

2. On 6th December 2017 the applicants brought the present application seeking orders that:

- a) pursuant to the judgment issued by this court on 2nd October 2017, this court do issue an order of eviction directed at the respondent to vacate from all the properties vested by the court to the applicant being land reference numbers Gatamaiyu/Kagaa/78, Gatamaiyu/Kagaa/299, Gatamaiyu/ Kagaa/T251, Gatamaiyu/Kagaa/T299, and Gatamaiyu/Kagaa/ T300;
- b) the court do issue an order of injunction directed at the respondent in relation to all the properties above restraining him from cutting and selling trees, carting away movable properties and all other forms or property alienation;
- c) the Deputy Registrar do execute transfers in favour of the applicant in respect of the above properties; and
- d) the OCPD Lari Police Station do assist in enforcement of the above orders.

3. The application was based on the grounds that the grant of letters of administration was obtained by the respondent who failed to disclose material facts as demonstrated in the present suit leading to judgment in favour of the applicants; that, specifically, the court stated that all the properties in the name of the deceased be transferred to the applicants; that the respondent was wasting the properties decreed by the court now vested in the applicants; that the respondent is carting away all movable properties in efforts to defeat the judgment issued by the court; that despite being aware of the judgment, the respondent has neglected to comply with it; and that the respondent has appealed against the decision but the appeal does not by law operate as stay. The application was supported by the affidavit of the 1st applicant dated 6th

December 2017.

4. The application was opposed by the respondent through his affidavit dated 5th April 2018. It was his case that he disclosed all facts in the previous and current administration and it was false for the applicants to state that she did not disclose material facts; that the alleged trees were planted and managed by himself and are not part of the judgment ; that he did not have anywhere to go in the event of an eviction, given his age, health and status; that he had lived amicably with the applicants and had done nothing whatsoever wrong to impose danger on them to the extent that they felt insecure; that the movable property mentioned in the application was his personal property and nowhere in the judgment was his entitlement taken away; that he had taken responsible steps to appeal against the said judgment as a matter of right and law having been dissatisfied with the decision of the court; that he filed an application for stay of execution at the court of appeal under **Civil Application No. 52 of 2018** which was certified urgent on the 28th February 2018 and was due for hearing; that it was a fact that he had lived on the suit property his entire life and if he was to be evicted it would only be fair if the same is done humanely and he be allowed to retain his house, trees and tea plantation that he had invested in; that he had always been on the suit property with the authority and consent of the deceased who licensed him over the same for over 40 years; and that the 1st applicant was like a son to him as he took care of him and took him to school at his own cost in utmost good faith.

5. Parties filed their submissions which I have considered.

6. **Order 42 rule 6** of the **Civil Procedure Rules** provides that 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. It is a well-known principle of courts that a successful litigant should not be deprived of the fruits of his success to which, *prima facie*, he is entitled to, pending appeal (**George Oraro -V- Kenya Television Network (NRB. HCCC No. 151 of 1992)**). The only way a decree holder should be denied the fruits of his/her success is through an order of stay of execution pending appeal. That is not the case here, as there is no order staying execution of the decree issued in favour of the Applicants. It is obvious that the respondent herein is not keen on complying with the orders issued by this court in its judgment of 2nd October 2017. There is no evidence of any existence of orders staying the orders of the court as per the above stated judgment. The respondent filed a Notice of Appeal on 11th October 2017. This, however, does not operate as a stay of execution, as provided by **Order 42 rule 6** of the **Civil Procedure Rules**. The applicants, on the other hand, have not been able to enjoy the fruits of the judgment.

7. This application succeeds. The Deputy Registrar shall execute all the necessary documents to effect the transfer of land parcels Gatamaiyu/Kagaa/78, 299, T.251, T.299 and T.300 to the 1st applicant. The respondent shall within 60 days vacate from these properties, failing which he will be evicted therefrom by the Court Bailiff under the supervision of the OCPD Lari Police Division. An injunction shall issue restraining the respondent from cutting any trees, or carting trees from the parcels of land, or alienating any properties from the parcels. The respondent shall pay costs of the application.

DATED and DELIVERED on the 2ND day of OCTOBER 2018

A.O. MUCHELULE

JUDGE