



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 309 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE PAUL MMBANGO OPATI.....DECEASED

AND

PAUL LAZARUS DISI1ST OBJECTOR/APPLICANT

MORRIS MAJONI PAUL.....2ND OBJECTOR/APPLICANT

VERSUS

FRANCIS AMAALA PAUL.....1ST PETITIONER/RESPONDENT

MARGARET KHABAYA PAUL2ND PETITIONER /RESPONDENT

RULING

1. The 1st petitioner/applicant has filed an application dated 26th September, 2018 seeking for orders:

1. That this honourable court be pleased to issue an order for stay of execution of the Ruling dated 13th day of June, 2018 by Hon. J. Njagi (Judge) and all other consequential orders pending hearing and determination of this application and the appeal against the ruling.

2. That status quo to be maintained on land parcels **Butsotso/Indangalasia/6229,6230,6231,6232,6233,6234 and 6235** be maintained pending the hearing and determination of the application and appeal.

3. The costs of the application be provided for.

2. The application is premised on the grounds that the applicant has filed an appeal against my ruling dated 13/6/2018 where I ordered that:-

1. That the Land Registrar–Kakamega County do nullify any or all titles issued in respect of land parcel Nos.**BUTSOTSO/INDANGALASIA/6229,6230,6231,6232,6233,6234** and **6235** respectively, being resultant from cancelled partition of land parcel No. **BUTSOTSO/INDANGALASI/247**.

2. That the original number **BUTSOTSO/INDANGALASIA/247** be restored in the name of the deceased.

3. That land Registrar,Kakamega County and land Surveyor, Kakamega County do execute orders made by this Honourable Court on 12th day of March, 2015 by Honourable Lady Justice R. Sitati.

4. That each party to bear its own costs.

3. The applicants were acting in person while the respondents were represented by the firm of Nadwa & Co. Advocates.

4. The application was opposed by the respondents on the grounds that:-

(1) That the application is improperly on record.

(2) That the applicants have not met the condition for the granting of the orders sought.

(3) That the application lacks merit, is an afterthought and an abuse of the court process.

(4) That there is no appeal to warrant a stay of execution.

(5) That the application has been brought with unreasonable delay.

5. The application was supported by the affidavit of the 1st applicant Paul Lazarus Disi. The deponent states in his affidavit that he has filed an appeal with the court of Appeal at Kisumu. However no copy of a memorandum of appeal was annexed to the application. There is then no evidence that the applicants have filed an appeal with the court of Appeal.

6. The applicant says that he has filed a notice of appeal with this court. However the notice of appeal in the court file is not dated. Neither is it stamped by the court to indicate the date it was received by the court. There is no receipt attached to the notice to indicate that it was paid for. Even after the issue of non- payment was raised by the advocates for the respondent during the hearing of the application, the applicant did not produce evidence that the notice was paid for. The importance of the date a notice is filed is because the time for filing the appeal starts to run from the time the notice of appeal is filed. These discrepancies are clear proof that there is no valid notice of appeal in record.

7. The ruling the applicants want to appeal against was delivered on 13th June, 2018. Three months have since lapsed and there is no evidence of a notice of appeal and an appeal having been filed. The applicants have not convinced the court that they deserve the orders that they are seeking.

8. The end results is that the application dated 26th September, 2018 is unmerited. The same is dismissed with costs to the respondents.

Delivered, dated and signed in open court at Kakamega this 7th day of November, 2018.

J.NJAGI

JUDGE

In the presence of:

Objectors/applicants.....absent

Tunoi holding brief Nadwa.....for petitioners /respondents

Petitioners/Respondents.....absent

Court Assistantabsent