



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION CAUSE NO. 290 OF 2012**

**IN THE MATTER OF THE ESTATE OF FRANCIS MIGWI MATU alias MIGWI MATU  
NDEGE (DECEASED)**

**AND**

**MIGWI MATE NDEGE.....PLAINTIFF**

**VERSUS**

**SIMON NYAMU MIGWI.....RESPONDENT**

**RULING**

1. Before this court are two applications both of which were for good reasons directed to be argued simultaneously. In the first application, the petitioner, **Simon Nyamu Migwi**, took out summons for rectification of grant dated 23<sup>rd</sup> March, 2016 seeking for the following reliefs:

- a. *That the grant issued to him on 17<sup>th</sup> March, 2016 be rectified in the following manner under rules 43 (1) of the Probate and Administration Rules:*
  - i. *KABARE/NYANGATI/4094 measuring 1 acre be devolved to him (Simon Nyamu Migwi).*
  - ii. *KABARE/NYANGATI/4095 measuring approximately 2 acres be given to Patrick Munene and Purity Wawira Wanjiku (the respondents).*

2. The grounds upon which rectification was sought was that this court in its judgment dated 2<sup>nd</sup> March, 2016 directed that that property described as **KABARE/NYANGATI/4094** would go to the respondents while **KABARE/NYANGATI/4095** would go to the applicant instead of the other way round because **KABARE/NYANGATI/4094** measures one acre while **KABARE/NYANGATI/4095** measures 2 acres and going by the said judgment the grant should be rectified to conform with the same.

3. The respondents through their counsels, Mr. Maina told this court that they had no objection to the rectification as prayed by the petitioner but their only reservation was that the same should be stayed pending the determination of the appeal filed by the respondents.

4. In the second application dated 25<sup>th</sup> April, 2016 Patrick Munene Migwi, the protestor/applicant sought an order for stay of execution of the judgment delivered by this court on 2<sup>nd</sup> March, 2016 under **Rules 49** and **73** of the Probate and Administration Rules pending the hearing and determination of the appeal filed vide **Nyeri Court of Appeal Civil Appeal No. 19 of 2016**. The Summons was supported by the affidavit of the applicant Patrick Munene Migwi sworn on 25<sup>th</sup> April, 2016. The applicant felt aggrieved by the

decision of this Court dated 2<sup>nd</sup> March, 2016 and filed an appeal in Nyeri Court of Appeal vide Civil Appeal No. 19 of 2016 (a copy of the Memorandum of Appeal was exhibited as 'PMM' in the said affidavit). The appellant feels that his appeal stands high chances of success and that it would be fair and just to grant a stay of execution of the aforesaid judgment pending the determination of the appeal.

5. Mr. Maina, learned counsel for the applicant, opined that the respondent herein would suffer no prejudice besides the fact that one of the issues to be addressed by the appellate court would be the respondent's entitlement to the share of the estate awarded to him by this honourable Court. In his view the decision of the Court of Appeal will have a bearing on whether or not rectification would be needed. The applicant expressed his fears that the respondent could transfer his share to third parties in a bid to render the appeal nugatory.

6. The respondent (Simon Nyamu Migwi) opposed the application for stay of execution terming it oppressive as the same in his view would keep him out of his inheritance to the estate. In his view the appeal stands no chance as he cannot be disinherited as the son to the deceased. He opined that the applicant would not be prejudiced if he is allowed to take occupation of his share of the estate and asked this Court to remove a restriction that had been placed on the property. He also asked for security to be provided to the surveyor when carrying out the survey work.

7. I have considered both applications and to begin with the first application dated 23<sup>rd</sup> March, 2016 both parties are in agreement that the property described as **KABARE/NYANGATI/4094** measures 1 acre while **KABARE/NYANGATI/4095** measures 2 acres as demonstrated by the copies of certificates of official searches exhibited by the Petitioner/applicant. When this Court made its decision dated 2<sup>nd</sup> March, 2016, it inadvertently perceived the converse that is to say that **Plot No. 4094** was 2 acres while **Plot 4095** was 1 acre. In view of the sentiments expressed by both parties and under **Section 74** of the **Law of Succession Act** the errors in description of the respective properties going to the petitioner and the respondents are hereby rectified as follows:

- i. That property known as **KABAE/NYANGATI/4094** measuring approximately 1 acre shall go to the petitioner (Simon Nyamu Migwi) while;
- ii. That property known as **KABARE/NYANGATI/4095** measuring approximately 2 acres shall be shared equally between Patrick Munene Migwi and Purity Wawira Wanjiku.

8. In the 2<sup>nd</sup> application dated 25<sup>th</sup> April, 2016, the applicant has contended that unless a stay of execution is granted, his appeal which he maintains has high chances of success, would be rendered nugatory. The Respondent for obvious reasons does not share this opinion. This Court cannot be called upon to determine whether or not a party appealing against it has chances to succeed in appealing against it. The guiding principles in application for stay of execution are now well settled. These are:

- i. An applicant must demonstrate that he/she would suffer substantial loss if stay is not granted.
  - ii. That the application for stay has been presented without delay and an offer of security is given.
- (See the following authorities:**

- i. **Real Consult Agencies Ltd -Vs- Gerald Wachira Nguthi [2015] eKLR.**
- ii. **Feisal Amin Jammohammed T/A Dunya Forwarders -Vs- Shami Trading Company Limited [2014] eKLR.**
- iii. **Socfinac Company Limited -Vs- Nelphat Kimotho Muturi [2013] eKLR)**

9. Under **Rule 73** of **Probate and Administration Rules** this Court is given a discretion to give any order as may be necessary to meet the ends of justice which in this context means an order that would not render the appeal if successful nugatory. (See the Court of Appeal decision in the case of **Stephen Njuguna Mwangi (legal representative of the estate of Mwangi Mbothu (deceased) -Vs- Wangari Njuguna [2015] eKLR.** It is also fair in my view to ensure that a successful party in litigation is not unnecessarily delayed in his quest to enjoy fruits of his/her judgment given the time and costs involved in the process of litigation in this country.

10. This Court is satisfied that the applicant herein presented this application under consideration without delay. The judgment of this Court was delivered on 2<sup>nd</sup> March 2016. Thereafter on 4<sup>th</sup> March, 2016, he applied for certified copy of the proceedings and judgment and proceeded to file a notice of appeal on 8<sup>th</sup> March, 2016. Thereafter on 25<sup>th</sup> April, 2016 he filed his Memorandum of Appeal in the Court of Appeal Nyeri. This clearly shows that he was timely pursuing his right to appeal the decision of this Court and cannot be faulted in that regard.

11. However, this Court finds that the applicant has not demonstrated satisfactorily what substantial loss he would suffer if stay is not granted or how his appeal at the Court of Appeal would be rendered nugatory if the respondent takes possession and utility of his one acre as they await the outcome of the Court of Appeal. This Court takes the view that Simon Nyamu Migwi, as a son to the deceased was a dependant with overriding interests on the estate of the late FRANCIS MIGWI MATU alias MIGWI MATU as compared to the applicant who was a grandson to the deceased. He is entitled to the fruits of the cause which commenced in the year 2012.

12. This Court finds that the applicant has not satisfied the conditions for granting a stay of execution. The concerns expressed in the application can be adequately addressed with an order of restriction on the petitioner's use of the property granted to him that is **KABARE/NYANGATI/4094**. The Respondent/petitioner) is granted possession and use of the said property but he is restricted from disposing it to third parties or charging it in order to obtain credit from financial institutions. Any other restriction(s) earlier placed on the property should be removed to facilitate transmission as per the rectified grant confirmed as follows:

- i. **KABARE/NYANGATI/4094** to go to Simon Nyamu Migwi.
- ii. **KABARE/NYANGATI/4095** to be shared equally between

Patrick Munene Migwi and Purity Wawira Wanjiku.

In conclusion the application dated 25<sup>th</sup> April, 2016 is disallowed for lacking in merit while the application dated 23<sup>rd</sup> March, 2016 is allowed. The order of costs shall abide by the outcome of the Court of Appeal. It is so ordered.

***Dated and delivered at Kerugoya this 6<sup>th</sup> day of July, 2016.***

**R. K. LIMO**

**JUDGE**

6.7.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Maina for protestor present

Simon Nyamu present in person.

**COURT:** Ruling signed, dated and delivered in the open court in the presence of Maina for the applicant and Simon Migwi Respondent in person.

R. K. LIMO

JUDGE

6.7.2016