

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION CAUSE NO. 56 OF 2012

IN THE MATTER OF THE ESTATE OF CIATU GATUANYAKI (DECEASED)

ANGELINA KANINI CIATU.....RESPONDENT

VERSUS

VIDES MARIGU CIATU.....PROTESTOR/APPLICANT

RULING

1. In this application the protestor/applicant has by way of notice of motion dated 8th august 2016 applied for stay of execution of the orders made by this court on 9th June 2016 in respect of Land Parcel No. Kagaari/Kanja/350, pending the hearing and determination of the intended appeal. The applicant has also sought an order for the provision of costs. Her application is brought under sections 1A, 1B and 3A of the Civil procedure Act, (Cap 21) of the Laws of Kenya, and under Orders 42 Rules 6 and 51 Rule 1 of the Civil 2010 Civil Procedure Rules and under all enabling provisions of the law.

2. The application is supported by the grounds on the face of the notice of motion and is anchored in the supporting affidavit of the applicant. The grounds in support of the notice of motion are that the ruling delivered on 9th June 2016 was unfavorable to the applicant.

3. The applicant's affidavit contains six paragraphs. She has deponed that she had filed a protest dated 29th October 2013 against confirmation of the grant in respect of the estate of the deceased. She also deponed that an unfavorable ruling was delivered on 9th June 2016, which she intends to appeal against. She further deponed that the intended appeal has high chances of success, which will be rendered nugatory unless an order for stay of execution is granted.

4. Angelina Kanini Ciatu, the respondent has filed a replying affidavit, in opposition to the application, which contains sixteen paragraphs. She has deponed that the ruling dated 9th June 2016 was meticulous and that the applicant has failed to appeal within the stipulated time. She has further deponed that the applicant is using delaying tactics to deny her the fruits of this ruling. It is also her further evidence that her deceased husband had indicated how his properties were to be sub divided and distributed among his beneficiaries. Furthermore it is her evidence that land parcel No Kagaari/Weru/ 3644 was to be registered in the name of Christopher Ndwiga Ciatu, to hold in trust for the applicant.

5. Furthermore, she also deponed that the applicant wants to disinherit the respondent of her rightful share of the estate of the deceased. She has also deponed that the intended appeal has no chances of succeeding. It also her evidence that the applicant concealed material facts from the court in that land parcel Kagaari/Weru/3644 was to be registered in the name of Christopher Ndwiga Ciatu. Finally, the respondent has deponed that the applicant has no legal right to redress to higher court, and that granting an order of stay of execution will cause prejudice to her and for that reason the application should be dismissed with costs.

6. The law applicable in this application is ***Order 42 Rule 6 of the 2010 Civil Procedure Rules***. According to the provisions of that order, an applicant for an order of stay of execution has to satisfy the following criteria. First, no order of stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant. Second, the application must be made without unreasonable delay. In doing so, the court may require security from the applicant for the due performance of the

decree or order as may be ultimately be binding on him.

7. In the light of the law applicable and the affidavit evidence of both the applicant and the respondent, I find the following to be the issues for determination. First, whether or not the applicant is likely to suffer substantial loss if the order of stay of execution is not granted. Second, whether or not the application has been made without delay. Thirdly, who should bear the costs of this application.

8. I have considered the affidavit of both parties and the applicable law. I find from the affidavit evidence that unless an order of stay of execution is granted the intended appeal of the applicant may be rendered nugatory. I also find that this court handed down the impugned ruling on 9th June 2016. Eleven days later on 20th June 2016 the applicant filed her notice of appeal against the ruling in the registry of this court. And on 8th August 2016, the applicant filed her application seeking an order of stay of execution of the ruling appealed against. It appears that the applicant did not act with speed to file the application for an order of stay of execution. There is a delay of almost two months, which delay has not been explained in the affidavit evidence of the applicant. I find that the delay of almost two months is inordinate. In the circumstances, I dismiss the applicant's application dated 8th August 2016 with no orders as to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **SEPTEMBER, 2016**

In the presence of Mr Kamunyori for the protestor/applicant and Ms Muthoni holding brief for Mr. Kitonga for respondent (Angelina Kanini Ciatu)

Court clerk Njue.

J.M. BWONWONGA

JUDGE

14.09.16