



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 16 OF 1988

IN THE MATTER OF THE ESTATE OF LABAN KING'ORI MACHARIA (DECEASED)

JOHN MWANGI KING'ORI.....APPLICANT

VERSUS

ZAWERIA WANGARI KINGORI

MACHRIA MAINA

IRUNGU MAINA

KARIUKI MAINA.....OBJECTORS

RULING

[1] By an application dated 3rd May, 2016 the Applicant invited the court to grant the following prayers:-

(a) Temporary order for stay of its own orders issued on 22nd April, 2016 pending the hearing of this application inter-partes.

(b) That the court stays its own orders issued on 22nd April 2016 pending the hearing and determination of the appeal.

[2] The application was supported by the affidavit of the Applicant in which he averred that the court confirmed the grant and distributed the deceased's assets to the deceased's three houses in its orders made on 26th April 2013 and 21st January 2014 respectively; that the court erroneously assessed the value of the deceased's assets without allowing the witnesses to be cross-examined; that the beneficiaries were unable to raise the huge amounts dictated by the court and that there is imminent danger of the deceased's assets being bought by third parties and the family being rendered destitute.

[3] The Applicant further complained that on 22nd April 2016 the court ordered in his absence that a charge registered against L.R. No. 209/1413/28 in favour of Housing Finance Company of Kenya (HFCK) be discharged. That no party to the cause before the court prayed that the charge be vacated and neither was the issue of discharge of charge ever canvassed. He also argued that the court ordered him to give vacant possession on L.R. No. 209/1413/28 without realizing that he was the Executor and the Custodian of the deceased's assets until transmission would be effected and without specifying to whom the vacant possession would vest.

[4] The Applicant further averred that it would not be possible to sell, value the properties, and then pay

the valuation fees with the proceeds of sale. He argued that unless orders issued by the court on 22nd April 2016 are stayed, the appeal will be rendered nugatory.

[5] In reply to the Applicant's affidavit, Francis Mwangi Kingori (hereinafter the Objector) swore an affidavit dated 13th May, 2016 in which he deposed that he is one of the beneficiaries of the estate and has authority to swear the affidavit on behalf of the other beneficiaries. That the Applicant who was mandated to distribute the estate has failed to do so. That the court gave directions on what should be done in the event parties given the option to purchase failed to exercise the said option. That the Applicant had the duty to execute the court orders which he has failed to do.

[6] The Objector also averred that it is hypocritical for the Applicant to allege that the beneficiaries were unable to raise the huge amount dictated by the court. That although the Applicant obtained Kshs.70 million by charging the prime property of the estate, he kept to himself all the proceeds and now wants the same status to continue. He asserted that the court acted within its mandate to cancel the charge. That the Applicant should give vacant possession to enable proper execution of the court orders.

[7] Mrs. Zaweria Wangari Kingori the second Respondent also swore a replying affidavit dated 12th May, 2016. She averred that the Applicant submitted his value of the land at Kshs.60 million vide a report commissioned by himself before the orders for distribution were made. Further that the Applicant has enjoyed immense benefits from the estate without bothering about the welfare of the other beneficiaries. She also asserted that the Charged of the property to HFCK by the Applicant for Kshs.70 million was done with impunity and was intended to defeat the beneficiaries' interests. She contended that the Applicant has not exhibited that he is likely to suffer any substantial loss as the property in issue belongs to the estate.

[8] The background of this matter is that the Applicant is the executor of the Will of the deceased. A dispute arose between the beneficiaries regarding how the properties that comprised the estate of the deceased were to be distributed among the beneficiaries. The deceased was married to three wives and the beneficiaries agreed that the basis upon which the estate would be distributed would be in accordance with the three houses of the deceased.

[9] The beneficiaries were however unable to agree on how the properties that comprised the estate of the deceased were to be distributed. The distribution was subsequently undertaken by the court in the presence of all the beneficiaries, by Hon. Kimaru J on 26th April 2013.

[10] The estate of the deceased comprised of ten (10) properties. There was no dispute regarding how nine (9) of the properties were distributed to the beneficiaries by the court. The Executor however disputed the manner in which the property registered as L.R. No. 209/1413/28 Accra Road Nairobi was distributed by the court. This is a prime commercial property situated in Nairobi City Centre.

[11] To resolve the distribution of this particular property, the court directed the contesting parties to each appoint a Valuer of their choice, to undertake the valuation of the suit parcel of land. Upon the filing of the valuation reports, the court then made its determination on 21st January 2014 as to the value of the land, placing it at Kshs.75 million.

[12] This value was arrived at as a compromise by the court between the valuation reports filed in court, by Messrs Townland Valuers, duly instructed by one of the Objectors, whose report valued the land at Kshs.90 million, and Messrs Mathu and Associates duly appointed by the Executor whose report valued the land at Kshs.60 million.

[13] The Applicant, John Mwangi King'ori, was aggrieved by the decision of the court rendered on 21st January 2014. On 29th January 2014 he filed notice of intention to appeal against the said decision to the Court of Appeal. On 21st February 2014, the Applicant moved the trial court pursuant to **Rules 49** and **73** of the **Probate and Administration Rules** seeking two (2) orders from the court.

[14] First he sought to be granted leave to appeal against the said decision of the court. The Objectors did not oppose the Applicant's application to be so granted leave to appeal. Indeed, on perusal of the court's record it is clear that the court did in fact grant leave to the Applicant to appeal against the decision as soon as it was rendered. In the premises, the court declined to grant leave to appeal twice in respect of the same decision stating that the prayer was superfluous.

[15] In the second prayer, the Applicant sought an order of the court to stay the execution of its decision pending the hearing and determination of the intended appeal. The application was supported by the annexed affidavit of the Applicant.

[16] Upon evaluation of the facts of the application, the court found that the prayer sought by the Applicant could not be granted, for reasons that the Applicant had not established, to the satisfaction of the court, what prejudice he stood to suffer when he was being asked to distribute the assets of the deceased to the beneficiaries.

[17] Two years down the line the Applicant Executor had not moved the Court of Appeal preferring to file another application to the High Court. In a ruling dated 22nd April 2016 this court restated the conditions set down by Kimaru J in the two earlier rulings stating that these orders having not been reviewed or overturned on appeal must be complied with. The Court gave additional orders as follows:

(i) Because the charge was done subsequent and contrary to court orders, this Court in exercise of its inherent jurisdiction, vacates the charge made to Housing Finance Company of Kenya on (HFCK) land parcel No. L.R. 209/1413/28. The HFCK shall be at liberty to move against any other of the Executor's personal properties.

(ii) The Executor do give vacant possession of the property that is L.R. 209/1413/28, to facilitate the sale thereof at the current market value.

(iii) Upon the sale of the property, and because the valuation done in 2014 may have been overtaken by time, a valuation shall be done to determine the value of the land as separate from the developments thereon and the valuation shall be paid for from the proceeds of the sale. The valuer shall be agreed upon by the three counsels on record.

(iv) The current market value of land only, shall be deposited in the Estate for distribution to the three houses of the Estate.

(v) The Executor shall then move with due dispatch to distribute the Estate of the deceased to the beneficiaries in accordance with the orders of Kimaru, J. dated 29th October 2014.

[18] The Applicant is now back in court seeking leave to appeal and orders of stay of execution. The record shows that upon reading the ruling in court the court granted leave to the parties to appeal. In the premise I will not belabour the prayer for leave to appeal as it is superfluous.

[19] On the second prayer for stay of execution the provisions of the law are clear and are couched in mandatory terms on when the court may grant stay orders pending appeal. **Sub rules (a) and (b) of Order 62(2) Civil Procedure Rules** provide that:

“No order for stay of execution shall be made under sub rule (1) unless – (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

(c) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The Court shall not therefore issue any stay orders unless the two grounds set out above are satisfied.

[20] The court finds that the Applicant has satisfied the second limb set out in **sub-rule (a) of Order 42 Rule 6(2)**, as the application having been filed on 3rd May 2016, was made without undue delay from the time the court orders were issued on 21st April 2016.

[21] On the first limb of substantial loss, the decisions which lend themselves to the circumstances of this case are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’

In the circumstances of this cause it is the Respondents and not the Applicant who stand to suffer substantial loss.

[22] It is common ground that after the death of the deceased, the Executor improved the value of the property by constructing several floors above the two (2) floors that already existed at the time of the deceased’s death. The parties are in agreement that the portion of the property that is to be distributed to the beneficiaries is the land itself and not the developments thereon. The Executor too concedes that the land belonged to the deceased and was therefore part of the estate which was available for distribution. Thus far there is no dispute between the beneficiaries.

[23] The distribution of the estate of the deceased has been pending in the corridors of this court for more than twenty-eight (28) years. During this period, the Applicant has enjoyed the status quo which has conferred a huge benefit to him to the exclusion of other beneficiaries. The mandate of the Executor of an estate as provided under **section 83 Law of Succession** is to *inter alia*:

- “(a)
- (b)
- (c)
- (d)
- (e)

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be; Duties of personal representatives.

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.”

The Applicant seems to have misapprehended the fact of his being an Executor to mean that that gives him the authority to hold the assets of the estate in perpetuity without distributing them to the beneficiaries.

[24] The Applicant has not demonstrated what loss, substantial or otherwise he stands to suffer when he is being called upon to discharge his mandate as the Executor and distribute the estate to the beneficiaries of the estate as he should have done 28 years ago. In the ruling of 22nd April, 2016 the court gave the reasons for moving *suo motu* to discharge the charge on the subject asset. I am in agreement with the holding of Kimaru J in his decision of 29th October 2014 that the Applicant is free to exercise his right of appeal but should not do so at the expense or to the detriment of the other beneficiaries.

[25] It is not lost on the court that the Applicant who is aggrieved and who now seeks discretionary orders from the court has for years disobeyed the orders of the very court he wishes to seek refuge in. Even now he does not indicate that he has endeavored to comply with the said orders as he seeks to move the higher court on appeal. The conduct of the Applicant demonstrates that he does not deserve the exercise of the discretion of this court in his favour.

[26] In view of the foregoing, this court finds and holds that the circumstances of this case are such that it cannot exercise its jurisdiction to grant the orders sought, for to do so would not serve the interests of justice in this cause. The Applicant's application lacks merit and is hereby dismissed with costs.

Reasons wherefore the application is dismissed.

SIGNED DATED and **DELIVERED** in open court this **15th day of September 2016.**

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L. A. ACHODE

JUDGE