



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

MISC APP NO. 83 OF 2007

FORMERLY NYERI MISC APP 99 OF 1994

REGINA WAKARITHI GACHO.....APPLICANT

VERSUS

TERESIA WANJA GACHO

DAVID MWANGI MACHARIA.....RESPONDENTS

RULING

Counsel for the respondents has moved the court through summons for confirmation of the grant issued to the 1st respondent in Succession Cause No. 45 of 1995 in the High Court at Kerugoya. The application is supported by the affidavit of the 1st Respondent (Teresia Wanja Gacho). According to her, she was granted letters of administration of the estate of the deceased on 17th August, 1993. Furthermore, she states that the deceased was survived by two dependants, that is herself and David Mwangi Macharia, the 2nd respondent. This 2nd respondent purchased part of the land forming the estate of the deceased.

In her affidavit in support of summons for confirmation of the grant, she identified the beneficiaries of the estate and ascertained the shares to be taken by each of the beneficiaries in respect of land parcel No. Kiine/Sagana/11 which was to be shared as follows:

1. David Mwangi Macharia – to get 3.5 acres
2. Teresia Wanja Gacho – to get 3.5 acres.

Both counsel were ordered to file written submissions in respect of the summons for confirmation of the application dated 2th June, 2012. As a result, counsel for the respondent filed their written submissions on 5th February, 2013. Counsel for the applicant did not file written submission as ordered. Instead, they filed a notice of motion dated 14th May, 2013 which was argued and dismissed on 1st August, 2014.

Following the dismissal of the application, the succession cause was before the registry on 19th May, 2015 in which both parties agreed to have the matter for mention on 23rd September, 2015. When the matter came for mention on 23rd September, 2015, Mr Gacheru proceeded to apply for a ruling in respect of his application dated 27th June, 2012. It should be remembered that this was the application for the confirmation of the grant. Mr Mwaniki who held Mr Magee's brief informed the court that Mr Magee

had filed a notice of appeal against the ruling of 1st August 2014. He further submitted that Mr Magee had not received certified copies of proceedings. He also submitted that he had no instructions from his client to prosecute the appeal. Finally, he submitted that he was not served with the notice of hearing that scheduled the matter for mention on 23rd September, 2015 and for that reason he requested for another mention date to enable him take a date for the ruling.

I have considered the rival submissions for both parties and the affidavit evidence of the 1st respondent in support of the confirmation of the grant. I find that the mention date of 23rd September 2015 was taken in the registry in the presence of both counsel for the parties. For this reason, I reject the submission that Mr Magee was unaware of the mention date of 23rd September, 2015. I also find that Mr Magee had not filed his written submissions as required. Instead, he filed a notice of motion seeking a review of the court's order which application was dismissed in the court's ruling of 1st August, 2014. I also find that Mr Magee has not filed any protest. Finally, I find that he also has not sought a stay of the current proceedings in order to enable him to prosecute the appeal in the Court of Appeal.

In terms of ***Order 42 Rule 6 (1) of the 2010 Civil Procedure Rules***, the filing of an appeal which includes the filing of the notice of appeal does not automatically operate as a stay of the execution or proceedings and a decree or order appealed against. A party who desires that the proceedings be stayed pending the outcome of an intended appeal has to seek stay of the order or proceedings from the court whose proceedings or order that is intended to be appealed against. Such a party is also at liberty to seek stay in the Court of Appeal. In the absence of any stay from the High Court or Court of Appeal, the proceedings or the order that is sought to be appealed against may be executed or continued.

I have perused the affidavit in support of the summons for confirmation of the grant and the submissions in support thereof. In the absence of the stay of these court's proceedings and in the absence of the any protest in the matter I hereby allow the applicant's application dated 27th June 2012.

There will be no order as to costs

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **OCTOBER, 2015**

In the presence of Mr Abubacar for the petitioners and in the absence of counsel for the Respondents

Court clerk. Mr Njue

J.M. BWONWONGA

JUDGE

14.10.15