



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 10 OF 2020

MARY WAIRIMU NJOKI.....1ST APPELLANT

LUCY WAMBUI NJOKI.....2ND APPELLANT

BETH NDUTA NJOKI.....3RD APPELLANT

FREDRICK MUGO NJOKI.....4TH APPELLANT

VS

DANSON MAINA KIMEMIA (suing as the Administrator /Executor

of the estate of Kamau Mahugu, deceased).....RESPONDENT

(Being an Appeal from the judgement of Hon Eddah Agade SRM at Kigumo in SPMCC No 95 of 2020)

RULING

1. The Appellants/Applicants have moved the Court by way of Notice of Motion dated the 21/8/2020 seeking for orders of stay of execution of the judgement /decree issued in SPMCC No 95 of 2020 issued on the 13/8/2020 pending the hearing and determination of the application/Appeal. The Applicants being aggrieved by the said judgement of the lower bench have proffered an Appeal and filled a Memorandum of Appeal dated the 21/8/2020 and filed on the 24/8/2020.
2. The application for stay of execution is premised on the grounds annexed to the application and amplified in the Supporting Affidavits of Fredrick Mugo Njoki and Francis Kariuki Wakahii. Interalia, the Applicants aver that they are aggrieved by the decision of the lower bench that ordered the remains of their mother the late Peninah Njoki to be exhumed from Land Parcel No LOC2 /KANDERENDU/432 (suit land). They term the exhumation draconian and would expose the Applicants to psychological torture. That the suit land is registered in the name of their grandfather the late Kamau Mahugu who they claim had in his lifetime subdivided the land and gave each of his children a portion, their deceased mother included.
3. In addition, they aver that they were not accorded the right to be heard on the 13/8/2020 when the matter came up for hearing as they lacked legal representation and had not filed their defense in the suit.
4. That the suit land is subject to a protest in the Succession Cause No 90 of 2011 at Kigumo which cause has not been determined.
5. That they stand to be prejudiced by the exhumation orders in the event that they successfully challenge the will and letters of administration held by the Respondent in the said succession cause.
6. Opposing the application, the Respondent filed a Replying Affidavit on the 7/9/2020 and contended that he is the Administrator of the estate of Kamau Mahugu, now deceased. He admitted that the Applicants' mother is his sister. That his father left a will in which he gave the Applicants' mother Land Parcel SOSIAN/SOSIAN/BLOCK 1/11585. That the Applicants hurriedly buried their mother on the suit land despite his protest.
7. He further contends that the Applicants failed to defend the suit in the lower Court despite service of summons upon them and in any event they were present and addressed the Court at the hearing on the 13/8/2020 and therefore refuted claims that they were denied the right to be heard. That the judgement of the lower Court has not been set aside and the Applicants have come to Court with unclean hands. He urged the Court to dismiss the application.
8. The parties filed their written submissions which I have carefully read and considered.

9. On the 16/9/2020 the Court granted a temporary stay of execution of the orders of the lower Court in SPMCC No 95 of 2020 -Kigumo pending the hearing and determination of the application.

10. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.

11. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus: -

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except Appeal case of in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the Appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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; and

(b) 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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from a subordinate Court or tribunal has been complied with.”

12. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and within the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that: -

(a) The application was brought without delay;

(b) Substantial loss may result to the Applicant unless the stay is granted; and

(c) Security for the due performance of the order or decree has been provided.

13. Going by the record the judgment complained of was delivered on the 13/8/2020. This application was filed on the 24/8/2020 and therefore there is no delay in bringing this application.

14. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated: -

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

15. In respect to the 2nd requirement of proof of substantial loss, the Applicants have contended that if the exhumation is not stayed they will suffer psychological torture of having to rebury their mother on a different property. Further they contend that there is a dispute revolving the suit land in which their mother had challenged the administration of the estate vide Succession Cause No 90 of 2011 on account of beneficial interest which cause is still pending. That in the event that the succession cause is determined in their favour then the exhumation will have been done in vain.

16. The Applicants have also annexed a valuation report showing the occupation of the suit land during the lifetime of their deceased mother along with a tea growers verification certificate to demonstrate that their deceased mother lived on the suit land and depended on it for her livelihood. These have not been controverted by the Respondents save to state that their deceased father's will did not provide for the deceased sister Peninah Njoki on the suit land as she had been given another parcel of land in Laikipia, a claim that the Applicants have contested on the ground that the said land was purchased by their mother.

17. I am satisfied that the Applicants have demonstrated the substantial loss that they stand to suffer in the event the orders of exhumation are not stayed. In the opinion of the Court the psychological torture of exhuming and reburying the body is the substantial loss. I say so in the

face of the succession dispute involving the suit land which is yet to be determined. In my view if the Appellants are successful the body of their mother will have been unnecessarily disturbed.

18. In respect to the requirement of security of costs, order 42 (6) (2) (b) states that it is the Court that orders the nature of the security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.

19. In this case the Court disagrees with the Applicant's submissions that this is not a money decree hence there is no need for security for costs.

20. I find and hold that the Applicants do deposit the sum of Kshs 80,000/- being security for the due performance of the decree.

21. In the upshot the motion dated the 21/8/2020 is allowed subject to the following terms;

- a. The stay of execution is granted provided that the Appeal is filed within 90 days from the date of this ruling.
- b. The Applicant to provide security for the due performance of the decree in the sum of Kshs. 80,000/- (Eighty Thousand only) within 45 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both Advocates of the parties or a bank guarantee of a similar amount.
- c. If the Applicant fails to comply with orders a) and b) above the stay granted herein shall lapse.
- d. Costs of the application shall be met by the Applicant.

22. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANGA THIS 15TH DAY OF OCTOBER 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Jesse Kariuki for the 1st – 4th Applicants

Kirubi HB for T M Njoroge for the Respondent

Kuiyaki and Njeri, Court Assistants