



IN THE COURT OF APPEAL OF KENYA
AT NYERI
CIVIL APPLICATION 172 OF 2008 (UR. 109/2008)

JANE MUKOMPURIA MWORIA APPLICANT

AND

MARGARET MUKOMUNENE

MISHECK NGURWE RESPONDENTS

(Application for stay of execution pending the lodging of an intended appeal from the ruling of the

High Court of Kenya at Meru (Lenaola, J.) dated 22nd May, 2007

in

SUCC. CAUSE NO. 139 OF 1998)

RULING OF THE COURT

This is an application by Jane Mukompuria Mworua (Jane) under Rule 5 (2) (b) of the Court of Appeal Rules (Rules) for three orders, namely, a stay of any further proceedings in Meru *Succession Cause No. 139 of 1998* pending filing and determination of an intended appeal, an order for maintenance of status quo of land title No. Ntima/Igoki/461 which was sub-divided into sub-titles – Ntima/Igoki/6037, 6038, 6039 and 6040; and lastly an order that the inhibition given by Chief Magistrate/Deputy Registrar, Meru on 4th October, 1999 be maintained in the register.

The applicant is the widow of one Mworua Rutere alias Mworua M'Rutere (Mworua) who died on 11th December, 1999. Mworua the applicant's husband was the brother to Justus Kiruma Rutere (Justus) and Misheck Ngurwe.

Justus was the registered owner of land title Ntima/Igoki/461. He later died in Gilgil. Upon his death Margaret Mukomunene (Margaret) the respondent filed High Court, Meru *Succession Cause No. 139 of 1998* seeking a grant of letters of administration to the estate of Justus. The respondent claimed to be a daughter of Justus and the only heir.

The Grant was subsequently given and later confirmed identifying Margaret as the sole heir of the land. The land was subsequently sub-divided into four portions – viz Ntima/Igoki/6037, 6038, 6039 and 6040 and Margaret was registered as the proprietor of the four titles on 8th July, 1999.

By an application dated 4th October, 1999, Mworua applied for revocation of the Grant given to the respondent under Section 76 of the Law of Succession Act on the grounds that the respondent had no relation with the deceased and that the respondent filed the succession cause secretly and fraudulently without informing the rightful heirs. Mworua however, died before he prosecuted the application and by an order of the superior court dated 14th February, 2000 Misheck Ngurwe was substituted for his deceased brother Mworua. That application was ultimately dismissed by Tuiyot J on 17th September, 2001.

Thereafter, Jane filed an application dated 1st October, 2001 under **Section 76** of the *Law of Succession Act* seeking

an order that the Grant given to Margaret in respect of the estate of Justus be revoked. When that application came up for hearing in the superior court, Mr. Kirima, learned counsel for Margaret raised a preliminary objection to the application contending that the application was *res judicata* as Jane's deceased husband, Mworira, had filed a similar application in respect of the same estate which was dismissed by Tuiyot J. on 17th September, 2001.

Mr. Kioga, learned counsel for Jane however contended that Jane had filed the application in her own capacity as an interested party and that **Section 76** of the *Law of Succession Act*, authorized her as an interested party to apply for revocation of the Grant. Nevertheless, the superior court (Lenaola J.) upheld the preliminary objection on 22nd May, 2007 and struck out the application. Jane being aggrieved by the decision of the superior court filed a notice of appeal on 31st May, 2007 and subsequently made an application in the superior court for stay of proceedings and for an order for maintenance of status quo pending appeal.

Mr. Kirima again raised a preliminary objection to that application on the ground that the matter was *res judicata* which objection was upheld by the superior court (Emukule J.) on 23rd May, 2008 and the application struck out.

In an application under **Rule 5 (2) (b)** of the rules, the discretion of the Court has to be exercised judicially and upon established principles which require an applicant to satisfy the court both that the intended appeal is not frivolous and that unless the order sought is granted, the intended appeal would be rendered nugatory.

The respondent has however raised other issues which in essence question the competence of the application. The respondent deposes that there are no pending proceedings in the succession cause that can be stayed as the succession cause was determined; that the land has been sub-divided and sold to interested parties and that the applicant has not joined the owner of the land.

Mr. Kirima submitted at the hearing of the application that the estate has been alienated and does not exist; that the order for maintenance of status quo would be in vain as there is no existing land belonging to the estate and that no proceedings are pending in the succession cause.

Mr. Kioga contended that there was an inhibition dated 21st September, 2001 stopping any dealing with the land and that, if anything has been done contrary to the inhibition such transaction would be null and void. The applicant has annexed a copy of the inhibition given on 21st September, 2001 stopping any registration of any dealing with land title Nos. Ntima/Igoki/6037, 6038, 6039 and 6040 until further orders of the Court.

The applicant has also annexed copies of the register for land title Nos. Ntima/Igoki/6037, 6038, 6039 and 6040 which show that the inhibition was registered against the four titles and that the inhibition was later removed on 14th June, 2007 through a court order in Succession Cause No. 139 of 1998.

The copy of the register of Ntima/Igoki/6037 shows that Margaret transferred the land to Simon Murungi on 1st August, 1999 who in turn transferred the same land to John Thurania on 12th July, 2007. The copy of the register further shows that the title was closed on 11th November, 2007 when the land was sub-divided into parcels Nos. 7167 and 7168. The copy of the register of title No. Ntima/Igoki/6038 shows that Margaret transferred the land to David Mwasia Mathenge on 12th July, 2007. The copy of the register of titles No. Ntima/Igoki/6039 shows that Margaret transferred the land to Hellen Mukiri Mangati on 12th July, 2007.

Lastly, the copy of the register of title No. Ntima/Igoki/6040 shows that Margaret transferred the land to Muthuri Mbwiria on 19th July, 1999.

It is apparent that no application is pending for hearing in the succession cause in the superior court. Mr. Kioga submitted that what is pending in the superior court are eviction proceedings against the applicant. He however admitted that the applicant's house has been demolished. The respondent has annexed a copy of a decree given by Magistrate's court on 18th February, 2009 ordering the eviction of the applicant from land title No. Ntima/Igoki/7351 which respondent says is a further sub-division of one of the original four titles.

In these circumstances, we are not satisfied that there are pending proceedings in the succession cause that can be stayed.

Regarding the prayer for an order for maintenance of status quo and for maintenance of the inhibition the abstract of register of the four titles Nos. Ntima/Igoki/6037, 6038, 6039 and 6040 show that the respondent has sold all the four parcels of land and that the register of parcel No. 6038 has been closed after further sub-divisions. The respective

proprietors have not been made parties to the application. It would be highly unprocedural if the court were to make any orders affecting the new titles without giving the respective registered owners an opportunity to be heard.

In view of the foregoing, we are of the view that the application is incompetent. It is not therefore necessary to inquire whether the intended appeal is arguable or whether the appeal would be rendered nugatory if we decline to grant the orders sought.

Accordingly, the application is struck out with costs to the respondent.

Dated and delivered at Nyeri this 12th day of June, 2009.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR