



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA T MERU**

**SUCCESSION CAUSE NO. 83 OF 2003**

**IN THE MATTER OF THE STATE OF MUGAMABI KOBIA ALIAS M' MUGAMBI (DECEASED)**

**FRANCIS MUTUA MUGAMBI.....PETITIONER**

**VERSUS**

**BEATRICE GAKII MUGAMBI (applying for and on behalf of**

**GERMANO MUGAMBI MURIIRA.....OBJECTOR**

**RULING**

1. Subsequent to the judgment delivered on 5<sup>th</sup> December 2018 in which the estate of the deceased was distributed, two applications were filed.

2. The first application is dated 11<sup>th</sup> June 2019 and it seeks for Orders: -

*a. That all the necessary documents to effect the transmission of various shares to the beneficiaries in regard to Land Parcel Number Abothuguchi/Kariene/463 and Plot No. 28 A Kariene Market be signed by the Deputy Registrar in place of the petitioner/administrator and*

*b. That half rent collected from the premises constructed on Plot No. 28A Kariene Market be deposited in court pending the hearing and determination of the application.*

3. The second application is dated 26<sup>th</sup> August 2019 and is made by the petitioner who seeks for a stay of execution pending the hearing and determination of his appeal in *Nyeri Court of appeal No. 146 of 2019 Francis Mutua Mugamabi versus Germano Mugambi Muriira*.

**Arguments in support of application**

4. The protestor opined that he is entitled to half a share of Plot No. 28 A Kariene Market but the petitioner has refused to transfer the said share to her. That the administrator continues to collect rent from the Plot N. 28 A Kariene Market without due regard to the share due to the estate of Germano Muriira Mugambi. That the petitioner filed its notice of appeal on 6<sup>th</sup> December 2018 and is yet to file its record of appeal. That it is her belief that the petitioner filed the notice of appeal so that he can delay the transmission process of the estate of the deceased. She attached a list of persons who have been paying rent to the petitioner herein for the last 6-24 months and stated that she is the one who will suffer prejudice since the petitioner has been receiving rental proceeds from the

year 2003.

5. The petitioner on his part submitted that his appeal has merit and will only suffer prejudice if the Orders for stay of execution are not granted. That it is untrue that the petitioner has not taken any steps to file the record of appeal despite taking steps to file the notice of appeal on 6<sup>th</sup> December 2018. That the record of appeal has since been served upon the protestors advocates. That the allegation that he has adamantly refuse to take any action to effect the transmission of the estate of the deceased and/or vowed never to execute the transmission is misguided, misconceived and an imagination by the protestor/applicant. That without going to the merits of the appeal it is clear that it is the petitioner who had constructed the houses and this much was determined by Hon. Justice Makau in his ruling dated 15<sup>th</sup> April 2013.

### **Submissions**

6. On 5/11/2019 this court directed the appeal be canvassed by way of written submissions. Both parties have filed their submissions which I have dully considered.

### **Analysis and Determination**

7. Good order dictates that I should determine the petitioner's application first. The principles of justice as formulated by the Constitution of Kenya, 2010 and the overriding objective of the law require courts to take a wider view of justice in considering prescriptions set out in law for grant of relief. However, as that remains the focus, the court shall consider inter alia the factors set out in **Order 42 Rule 6(2) of the Civil Procedure Rules** to wit;

*i. Whether the Application has been made without unreasonable delay.*

*ii. Whether substantial loss may result to the Applicants unless the order sought for is made; and*

*iii. The appropriate security to be provided by the Applicant for the due performance of the decree or order.*

8. The application was made 9 months after the delivery of the judgement. No explanation of the delay has been offered by the Petitioner. Accordingly, the Protestor's belief that this application was prompted by her application makes sense. In the circumstances, I find that the application was not made without unreasonable delay.

### **On substantial loss occurring**

9. The petitioner has submitted that he is the one who built the structures in the suit property hence ought to be collecting the aforesaid rent and if this orders are not granted he shall suffer substantial loss. The court took care to consider in its judgement this claim by the petitioner. It found that the deceased had developed the shops and butchery on the property and the petitioner only constructed some structures on the plot during the pendency of these proceedings- an act in violation of the law. The latter element would militate against his argument that he will suffer substantial loss.

10. Be that as it may, sometimes- and this depends on the facts of the case- the court should just establish where the balance of convenience lies. The novel balancing here require adherence to principles of fairness, objectivity and legitimacy: entertain the *account from the other side*; and thereafter, weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result. I have weighed the competing interest of the parties. This being a succession case, prejudice to the other beneficiaries is as important a consideration as the right of appeal. Although the petitioner is on appeal on my decision on Plot No. 28B, he has continued to collect rent and keep for his exclusive use despite my order. The protestor has shown that she continues to suffer irreparable harm by the petitioner's insistence on keeping the rental proceeds derived from Plot No. 28 A Kariene. I agree. Thus, the balance of convenience tilts in favour of preserving the income i.e. rent derived from the plot even as he pursues his appeal. I find it curious that the petitioner merely stated in his submissions that the protestor would be compensated if the appeal does not succeed.

11. Accordingly, I will make appropriate orders after determining the protestor's application.

12. The protestor's application is for DR to sign all transmission documents of shares in the estate properties and for the rental

proceeds to be deposited in court. I do find that more than 6 months have passed since the issuance of the Certificate of confirmation of grant. There is no indication given whether the estate has been transmitted to the beneficiaries. Section 83 of the Law of succession Act is very clear on the duties of beneficiaries. The same stipulates as follows;

### **83. Duties of personal representatives**

**Personal representatives shall have the following duties—**

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;**
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;**
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);**
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;**
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**
- (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 interest therein under the will or on intestacy, as the case may be;**
- (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;**
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration. [Emphasis mine]**

13. The petitioner/administrator has not shown the steps taken to complete the administration of the estate especially the other property on which he has not raised any serious objection. I, however, is acutely aware that he has filed an appeal and he has rights thereto. Proper exercise of discretion in orders that ensures the petitioner moves quickly in his appeal and at the same time protect the estate property.

14. Accordingly, I Order;

- (i) Stay of execution for six months to enable the Petitioner pursue and complete his appeal; and**
- (ii) Transmit Abothuguchi/Kariene/463 as per the grant in 30 days which failing the Deputy Registrar to sign transmission documents in place of the petitioner/administrator.**
- (iii) The entire rent collected from the premises constructed on Plot No. 28A Kariene Market be deposited in court pending the hearing and determination of the appeal.**

Dated Signed and delivered at Meru this 17<sup>th</sup> day of December, 2019

F. GIKONYO

JUDGE

In presence of

M/s Otieno for petitioners

M/s Athieno for protestor

F. GIKONYO

JUDGE



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