REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 31 OF 2006

IN THE MATTER OF THE ESTATE OF YUSUF KIPKORIR CHEPKEITANY (DCD)

DAVID MUTURI MIGWI..... OBJECTOR/APPLICANT

VERSUS

SALLY JEMELI KORIR..... 1ST PETITIONER/RESPONDENT

EDWIN KIPKORIR KORIR..... 2ND PETITITIONER/RESPONDENT

RULING

Introduction & Background

1. By a Notice of Motion dated the 18th of February 2020 and brought pursuant to **Order 21 rules 22 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 63 (e) of the Civil Procedure** Act accompanied by a supporting affidavit sworn on the 18th of February 2020, **DAVID MUTURI MIGWI** (the applicant/objector) seeks the following orders: -

a) Spent

b) Spent

c) That there be stay of execution of this Honorable Court's ruling pending the hearing and determination of the Appeal No. 3 of 2016

d) Costs awarded to the applicant herein in any event

2. The application is premised on grounds that the applicant has been in occupation of the land since the year 1986 when he legally purchased the land, yet the respondents either by themselves and/or their servants and nominees, have now threatened to forcefully evict the applicant and occupy the land. He has already filed an appeal from the judgment of this court dated 24/10/2020 which he describes as having high chances of success, and is apprehensive that he will suffer irreparable loss and damage unless the prayers sought are granted.

3. The background to the matter is that the respondents **(SALLY JEMELI KORIR and JUDITH C. KORIR)** petitioned for, and successfully obtained grant of letters of administration in relation to the estate of **YUSUF KIPKORIR CHEPKEITANY** on 13th May 2009. The applicant filed an objection on grounds that he had a legal interest in the estate over part of land parcel number known as **UASIN GISHU/ILLULA SETTLEMENT SCHEME/567/90** measuring about four acres. However, the said application was dismissed with costs on the 24th of October 2019 by this court. The applicant being aggrieved by the said judgement, preferred

an appeal against it vide **Appeal No. 3 of 2016.**

4. The thrust of the applicant's case and as expressed in his affidavit is that he has been in occupation of the subject land since 1986 when he purchased the same and it is only fair and just that he be allowed to continue occupying it until the appeal is heard and finalized. He urges this court to issue the prayers sought as a way of restraining any adverse activities that would affect his interest until the appeal is heard and determined.

5. In opposing the application, the petitioners/respondents through their replying affidavits state that the application is inept, incompetent, scandalous, frivolous, malicious and res judicata and the same ought to be dismissed with costs.

6. The petitioners/respondents further depose that the applicant is engaged in forum shopping, having had his case over the same land, and his interest heard and dismissed by the **Environment and Land Court in ELC No.232 of 2012** and subsequently by the Court of Appeal in **Civil Appeal No. 47 of 2015**. For these reasons, the petitioners/respondents contend that the application is res judicata as the issue of ownership of the suit land has been determined with finality.

7. This court directed that the application be canvassed through written submissions, and parties to file their submissions within specified timelines. The applicant filed his submissions on the 20th of January 2021 and the petitioners/respondents with leave of court, filed their submissions on the 8th of April 2021.

8. Drawing from the **case Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR**, it was submitted on behalf of the applicant that it is only fair for the court to grant the order of stay of execution pending hearing and disposal of the appeal so that his appeal is not rendered nugatory. It is pointed out that the applicant/objector has been in occupation of the suit land since 1986 and the respondents have never been in occupation or use of the same. He laments that he will suffer irreparable losses and damages if the respondents make good their threats to occupy and start using the land. It is his contention that he has a good chance that his case will succeed on appeal and therefore, the court should grant him the orders sought in order to preserve the property from interference.

9. The petitioners/respondents on their part maintain that the objector's proceedings were heard and finally determined by the ruling of this court delivered on the **24th of October 2019 and subsequently in 2 other cases namely ELC Case No. 232 of 2012 and Civil Appeal No. 47 of 2015**. That the issue of ownership of the land has been dealt with by the Environment and Land Court as well as the Court of Appeal, and in any case, despite challenging the ruling delivered on the 24th of October 2019, the objector/applicant has not filed the proper documents for appeal.

10. In this regard, the petitioners/respondents submitted that there were two issues for determination namely;

a) whether there is a valid notice of appeal and

b) whether the applicant is entitled to the orders sought.

11. On the first issue, relying on the case of **Rhoda Wairimu Karanja & Anor v Mary Wangui Karanja & Anor [2014] eKLR** the respondents submitted that the applicant never sought leave to appeal against the ruling delivered by the court but opted to file the notice of appeal without leave contrary to the standard procedure in succession matters and therefore there is no appeal in the instant case.

12. On the second issue, they pointed out that the objector relied on sections of the law that do not deal with succession matters, and in any case **Order 21 Rule 22** does not exist in the Civil Procedure Rules. Even so, the petitioners proceeded to submit that the main grounds upon which grant of stay orders are sought, have not been met. They argued that the current application was brought with inordinate delay having been filed on the 1st of February 2020 yet the ruling had been given on the 24th of October 2019, 117 days later or 3 months and 26 days later.

13. Further, that the applicant has not demonstrated how he will suffer substantial loss should the appeal succeed and relied on the case of ***James Wangalwa & Anor v Agnes Naliaka Cheseto [2012] eKLR*** and ***Daniel Chebutui Rotich & 2 others v Emirates Airlines, Civil Case No.368 of 2001***. They argued that there is no need for security considering that the two grounds stated above

have not been met, and this court is urged to dismiss the application and allow the respondents to enjoy the fruits of the judgement and conclude the succession proceedings.

Analysis and Determination

14. A perusal of the pleadings and submissions made by the parties reveals that there is only one issue for determination and that is whether the applicant has made a case for grant of stay. However, two other issues emerge – namely

a) An issue of res judicata raised by the respondents in their replying affidavit even though the court in its ruling dated the 24th of October 2019 had an opportunity to address this question and found that the issues were not res judicata since the Court of Appeal dismissed the case not on merit. In particular, the court in the said ruling observed:

"11. In the premises, it cannot be said that the Applicant's application dated the 18th of June 2018 is res judicata for purposes of Section 47 of the Law of Succession Act. I would accordingly agree with the position taken by Hon. Kuloba J in HCCC No. 2340 of 1991: Mwangi Njangu vs Meshack Mbogo Wambugu & Another that:

"Res Judicata applies where there is an existing final judgement rendered upon the merits without fraud and collusion."

I agree with the sentiments of Sewe (J). The Court of Appeal did not address the merits of the case and as such, the applicant is entitled to ventilate his grievance as an interested party in the estate of the deceased but within the ambit of the law.

b) I take cognizance of the fact the Objector/applicant in the notice of motion dated the 18th of February 2020 has relied on wrong and or non-existent provisions of the law. For example, Order 21 rule 22 does not exist under the Civil Procedure Rules. In this regard, I am aware that there are courts where such a mistake would be fatal to the application. However, I am guided by the Overriding objective principle and the need to afford parties an opportunity to be heard and have their issues determined rather than focusing on technicalities. After all, the Oxygen Principle exists to mitigate the harshness of the Civil Procedure Rules, and breath life to substantive issues which would otherwise be drowned by the rules of procedure.

15. I will now proceed to address the issue for determination. Considering that the application seeks to stay the execution of the ruling of this court, **Order 46 Rule 6 (2) of the Civil Procedure Rules** is instructive. The said provision requires that an applicant must demonstrate the following: -

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

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

16. Evidently, the three conditions set out in Order 42 Rule 6 cannot be severed and must be read to mean that the conditions are cumulative and simultaneous. This position finds support in Electro ***Watts Limited v Alios Finance Kenya Limited [2018] eKLR*** where the learned judge noted that use of the word "and" connotes that all three conditions must be met simultaneously.

17. It is also clear from the provisions of Order 42 rule 6 that the court must be satisfied that there is ***"sufficient cause"*** to grant a stay. As such and as rightly noted by court in ***Catherine Njeri Maranga v Serah Chege & another [2017] eKLR,*** the filing of an appeal does not, *ipso facto,* guarantee stay of execution of the court's orders.

18. The court must therefore be satisfied that two key conditions are met namely; whether the applicant will suffer substantial loss if the order is not made; and secondly, whether the applicant is willing to give such security for the due performance of the decree or order in issue, as may ultimately be binding on him or her.

19. In ***Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR,*** the Court of Appeal for East Africa stated in respect of stay of execution, that for an order of stay of execution to lie, there must be positive requirements therein which would or could be affected or tampered by the stay. In particular, the court observed: -

"But what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In* Wilson v Church *the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered"

20. Similarly, in ***Milcah Jeruto vs Fina Bank Ltd [2013] eKLR*** the court held that an order for stay cannot be granted where a negative order has been issued. Moreover, under ***Section 2 of the Civil Procedure Act***, the definition of a decree holder alludes to an order that is capable of being executed. Therefore, it is only upon a positive order that execution can be undertaken hence the court can issue stay orders.

21. Conversely, where there is a negative order and/or an order that cannot be executed, then no stay can be granted. ***In Executive Estates Limited vs. Kenya Posts & Anor. [2005] 1 E.A. 53*** the court adopted this position noting that ***"…… The order which dismissed the suit was a negative order which is not capable of execution."***

22. In ***Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] e KLR the Court of Appeal*** held that:

'An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

'….. an order for stay of execution must be intended to serve a purpose ...' "

23. It is therefore clear from the afore-going decided cases, that any order which is the subject of an appeal to the Court of Appeal be it in judicial review proceedings or civil proceedings, must be capable of execution for them to be amenable to stay of execution.

24. My perusal of the application and the record, reveals that the ruling that the applicant seeks to appeal is a negative order, that is, an order incapable of execution. There is nothing which the Court ordered to be done or to refrain from being done. All the court did was to dismiss the applicant's application dated the 18th of June 2018. Moreover, even if the applicant was to fail to deposit security, there is no order that would be executed for this court to grant stay.

The appropriate application that would have sufficed would be stay of proceedings but which the applicant has not sought.

25. The upshot is that the applicant has not met the threshold to warrant granting stay orders. Consequently, the notice of motion dated the 18th of February 2018 lacks merit and is dismissed with costs to the respondents.

VIRTUALLY DELIVERED AND DATED THIS 3RD DAY OF JUNE 2021 AT ELDORET

H.A. OMONDI

JUDGE

Mrs Owino for applicant

Mr. Tarigo for respondent

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