



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION NO. 691 OF 2018**

**IN THE MATTER OF THE ESTATE OF JOHN GICHIA MACHARIA**

**RULING**

1. The proceedings herein relate to the estate of John Gichia Macharia, who died intestate on 26.4.18. The record shows that on 31.5.18, a limited grant of letters of administration *ad litem* was issued to the deceased's siblings David Karanja Machria (David) and Stella Nyanjiru Macharia (Stella). This grant lapsed on 11.3.19, when a full grant of letters of administration was issued to Samuel Kamau Macharia (SK Macharia), the deceased's father. Thereafter another grant of letters of administration was issued to SK Macharia and the deceased's mother Serah Njeri Macharia (Serah), on 5.4.19 and rectified on 23.5.19. By a ruling of 28.7.21, the earlier grant was revoked pursuant to an application dated 10.12.2020 by SK Macharia himself while the latter grant was revoked pursuant to 2 applications dated 11.6.19. One application was filed by David Karanja Machria and Stella Nyanjiru Macharia, the deceased's siblings and the other by Lisa Anyango Ameyia (Lisa). Lisa is the mother of Adam Kamau Macharia (Adam), the only child of the deceased.

2. It is the said ruling that has provoked the present application dated 4.8.21 and amended on 12.10.21. SK Macharia seeks the following orders:

**1. Spent**

**2. THAT** this Honourable Court be pleased to stay/suspend the Orders made on 28<sup>th</sup> July 2021 on the applications for revocation of grant dated 11<sup>th</sup> June 2019.

**3. THAT** the status quo prevailing/subsisting prior to the ruling of 28<sup>th</sup> July 2021, do continue and in particular the grant of representation issued on 5<sup>th</sup> April 2019 herein remain in force.

**4. THAT** as an alternative to (3) above, that Dr. Samuel Kamau Macharia be issued with a limited grant pending further directions on 22<sup>nd</sup> September, 2021 when this cause comes up for mention on account of the fact that there is no administrator to the estate which estate stands prejudiced.

**5. THAT** the costs of the application be provided for.

**6. THAT** this Honourable Court be pleased to hear this application together with Dr. Samuel Kamau Macharia's notice of motion dated 4<sup>th</sup> August, 2021 filed in Commercial Division Civil Suit No. 256 of 2020; Directline Assurance Company Limited vs AKM Investments Limited.

3. The Application is premised on grounds that following the revocation of the 2 grants on 28.7.21, the estate of the deceased has no Administrator to protect its interests generally and specifically in the said HCCC E256 of 2020 in which the Plaintiff therein seeks colossal sums of money against the Defendants; Misc. Application No. E250 of 2021, Directline Assurance Company Limited (Directline) v & 4 Others v Philip Alikier & Others and Arbitration between Sureinvest Company Limited & Others v Royal Media Services & Others. In HCCC E256 of 2020, SK Macharia has been sued as the Administrator of the deceased's estate and has defended the suit on behalf of the 1<sup>st</sup> Defendant as administrator of the estate of the deceased which owns all issued 600,000 shares in AKM Investments Limited (AKM). According to SK Macharia, the estate is entitled to protection of the law and to a fair hearing which can only be done through the agency of a natural person and that is himself, given that Serah abdicated her role as administrator.

4. SK Macharia further stated that he has an arguable appeal which raises grounds *inter alia* as to the legality of Serah's withdrawal from the petition dated 11.8.18 without making a formal application, the jurisdiction of the Court to entertain the 2 Applications for revocation of the latter grant. An arguable appeal is all that an applicant is required to demonstrate in an application for stay of execution. He further averred that he and the 1<sup>st</sup> and 2<sup>nd</sup> defendants in HCCC E256 of 2020 will suffer substantial loss if the stay sought is not granted and that the right of appeal will be rendered nugatory as the defendants will be unable to defend the suit.

5. In his replying affidavit sworn on 13.1.22, Adam averred that at the time SK Macharia was appointed administrator of the estate of the deceased, he had no legal capacity to act as such, having been adjudged bankrupt and receiving orders having been issued on 22.2.11; that SK Macharia concealed this material fact from the Court at the time of applying for the grant; that at the time the receiving order was gazetted on 16.9.2020, SK Macharia was still an administrator and continued to act as such and to file documents in this Court, yet he had no capacity to do so; that SK Macharia has previously acted against the estate of the deceased by filing suits against the estate and its interests; that SK Macharia is a man of means and was at no time maintained by the deceased and is hence not a dependent of the deceased.

6. Adam further stated that the deceased was the sole shareholder of AKM, which owns several properties and shares in various companies; that the deceased was, through several companies, the majority shareholder of Directline; that SK Macharia maliciously used the grant issued to him to take over the control of all the affairs of Directline; that SK Macharia has undertaken changes and actions which have diminished the value of the deceased's shareholding in Directline, thereby prejudicing the estate; that SK Macharia has acted against the estate by filing various suits against the estate and at the same time has as administrator, instructed advocates to defend the same suits; that in Misc. Application No. E 250 of 2021, Directline Assurance Co. Limited & 4 Others -vs- Philip Alier & 8 Others, the applicants therein who include SK Macharia, are seeking orders which are against interests of this Estate; that in H.C.C.C. No. E278 of 2019, Directline Assurance Co. Limited & 4 Others -vs- Suninvest Limited & 15 Others in which adverse orders against the estate are sought, SK Macharia as chairman of the plaintiff is also a witness on behalf of the plaintiff; that the same situation applies in H.C.C.C. NO. E 256 of 2020, Directline Assurance co. Limited -vs- AKM Investments Limited & 6 Others; that the suit was filed by Orege J. & Associates Advocates, counsel for SK Macharia, and seeks orders which are very adverse to this Estate; that in Misc. Criminal Application No. E 2754 of 2021, Directline Assurance Co. Limited & 3 Others -vs- Hillary Mutyambai, Inspector General of Police & Others, SK Macharia is one of the Applicants seeking orders adverse to this Estate.

7. It is Adam's view that stay of the orders of 28.7.21 will be prejudicial to the estate and to him as the sole beneficiary of the estate; that SK Macharia has failed to render accounts of his dealings with the estate as administrator and also failed to disclose the dividends payable to the estate from Directline or any of the other entities the deceased had an interest. Adam prayed that the Court *suo moto* appoints him and his mother or any other member of the family excluding SK Macharia, as Administrator. He also urged the Court to dismiss the Application.

8. On her part, Serah, opposed the Application by means of her replying affidavit sworn on 16.9.21 and grounds of opposition dated 18.2.22. According to Serah, the Application is unmeritorious and does not lie. It is frivolous, vexatious and an abuse of the Court process. She stated that SK Macharia has not satisfied the threshold for the grant of stay orders. Further, he is a parent to the deceased and not a beneficiary of the estate and hence, no substantial loss would be occasioned to him. Additionally, reverting to the *status quo* prevailing before the orders of 28.7.21 would compound confusion that has attended the deceased's succession proceedings. Serah denied having abdicated her duties as administrator and only withdrew her application for appointment to avoid causing strife in the family. She urged the Court to dismiss SK Macharia's Application.

9. In his further affidavit sworn on 16.2.21, SK Macharia reiterated the averments in his affidavit in support of his Application. He contended that Adam, having been a minor and, therefore, not a party to the proceedings that led to revocation of his grant lacks locus to oppose his Application. He denied the allegations made against him by Adam in his replying affidavit and termed them as largely false, and scandalous and have no bearing on the issues before Court. He accused Adam of being used by his mother Lisa, to insult him and also by former directors of Directline, whose prosecution he has sought, to insult him. SK Macharia further stated that out of the 4 pending suits, it is only in HCCC 256 of 2020 that the estate of the deceased has been sued and he defended the estate as he has always protected the interests of the estate. Additionally, SK Macharia contended that a shareholder of a company is not an owner of its assets. Consequently, the estate is only made up of the shares the deceased held in AKM and not those held by Directline. He further contended that this Court has no jurisdiction over the issue of his alleged bankruptcy as the matter is pending before the Court of Appeal and the Supreme Court. Further that Form CR12 in respect of Directline as exhibited by Adam is fraudulent in that the deceased and others conspired and illegally admitted 3 companies as members to hold shares in trust for AKM.

10. Parties filed their respective submissions which I have duly considered. In their submissions, parties relied on Order 42 Rule 6 of the Civil Procedure Rules which makes provision for stay of execution pending appeal. Order 42 is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by virtue of Rule 63 of the Probate and Administration Rules which provides:

**1. Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (*Cap. 21, Sub. Leg.*), together with the High Court (*Practice and Procedure*) Rules (*Cap. 8, Sub. Leg.*), shall apply so far as relevant to proceedings under these Rules.**

11. The submissions by parties which are anchored on Order 42 including the authorities cited, are in the premises not relevant in the matter herein.

12. It is noted that the Law of Succession Act does not contain specific provisions regarding stay of execution. However, the jurisdiction of this Court to hear and determine the Application herein, is derived from the inherent power of the Court to entertain any application under the Act and give such orders it deems appropriate for the ends of justice.

13. Under Section 47 of the Act, the Court has wide powers as follows:

**The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.**

14. Additionally, Rule 73 of the Probate and Administration Rules goes on to provide:

**“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.**

15. In the case of James Karanja Chege & 3 Others v Eunice Wanjiku Chege [2011] eKLR, Ouko, J. (as he then was) stated:

**In any civil proceedings, the court has inherent power *ex debito justitiae* to order a stay of execution pending appeal. It is a power that can be invoked under section 3A and more recently Sections 1A and 1B of the Civil Procedure Act. In succession matters, despite Rule 63 aforesaid, it is available under Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. When a court is called upon to exercise a discretion in any dispute, it must do so judicially to ensure the ends of justice are met and justice is done to both parties.**

16. When an application in respect of which no provision has been made under the Act, the Court will invoke its inherent jurisdiction to deal with the same. The general rule regarding an order for stay is that first and foremost, it is discretionary. Where the Court is called upon to exercise of its discretion in any application, it must do so judicially, the overriding objective being to ensure the ends of justice are met.

17. Rule 49 of the Rules, makes provision for the procedure for filing applications that are otherwise not provided for, such as stay of execution, as follows:

**A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.**

18. I have carefully considered the record and the averments by the parties. One of the things that quickly stands out is that both SK Macharia and the deceased have interests in companies that are in litigation against each other. For instance, in HCCC 256 of 2020, Directline whose Chairman is SK Macharia, is the Plaintiff while the Defendants include AKM, SK Macharia and Serah as administrators of the estate of the deceased, among others. Similarly, in HCCC 278 of 2019, the Plaintiffs include Directline, SK Macharia himself and others while the Defendants include AKM among others. This would present an awkward situation where SK Macharia as administrator of the estate of the deceased would be defending suits filed by a company of which he is chairman. In view of these positions, SK Macharia would clearly have 2 relationships competing with each other for his loyalty. When push comes to shove, as it most likely shall, will SK Macharia choose his company over the estate, or the estate over his company? In light of this, the conflict of interest is undeniable.

19. In Mwikali Ngui v Mary Kalolia Mutisya [2016] eKLR, the Court was called upon to consider and determine whether a person who had sued the deceased could be appointed administrator of his estate. Nyamweya, J. stated:

**I have perused the pleadings filed in Machakos High Court HCCC No. 41 of 2003 and Kangundo PMCCC No. 208 of 2006 that were annexed by the Petitioner to her response to the objection and were marked as annexure ‘MN F’, and note that indeed the Objector had sued the deceased in the two suits seeking certain properties from the deceased.**

**Therefore, not only will the Objector be in conflict of interest as she will then be acting for both the Plaintiff and Defendant in the two suits, but will also not be able to fairly and impartially discharge the duty of getting in all free property of the deceased imposed by section 83 of the Law of Succession Act. She cannot therefore qualify to be administrator of the deceased’s estate as long as the suits she has filed against the deceased are still subsisting.**

20. I agree with the learned Judge and find that SK Macharia whose company is in litigation with the estate of the deceased and in a company in which the deceased was the sole shareholder, cannot qualify to be administrator of the estate of the deceased. Staying the orders of 28.7.21 would mean that SK Macharia would continue as administrator of the deceased notwithstanding the conflict of interest.

21. I now turn to the revoked grants. It is not clear why one grant was issued to SK Macharia on 11.3.19 and another on 5.4.19 and amended 23.5.19 to both SK Macharia and Serah. Section 67 of the Act provides:

**1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.**

17. In the present case, the record shows that the notice of the application for the grant was published in the Kenya Gazette on 8.3.19 inviting objections thereto, within 30 days. In the premises, the earliest date, a grant ought to have been issued herein was 7.4.19. Notably, the 2 grants were issued on 11.3.19 and 5.4.19 respectively. The 2 grants were issued prematurely, thereby denying any interested party the time and opportunity to participate in the proceedings, as contemplated under Section 67 of the Act.

18. In the case of Sally Njambi Mahihu & another v Mwanguzi Kai Deche & another [2017] eKLR, the Court of Appeal considered the question of the validity of a grant issued before the expiry of 30 days and had this to say:

**The gazette notice specified that the grant would be issued within 30 days if no objection was raised. The grant was gazetted on 18<sup>th</sup> March, 2015 and issued on 24<sup>th</sup> March, 2015, one week later.**

**The only mischief intended by the requirement that the notice of the application for a grant be for a period of not less than 30 days from the date of publication, is to avail any objector the time and opportunity to participate in the probate proceedings.**

**With respect, it was therefore in grave error for the learned Judge, even after noting that there was an anomaly in the manner the grant was issued and that it ought to have been issued on 19<sup>th</sup> April, 2015, nevertheless hold that the grant was properly issued.**

**We find merit in this appeal due to the grave misdirections by the learned Judge, the result of which is that we allow the appeal with costs and set aside the orders of the learned Judge. The grant issued on 24th March, 2015 to the respondents is accordingly revoked.**

19. The issuance of the 2 grants before the expiry of the 30 days stipulated in the said Kenya Gazette notice rendered the grants illegal. This is however now water under the bridge because both grants were revoked on 28.7.21. Staying the orders revoking the grants as sought by SK Macharia, would give new life to the grants thereby sanctioning an illegality.

20. Prayer 6 of the Application is spent given that this Application has now been heard and determined. In any event, quite apart from convoluting the matter, I doubt that it is possible or even prudent to hear 2 applications filed in different divisions of this Court with different parties, notwithstanding that the subject matter may be related.

21. In the end, and in view of the foregoing, I make the following orders:

- i. The Summons dated 4.8.21 and amended on 12.10.21 lacks merit and the same is hereby dismissed.
- ii. This being a family matter, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25<sup>TH</sup> MARCH, 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Applicant**

.....**for the Respondent**

.....**for the Respondent**

.....**Court Assistant**