



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. P & A NO. E001 OF 2020

IN THE MATTER OF THE ESTATE OF THE LATE JACKSON GUTO NYABOGA.....(DECEASED)

NICK ABOKO OMARI.....PETITIONER

-VRS-

1. NYANG'AU GUTO NYABOGA.....1ST OBJECTOR/APPLICANT

2. ALICE MOKEIRA GUTO.....2ND OBJECTOR/ APPLICANT

3. MARY NYASUGUTA GUTO.....3RD OBJECTOR /APPLICANT

4. THOMAS MOMANYI GUTO.....4TH OBJECTOR/ APPLICANT

5. GEORGE MACRIDIS GUTO.....5TH OBJECTOR/ APPLICANT

RULING

On 23rd November 2020 this court issued a grant ad colligenda bona to Moses Nyaboga Guto and Nick Aboko Omari limited for a period of thirty days for the purpose of preserving the assets comprising the estate of Jackson Guto Nyaboga, the deceased. The said Moses Nyaboga Guto and Nick Aboko Omari are the son and grandson of the deceased respectively. Thereafter on 24th November 2020 the applicants herein filed a summons under certificate of urgency seeking orders as follows:-

“1. THAT this Application be certified as urgent and service thereof be dispensed with in the first instance.

2. THAT pending the hearing and determination of this application, this honourable court be pleased to stay the ex parte orders on 23rd November, 2020.

3. THAT this court be pleased to set aside, vacate, annul and or revoke the ex parte orders/grant of 23rd November, 2020 and list the application dated 13th October, 2020 for hearing on merit.

4. THAT costs of this Application be provided for.”

The summons is premised on the following grounds: -

“(a) THAT the respondent in this matter filed the application dated 13th October, 2020 and the objectors/applicants filed a replying affidavit together with a notice of objection.

(b) THAT the matter did not proceed in two occasions and hence was given a date for 23rd November, 2020 for hearing.

(c) THAT counsel for the applicant attended court accordingly but the matter proceeded the moment he moved to another court.

(d) THAT the respondents therefore took advantage of the counsel's absence and proceeded with their application

notwithstanding the pendency of the objection filed.

(e) THAT the orders granted by this court have far reaching consequences to the beneficiaries of the estate of JACKSON GUTO NYABOGA unless they are vacated and or set aside.

(f) THAT the respondent used forged documents to mislead this court and even listed strangers to the estate which was the contention in the objection.

(g) THAT the objection filed by the applicants therefore remains unprosecuted and no determination or adverse orders were made regarding the said objection.

(h) THAT it will be in the interest of justice that he be accorded an opportunity of being heard.

(i) THAT the applicant stands to be prejudiced and suffer loss and damage if the orders granted on 23rd November, 2020 were not stayed and or set aside.

(j) THAT unless the orders sought are granted the applicants stand to suffer loss and damage.”

The summons is supported by the affidavit of George Macridis Guto sworn on 24th November 2020 in which he reiterates the grounds in support of the application.

The application proceeded before me on 11th December 2020. Mr. Nyambati Advocate represented the applicants while Mr. Ongányá and Mr. Chadianya represented the respondents as well as other beneficiaries.

I have carefully considered the application, the grounds thereof, the supporting affidavit, the replying affidavit and the rival submissions.

The grant sought by the applicants was one for the collection and preservation of the assets of the deceased. The power to issue such a grant is vested in this court by **Section 67 (1) of the Law of Succession Act** which also provides that such a grant may be issued prior to publishing a notice of the application inviting objections within the prescribed time. The submission that the grant is defective for being made prior to invitation of objections therefore lacks merit. The allegation that the deceased widow is still alive is also not a good ground to revoke the grant because **Clause 16 of the Fifth Schedule** permits this court to appoint a person not normally entitled to a grant upon considering the circumstances of the case. The formal grant issued to the respondent expressly made it clear that it could not be used for distribution of the estate. Moreover, this court limited the time for the grant to only thirty days expecting that whichever beneficiary stands in priority to the others would petition for a full grant. In my view what would best serve the interest of justice in this matter would be Counsel bringing the beneficiaries of this estate to a round table so that they can agree on who among them shall petition for a grant instead of bringing applications that only serve to divide them. In any event the grant has lapsed by effluxion of time. The Chief’s letter referred to by Counsel for the applicants will become material at the time of petitioning for a full grant as the main consideration for issuing the limited grant was preservation of the estate but not the order of priority. This court expected that by now the beneficiaries would have arrived at a consensus on which of them would petition for the grant. If they have not done so then Counsel should facilitate them to do so. The application for revocation of the limited grant is dismissed firstly for want of merit and secondly because the grant has lapsed. In regard to costs, given the nature of these proceedings the order that commends itself to me is that each party shall bear their own costs. It is so ordered.

Signed, dated and delivered electronically this 18th day of January 2021.

E. N. MAINA

JUDGE