



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 285 OF 2017

**IN THE MATTER OF THE ESTATE OF GURNAM SINGH S/O PRITAM SINGH ALIAS GURNAM SINGH GHATAHORA
(DECEASED)**

AMRIT KAUR GHATAHORAPETITIONER/APPLICANT

V E R S U S

JOGINDER SINGH BHANGRA.....1ST RESPONDENT/OBJECTOR

AMRIK SINGH HEER2ND RESPONDENT/OBJECTOR

KIRPAL SINGH 3RD RESPONDENT/OBJECTOR

RULING

Factual Background

1. The Deceased herein died on 28th January 2017. Upon his death, his son Pardeep Singh Ghatahora sought a Limited Grant Ad Litem seeking to represent the estate in a case where one of the deceased's property had been transferred to Exotic Crafts Limited. On 16th March 2017, the Court granted a Limited Grant Ad Litem. Subsequently, the said Applicant (Pardeep) sought extension of the orders of 16th March 2017 and further orders to include collection and preservation of the estate.
2. On 11th May 2017, Amrit Kaur wife/widow to the deceased filed a Petition for Grant of Probate. In the said application, she (Amrit Kaur) disclosed that the deceased had executed a Will dated 14th February 1986 wherein she was appointed together with Harcharan Singh Matharu as the Executrix and Executor respectively. She however expressed shock that she had discovered that there was another Will alleged to have been executed on 25th August 2016. According to her, the Will of 25th August 2016 was invalid on grounds that it was not executed out of the deceased's free will as he was critically ill when it was purported to have been executed.
3. On 20th February 2018, Joginder Singh Bhangra, Amrik Singh Heer and Kirpal Singh filed Answer to Petition to Amrit Kaur's Petition for Grant of Probate. They also stated that pursuant to the deceased's last Will dated 25th August 2016, they were entitled to the Grant of Probate of Written Will. Subsequently, on 18th August 2017, they again filed an application objecting to the making of the Grant to the Petition filed by Amrit Kaur.
4. On 8th June 2018, Pardeep Singh Ghatahora filed a Notice of Motion seeking the law firm of M/s Archer and Wilcock Advocates to furnish all records in respect of sale of L.R. 209/7023 and registration of documents of transfer effected on 30th January 2017 to Exotic Crafts Limited and charge to KCB Kenya Ltd; that the said firm to provide records of sale of L.R. 209/7023 plus accrued interest and all court orders and records in respect of land or of possession of property L.R. 209/7023 as well as an account for all machinery and assets during the hand over possession of suit property.
5. The Court consolidated the hearing of all applications and delivered its Judgment on 21st September 2018 declaring the two Wills as invalid and that the probate proceedings to proceed under intestacy laws. The Court also declined to grant a Grant of Probate; Also, the prayer sought against the law firm of Archer and Wilcock to furnish details and records of sale and transfer documents, court orders and proceeds of sale and transfer of L.R. 209/7023 was rejected on grounds that the firm of Archer was not party to the suit.
6. After delivery of the Judgment, a temporary stay of execution was sought but the Court rejected it advising for a formal application to be filed. Subsequently, Amrit Singh Ghatahora and Pardeep Singh Ghatahora petitioned for a Grant of Letters of Administration Intestate on

12th October 2018. In Form P and A 5, they listed the following as survivors to the deceased;

- (i) Amrit Kaur Ghatahora (wife)**
- (ii) Jaswinder Singh (son)**
- (iii) Gurnam Singh Ghatahora (daughter)**
- (iv) Narinder Singh Ghatahora**
- (v) Parminder Singh Ghatahora (son)**
- (vi) Pardeep Singh Ghatahora (son)**

7. Consequently, the Court issued a Grant of Letters of Administration to the Petitioners on 19th February 2019 via an application dated 27th March 2019 and filed on 28th March 2019. The petitioners sought Confirmation of the Grant the expiry of six months notwithstanding. The application to have the grant confirmed before the expiry of six months was rejected and the Petitioners advised to wait until the expiry of six months.

8. Meanwhile, the Administrators filed an application dated 8th April 2019 seeking orders;

(i) That M/s Archer and Wilcock Advocates be ordered to furnish all records in respect of the purported sale of property Land Reference Number 209/7023 and registration by way of entry dated 30th January 2017 of transfer to Exotic Crafts Limited and charged to KCB Bank Kenya Ltd including all records of accounts for the deceased share of proceeds of sale of property Land Reference Number 209/7023 including all accrued interest to this Honourable Court if any.

(ii) That M/s Archer and Wilcock Advocates be ordered to surrender all original title documents in their possession in respect of the late Gurnam Singh S/o Pritam Singh also known as Gurnam Singh Ghatahora.

(iii) That this Honourable Court to issue any and all appropriate orders it deems fit in the interest of preserving the estate of the deceased herein.

(iv) That the costs of this application be provided for.

9. The application is premised upon grounds set out on the face of it and an affidavit sworn on 8th April 2019 by Pardeep Singh Ghatahora. It is pegged on the grounds that the deceased herein was the registered owner of ½ share of Land Reference No. 209/7023 as at the date of his death. That the deceased was also the administrator of the remainder ½ share of the late Jaswant Singh wherein he had beneficial interest thereof.

10. That in the interest of safeguarding the interest of the said property, he (Pradeep) sought a Limited Grant for purposes of filing a suit which he filed as **ELC No. 256/2017** on behalf of the estate of the deceased herein against Exotic Crafts Limited who purportedly bought the land from the deceased and KCB who allegedly registered a charge interest over the property.

11. That in their defence, Exotic and KCB provided evidence that the deceased had sold the property to Exotic and that as per the terms of the sale agreement, the sale proceeds were paid through the law firm of M/s Archer and Wilcock Advocates who were acting for the deceased.

12. He averred that despite knowledge by the law firm of Archer and Wilcock that the deceased had died, they proceeded to execute transfer of the property to Exotic thus occasioning loss to the Estate. When the application came up for certification, the Court directed for its service upon the Respondents.

13. In response, the Respondent filed Grounds of Opposition dated 20th May 2019 and filed on 30th May 2019 stating that;

(i) This Court lacks the requisite jurisdiction to grant the reliefs sought in the said application or at all.

(ii) M/s Archer and Wilcock Advocates are not a party to the proceedings herein and as such no orders can be granted against them.

(iii) The said application constitutes an abuse of the Court process of this Honourable Court as the orders sought relate to prior transactions which orders can only be sought in a separate suit.

14. Before the application of 8th April 2019 could be heard, Joginder Singh Bhangra, Amrik Singh Heer and Kirpal Singh moved the Court on 17th May 2019 vide a Notice of Motion of even date seeking orders as hereunder;

(a) That further proceedings herein be stayed pending the hearing and determination of the Applicant's intended appeal against the decision and order of this Honourable Court (Muigai, J) made on 21st September 2018

(b) That there be a stay of all further administration of the deceased's estate.

(c) That the costs of this application be provided for.

15. The application is based on the grounds stated on the face of it and an affidavit sworn on 17th May 2019 by the three Applicants jointly. It is anchored on the allegation that they intend to appeal against the Judgment of 21st September 2018. They have filed a Notice of Appeal and that the delay in filing the substantive appeal has been occasioned by the Court not releasing typed proceedings in time.

16. They averred that the administrators have embarked on writing letters to Archer and Wilcock Advocates and banks demanding several documents hence the need to stay execution.

17. In reply, the administrators through Pardeep Singh Ghatahora filed a replying affidavit on 7th June 2019 stating that despite the filing of the Petition, gazettelement of the estate and issuance of Letters of Administration, the Applicants did not lodge any objection. He further stated that as the administrators, they are duty bound to collect and preserve the estate including filing of a suit which requires submission of certain documents in the possession of Archer and Wilcock Advocates, KCB Bank and Bank of Barodha to ascertain the genuineness of the sale of L.R. 209/7023.

18. They contended that the Applicants are colluding with Archer and Wilcock Advocates to hide the truth regarding the sale of L.R. 209/7023 and the status of the sale proceeds. They stated that the intended appeal has no high chances of success.

19. When the two applications came up for hearing on 10th June 2019, Parties agreed to have the two consolidated and disposed together through written submissions. For one reason or the other, the filing and highlighting of submissions took long than anticipated.

Submissions

20. The firm of Archer and Wilcock appearing for the Applicants in the application dated 17th May 2019 and Respondents in the application dated 8th April 2019 filed their submissions on 12th July 2019.

21. Counsel basically submitted that the prayer for stay of proceedings is necessary as the appeal already lodged will be rendered useless if the proceedings continue. Counsel submitted that grant of stay orders is a matter of discretion by the Court exercised in the interest of justice taking into account expeditious disposal of the matter; prima facie merits of the intended appeal; whether it is arguable and; scarcity and utilization of judicial time. In support of this position, counsel relied on the decision in the case of **Global Tours and Travel Limited, Nairobi High Court Winding Up Cause No. 43 of 2000.**

22. Regarding the issue of preserving precious judicial time, Counsel opined that it will be a waste of judicial time if the Court of Appeal overturns the Judgment of J. Muigai thus recognizing one of the Wills indicated in the said Judgment.

23. Concerning prudent exercise of discretionary powers, the Court was urged to consider the fact that should the grant be confirmed and the property distributed sold to 3rd parties, it will be difficult and expensive to restore them should the appeal succeed. In support of this proposition, the Court was referred to the holding in the case of **Re The Estate of Zakayo Kipkoech Kirui (Deceased) (2018) eKLR** in which the Court held that, if stay was not granted pending appeal, the order distributing the estate would have been executed thus causing substantial loss to the applicant. Further reference in support of the same position was made in respect of the case of **Hannah Ngina and 2 Others vs. Francis Kamau Thairu (2016)eKLR.**

24. Concerning time factor within which the application was filed, Counsel contended that it was timely as Judgment was delivered on 21st September 2018 and Notice of Appeal lodged on 28th September 2018 and the application herein filed on 17th May 2019 owing to the delay in securing proceedings.

25. Turning to the application dated 8th April 2019, they submitted that a Court cannot issue orders against a non-party and that these proceedings cannot be used to impeach transactions independently caused by 3rd parties long before the deceased died. To support the position that no order can issue against a non-party to the proceedings, Counsel relied on the wisdom in the case of **Republic vs Kenyatta University Exparte Ochieng Orwa Dominick and 7 Others (2018)eKLR.**

26. On their part, the firm of Shabana Osman and Associates appearing for the Petitioners/Administrators filed their submissions on 5th July 2019. M/s Shabana submitted that the Applicants in respect of the application dated 17th May 2019 have wrongly relied on wrong provisions of the law by citing Order 42 Rule 6 in filing their application for stay in that Rule 63 does not apply to Order 42 as one of the Civil Procedure provisions applicable in Succession proceedings. To support this argument, Counsel relied on the finding in the case of **In Re Estate of Sarastino M'Chabari M'ukabi (Deceased) (2019)eKLR** which reiterated the finding in the case of **Josephine Wambui Wanyoike Vs Margaret Wanjiru Kamau and Another (2013)eKLR** where the Court stated that the Law of Succession is a self-sufficient Act of Parliament with its own substantive law and rules of procedure and where Rule 63 does not provide for the Civil Procedure Rules applicable, Rule 59 of Probate and Administration should apply.

27. Counsel submitted that a successful party should enjoy the fruits of his or her Judgment. To buttress this position, reference was made to the holding in the case of **Machira T/A Machira and Co. Advocates Vs. East African Standard (No. 2) H.CCC No. 612/1996.** According to her, the intended appeal has no merit hence proceedings should continue.

28. Commenting on the time lines, Counsel submitted that the application dated 17th May 2019 was filed 8 months down the line which is

unreasonable. Counsel asserted that the application for stay of proceedings is intended to circumvent the prayer for submission of details, records and Court orders lying with KCB bank and the law firm of Archer and Wilcock.

29. Concerning the issue of substantial loss, M/s Shabana submitted that there was no loss to be suffered if the estate is to be managed as per the law. That no security has been deposited to safeguard the administrators from any loss. Counsel contended that the prayer for stay has been overtaken by events as there is already an administrator in place.

Determination

30. I have considered the applications herein dated 8th April 2019 and 17th March 2019. Further, I have considered the affidavits in support and their respective responses together with oral submissions. For the sake of clarity, I will deal with each application separately.

Application dated 8th April 2019

31. In this application, the Petitioners/Applicants are seeking submission of some details and documents regarding the sale and transfer of the deceased's property L.R. 209/7023 to Exotic Craft Ltd through the law firm of Archer & Wilcock. According to the Applicants, the sale transaction and subsequent transfer to Exotic Crafts Ltd after the deceased had died was fraudulently done through forged documents and sale agreement a fact established through forensic analysis. They further argued that they have filed ELC Case No. 256 of 2017 in which they are challenging the sale transactions and subsequent charge of the property to KCB.

32. On the other hand, the firm of Archer & Wilcock opposed the application through grounds of opposition claiming that they are not parties to this suit hence no orders can be made against them.

33. I note from the prayers sought, similar application was made vide application dated 8th June 2018 seeking similar orders. In its Ruling, the Court declined to grant the orders. From a perusal of the application and the prayers sought, the administrators are alleging or imputing fraud on the part of the law firm of Archer and Wilcock in execution of an illegal sale and transfer transaction of the land in question. They (the Applicants/Administrators) have also alleged acts of forgery in the sale agreement. In other words, the sale of the land in question was illegally done in collusion with the buyers and the law firm. This is purely an independent Civil suit to be instituted in the appropriate Court with jurisdiction to nullify the sale transaction(contract)and not the Probate Court.

34. It is in the course of those proceedings that the administrators will be enjoined to seek for discovery or production of particulars from the firm of Archer & Wilcock. To use a Probate Court to obtain the land documents and information being sought from the firm of Archer and Wilcock will amount to opening mini or multiple suits within the probate suit.

35. I do agree with the Respondents in this application that a Probate Court is not the right forum to deal with land related issues especially where it touches on illegal contracts on sale of property. The prayers sought can be dealt with in a Civil court or even Criminal Court in case of forgery allegations. Since the firm of Archer & Wilcock are not parties in this case, no orders can issue against them unless first enjoined as Respondents if found to be applicable.

36. In arriving at the above finding, I am guided by the holding in Republic Vs. Kenyatta University Exparte Ochieng Orwa Domnick and 7 Others (supra) where the Court stated that;

“A Court of law cannot issue orders which will affect persons who are not parties to the case. Such a scenario amounts to granting orders affecting other persons without giving them the benefit of hearing. It is an established principle that a person becomes a necessary party if he is entitled in law to defend the orders sought.”

37. In view of the above finding, I do not find any merit in the application dated 8th April 2019 as it seeks to introduce a suit within a suit. The administrators can seek redress before the right forum for enforcement of their claim and acquisition of the documents in question. Accordingly, the application is dismissed.

Application dated 17th May 2019

38. Under this application, the Applicants are seeking stay of proceedings pending the outcome of the intended appeal. The Judgment herein was delivered on 21st September 2018. A Notice of Appeal was lodged on 1st October 2018 almost immediately.

39. Having considered the application and the response thereto, issues that emerge for determination are;

(i) Whether the Applicant is likely to suffer prejudice or substantial loss if the proceedings are not stayed.

(ii) Whether the appeal will be rendered useless if the application is not allowed.

(iii) Whether the application was filed in good time.

40. Considering that issues No. 1 and 2 are somehow intertwined, I will conveniently deal with them together.

41. The application herein has been filed under the inherent jurisdiction of the Honourable Court. Under the Law of Succession, there is no specific provision governing stay of proceedings. In the circumstances, the only applicable provision is Rule 49 of the Probate and

Administration Rules which provides that any person desiring to make an application relating to the estate of a deceased person to which no provision is made in the rules shall file Summons supported if necessary by an affidavit. Rule 73 of the Probate and Administration Rules goes further to clothe the Court with inherent powers to make such orders as it may be necessary for ends of justice to be met.

42. Although the application herein has been filed as a Notice of Motion instead of a Chamber Summons, it is not prejudicial in the interest of substantive justice. The same is curable under Article 159(2)(d) of the Constitution.

43. Therefore, the argument by M/s Shabana that this application has been brought or argued under Order 42 Rule 6 of the Civil Procedure Act which is not provided under Rule 63 of the Probate and Administration Rules is not sustainable. In any event, rules of procedure under the Law of Succession are subject to attainment of substantive justice. Besides, the application herein is not seeking stay of execution of the orders of 31st September 2020 but rather stay of proceedings. Although the principles for stay of proceedings and those for stay of execution are similar, the objective for each and the end result is different. See **Kenya Wildlife Service Vs. James Mutembei (2019)eKLR** where the Court stated that:-

“Stay of proceedings should not be confused with stay of execution pending appeal.”

44. I will now turn to the issue as to whether the Applicants will suffer substantial loss should the proceedings not be stayed. It is not in dispute that after delivery of the impugned Judgment, the Petitioners proceeded to petition for a grant of Letters of Administration which was eventually issued on 19th February 2019.

45. The legal implication in issuing a Grant of Letters of Administration is that the administrators acquired powers to collect and preserve the estate and take full responsibility and accountability of the estate and its operation.

46. In the instant case, what is pending is Confirmation of the Grant so as to distribute the estate. According to the Applicants, they are likely to suffer substantial loss should the grant be confirmed, the estate distributed and sold to 3rd parties and thereafter, the appeal succeeds.

47. Whether to issue or not an order of stay of proceedings is a matter of Court’s discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The Court must carefully weigh on the consequences of stay among them; expeditious delivery of justice. See **Global Tours and Travel Limited: Nairobi H.C Widing Up Cause No. 43 (2000) (supra)** where the Court held;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

48. In Halsbury’s Laws of England 4th Edition Vol. 37 pages 330-332, the author observed that;

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

49. The impugned Judgment herein invalidated two last Wills of the deceased. What will happen if the grant is confirmed, estate distributed and ownership changes hand to 3rd parties and then the appeal succeeds? It will be costly and extremely cumbersome to restore the same properties to the deceased’s name should the appeal succeed and the will declared valid.

50. The cumulative effect and the cost implication when taken into account is persuasive enough to conclude that the Applicants may suffer substantial loss and indeed innocent third parties in incurring expenses to restore the estate property to its original position. On that ground, I am in agreement with the holding in the case of **Hannah Ngina and 2 Others v. Francis Kamau Thairu (2016) eKLR** where the Court held:-

“...In the circumstances of this case, if the Estate was to be distributed, restitution may not be practical as the other beneficiaries would be at liberty to deal with their shares in whichever way they deem fit which includes disposing ...”.

51. The Petitioners are in possession of a Grant of Letters of Administration and therefore incharge of administering the estate. The only order this Court can issue is stay of further proceedings which implies the application for Confirmation of the grant will remain in abeyance pending the hearing and determination of the intended appeal which is deemed to have been filed by dint of lodging a Notice of Appeal. There is no prejudice likely to be suffered by the Petitioners if further proceedings were stayed. They will continue administering the estate including representing the estate in any relevant or pending suit. Stay of proceedings does not mean stay of the administration of the estate.

52. This Court has been asked to find whether the appeal is arguable. What was in question was the validity of the deceased’s last Wills. The Court found that the two Wills were not validly executed. The grounds upon which they were invalidated is a legal question hence the need for the Court of Appeal to re-examine and make a determination. The issues raised are weighty which in my opinion makes the appeal arguable. It is trite that an arguable appeal need not be one that will succeed. See **Co-operative Bank of Kenya Ltd Vs. Banking Insurance & Finance Union (Kenya) (2015)eKLR**.

53. Regarding time factor, the same was filed on 13th May 2019 yet the impugned Judgment was delivered on 21st September 2018 about 8 months down the line. The delay was attributed to the delay in releasing proceedings. Although it is not clear how the delay in releasing proceedings contributed to the delay in filing this application in a case where the Applicants were on record all through, 8 months may not be unreasonable given that a Notice of Appeal was filed within 11 days after delivery of Judgment thus expressing the seriousness of the Applicants in challenging the orders.

54. For the reasons that the Court contributed to the delay, justice demands that a party should not be prevented from prosecuting his appeal where he has shown and made every effort to process the appeal. The respondents will not suffer any prejudice by staying proceedings.

55. Regarding depositing of security, this is a family dispute in a Succession matter. I do not find it necessary as there is no likelihood of any party suffering any prejudice if security is not furnished. The circumstances of this case do not warrant depositing security as the Respondents have not shown that the Applicants are people of straw and therefore not likely even to refund costs should they lose.

56. In view of the above holding, it is my finding that the Applicants in respect of the application dated 17th May 2019 have established a prima facie case to warrant orders of stay of proceedings in this case pending hearing and determination of the appeal. The Applicants should expedite the process of appeal. As regards of costs, I will order that costs be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF JANUARY 2021.

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J. N. ONYIEGO

JUDGE