REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION NO. 205 OF 2015

IN THE MATTER OF ESTATE OF KITHUMBU NYAGA ELIJAH (DECEASED)

VIOLET NGITHI KITHUMBU............1ST APPLICANT/RESPONDENT

ELIJAH NYAGA KITHUMBU...........2ND APPLICANT/RESPONDENT

VERSUS

JOSEPHENE RWAMBA NJUE..........1ST RESPONDENT/APPLICANT

JAMES NAMO....................................2ND RESPONDENT/APPLICANT

RULING

A. Introduction

1. Before me is the chamber summons dated 15.12.2020 wherein the applicants have sought for orders of stay of hearing of the summons dated 25.02.2020 in Runyenjes PM Succession Cause No. 227 of 2011; that this court be pleased to call for and order the remittance to this court of Runyenjes PM Succession Cause No. 227 of 2011 for directions and further orders on its disposal; stay of proceedings of this court's orders dated 24.07.2019 until the applicant's Nyeri CA No. 16 of 2020; and costs of the application.

2. The application is premised on the grounds on the face of it and further supported by the affidavits of Morris Guchura- advocate and Josephine Rwamba Njue - the 1st applicant. The applicants' case is that vide the orders of 24.07.2019, this court revoked the grant issued and confirmed to the applicants in Runyenjes PM Succession Cause No. 227 of 2011 and the court appointed the 1st applicant and the respondents herein as administrators amongst other orders but there were no orders by this court to the Runyenjes PM Court with regards to its revoked grant in Succession Cause 227 of 2011 and the court was in error in assuming jurisdiction over the matter and as thus the court acted ultra vires and without jurisdiction and its actions are null and void. That further there is an appeal in the Court of Appeal at Nyeri being Nyeri CA No. 16 of 2020 filed on 7.02.2020 and record thereof was served upon the respondents herein but the respondents proceeded to file chamber summons for revocation of grant in Succession Cause 227 of 2011 and which application was not sanctioned by this court. Further that Appeal 16 of 2020 is a serious appeal and not frivolous and that the same will be rendered nugatory unless the orders of stay are granted.

3. Directions were given that the application be served upon the respondents herein and fixed for hearing. On the day of the hearing, there was no appearance on the part of the respondents and/ or any response to the application as such the matter proceeded ex-parte.

4. I have considered the application herein and the supporting affidavits. As I have noted, the same is not opposed. However, it is a rule that, that notwithstanding, this court has a duty to interrogate the pleadings before it and determine whether the application is merited. As such, the main issue for determination is whether the application herein is merited?

5. I note that the applicant seeks for stay of hearing of the summons dated 25.02.2020 in Runyenjes PM Succession Cause No. 227 of 2011 (prayer 2) and this court be pleased to call for and order the remittance to this court of Runyenjes PM Succession Cause No. 227 of 2011 for directions and further orders on its disposal (prayer 3). From the reading of the application, it is clear that one of the grounds for seeking that order is that the court does not have jurisdiction to entertain the application for confirmation of grant before it. The applicants appear to be arguing that the said court does not have jurisdiction to confirm the grant as the same was revoked by this court.

6. I have perused the court orders of 24.07.2019 and it is clear that when this court revoked the grant issued to the respondents herein, the court further ordered that **"the administrators to jointly or separately file summons for confirmation of grant within 60 days".** This court in making the said orders was handling a miscellaneous application and which was filed seeking revocation of grant made by court in Runyenjes PM Succession cause No. 227 of 2011.

7. Prior to the year 2015, section 48(1) of the Law of Succession Act provided that; -

> "***Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as my be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:……."***

Under Rule 44 of the Probate and Administration Rules 1980, where a person intends to file an application for revocation of grant and where the said grant is issued by a resident magistrate, the application should be made through the High Court registry situated nearest to that resident magistrate's registry. It is pursuant to these two provisions that the Miscellaneous Application was filed before this court seeking revocation of grant issued by the lower court. This position has changed following the enactment of the Magistrates' Courts Act No. 26 of 2015 and whose section 23 repealed Section 48(1) of the earlier Act. The said section provides as thus;-

> ***"The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection — (1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.***

8. The effect of the above provision is that magistrate courts have jurisdiction over any application but subject to the pecuniary limits as set out by Magistrate Courts Act of 2015. I therefore fail to understand on what grounds the applicant herein claimed the lack of jurisdiction on the part of the lower court. The practice before the amendment of the Act was that once this court revokes a grant, it could exercise discretion under section 65 of the Law of Succession Act and appoint new administrators or even order the beneficiaries to appoint new administrators who would proceed and apply for confirmation of grant. There is no provision in the law which provides that it is this court which can hear the application for confirmation of grant subsequently filed. I find the applicant's submission in this respect misplaced. It is my finding that the lower court has jurisdiction to determine the application for confirmation before it and save for the circumstances which I will discuss herein under, it can indeed proceed and dispose of the application for confirmation of grant filed on 26.02.2020. The court would be having no business to call for and order the remittance to this court of the lower court file for further orders on its disposal.

9. The applicants further seek **stay of proceedings** of this court's orders dated 24.07.2019 until the applicant's (appeal) Nyeri CA No. 16 of 2020 is heard and determined. It is my view that the said orders are untenable and this court cannot grant the same. The orders sought herein are unknown to law. There can be no order staying proceeding of an order. What can be stayed in relation to an order is execution thereof.

10. However, from the reading of the application, it is clear that the applicants' intentions are to seek stay of execution of the orders of 24.07.2019. The applicants' deposed that their appeal is serious and not frivolous and that unless the stay is granted the same shall be rendered nugatory. These are conditions for granting of order of stay of execution pending appeal.

11. As a rule, in proceedings under the Law of Succession Act, provisions of the Civil Procedure Act and Civil Procedure Rule do not apply as the Law of Succession Act is *sui generis* with its own unique and special procedures which regulate proceedings in probate matters. The only provisions of the Civil Procedure Rules which apply to succession proceedings are provided under Rule 63 of the Probate and Administration Rules. (See **Josephine Wambui Wanyoike** -**vs- Margaret Wanjiru Kamau & Another [2013] eKLR**) they are Orders dealing with *service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time*. As such, it is clear that pursuant to the express provisions of the Probate and Administration Rules Order 42 of the Civil Procedure Rules does not apply to succession matters.

12. However, pursuant to the provisions of section 47 of the Law of Succession Act, this court has jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. Further, rule 73 of the Probate and Administrative Rules preserves the inherent jurisdiction of this court while dealing with matters succession. It is my view that notwithstanding Order 42 of the Civil Procedure Rules not being one of those Orders imported by Rule 63(1) of the Probate and Administration Rules, this court has jurisdiction to grant orders of stay of execution while invoking its inherent powers under Rule 73 and make orders in the interest of justice.

13. As a rule, an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for this court to order stay of execution are provided for under Order 42 rule 6(2) Civil Procedure Rules. Basically, the applicant must satisfy the court;-

> ***i. that substantial loss may result to the applicant unless the order is made***
>
> ***ii. that the application has been made without unreasonable delay; and***
>
> ***iii. that the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.***

14. The Court of Appeal in **Halai and Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR** in considering the conditions for stay of execution pending appeal held that; -

> "***The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.***

In addition, the Applicant must demonstrate that the intended Appeal will be <u>rendered nugatory</u> if stay is not granted as was held in <u>Hassan Guyo Wakalo…Vs…Straman EA Ltd (2013)</u> as follows:-

"In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."

<u>These twin principles go hand in hand and failure to prove one dislodges the other"</u>

15. In my view, these are the conditions which the applicant ought to satisfy for this court to grant orders of stay of execution in an application filed before it. The question therefore is **whether the applicants have satisfied the above conditions.**

16. As for the likelihood to suffer substantial loss if the stay is not granted, the 2nd applicant deposed that if the orders of stay are not granted, she will be prejudiced as she will have to deal with orders issued by an incompetent court and further that her appeal will be rendered nugatory. In **<u>James Wangalwa & Another –-vs- Agnes Naliaka Cheseto [2012] eKLR</u>** the court held that; -

"the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. <u>Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory</u>."

17. I have perused the court record and I note that the grant issued by the lower court was confirmed on 6.03.2012 and a certificate of confirmation of grant issued in that regard. Further, it is clear from the court record that the said certificate of confirmation of grant was implemented and the estate of the deceased distributed. The said grant was revoked by this court and the said orders are the subject of the instant application. Apart from the revocation of the grant, the court went further and appointed the respondents herein as co- administrators; the transmission or transfer of assets of the deceased arising from the grant were nullified and the assets reverted back to the name of the deceased; and that the co-administrators to file for confirmation of grant.

18. Generally, once a grant is revoked, any subsequent transaction on land forming the estate of the deceased becomes null and void. The land reverts back to the deceased. It is my view that the applicants herein shall not suffer any irreparable loss if the orders being challenged are executed. In any event the estate is safe in the names of the deceased as opposed to how they are currently registered. It is also in the interest of the respondents herein that they be part of the administration so as to prevent the applicant from interfering with the estate.

19. The applicant having failed to prove that she will suffer substantial loss if the orders sought are not given, then even if the application was brought without unreasonable delay and further even if the applicant is willing to provide security, nonetheless, failure to prove the first condition dislodges the others.

20. However, and the above notwithstanding, this court has a duty to protect the estate of the deceased awaiting distribution. Now that there is an appeal pending before the Court of Appeal, it is my view that the order to the effect that the administrators jointly or separately do file for confirmation will not serve the interests of justice. I have looked at the application for confirmation of grant pending before the lower court and I notice that the same has introduced new beneficiaries. The two applicants in the application for confirmation of grant pending before the lower court have applied for confirmation in exclusion of the 1st applicant herein. The Court of Appeal being the superior court to this court and the lower court ought to determine on the mode of distribution in finality. By the fact that the decision of the Court of Appeal shall be binding on the lower court (and even this court) it is in the interest of justice and prudent use of judicial time that the appeal be heard first. The estate can only be distributed in the mode which will be upheld by the Court of Appeal. As such, it will be a waste of the lower court's judicial time to proceed and hear the application for confirmation of grant pending before it. In the circumstances, this court ought to stay the execution of the orders No. 4 of the orders made on 24.07.2019 pending the hearing and determination of the appeal in Nyeri CA No. 16 of 2020. In so doing, the court ought to issue an order of stay of hearing of the summons dated 25.02.2020 in Runyenjes PM Succession Cause No. 227 of 2011 pending the hearing and determination of the appeal in Nyeri CA No. 16 of 2020.

21. As for the costs of the suit, it is trite that issue of costs is discretional power available to court and as a general rule costs follow events. However, the instant application is pitting what appears to be a step-mother against her step- children. The same being a family issue, this court ought to exercise its discretion and make no orders as to costs.

22. The applicants' application succeeds in terms of prayers 2 and 4.

23. It is so ordered.

Delivered, dated and signed at Embu this 24th day of February, 2021.

L. NJUGUNA

JUDGE

…………………………………………..……for the Applicants

……………………………………..……..for the Respondent