



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 57 OF 2017

CONSOLIDATED WITH HCCA. NO. 61 OF 2017

JOYCE WANJIRU KIMANI.....1ST APPELLANT/RESPONDENT

BUXTON FARMERS COMPANY LTD.....2ND APPELLANT/ RESPONDENT

VERSUS

NJENGA KINYANJUI (Legal Representative of the Estate of LEAH WANJIKU

KINYANJUI (Deceased).....1ST RESPONDENT/APPLICANT

NJENGA WANJIKU KINYANJUI (Deceased)...2ND RESPONDENT/APPLICANT

SIMON MATHERI.....3RD RESPONDENT/APPLICANT

MICHAEL GITAU KINYANJUI.....4TH RESPONDENT/APPLICANT

RULING

1. The appeals herein were heard in 2019 and judgment delivered on 25th October 2019. On 6/12/2019 a motion was filed by counsel for Respondent/Applicants, Messrs **J. M. Njenga & Co. Advocates**. The sole substantive prayer in the motion seeks that the sum of Kshs. 2,275,525/- and all accrued interest held pursuant to the consent order adopted by the court on the 18th July, 2018, in a joint interest earning account in the name of **J. M. Njenga & Co. Advocates** and **R. W. Muhuhu & Co. Advocates** under account no. 123*****1 at Kenya Commercial Bank (KCB) Limuru branch be released to the Respondent/Applicants through their advocates on record.

2. The motion is expressed to be brought under Order 27 Rule 8(2) and Order 51 Rule 1 of the Civil Procedure Rules. It is supported by the affidavit of **Victoria Wambua** who describes herself as an advocate practicing in the firm of J. M. Njenga & Co. Advocates. To the effect that the sums which are the subject of the motion were deposited as security for stay of execution pending appeal and that the final judgment did not contain an order for the release of the said monies to which the Respondent/Applicants are entitled, the appeal having been dismissed. That the Appellant/Respondents will not suffer any prejudice whereas the Respondents/Applicants are entitled to the fruits of their judgment.

3. The 1st Appellant, Joyce Wanjiru Kimani swore an affidavit in opposition to the motion. Therein she deposed that the Respondent/Applicants were her siblings, that while the 3rd Respondent/Applicant is deceased, the 2nd Applicant [this is obviously an erroneous reference to the 1st Respondent/Applicant] is the holder of limited grant of letter of Administration *Ad Litem* in respect of the estate of their deceased mother **Leah Wanjiku Kinyanjui**. She asserts that the judgment on appeal upheld the decision of the lower court directing that refunds and dividends be paid to the estate of the deceased mother, and that no succession cause had been filed regarding the devolution of the said estate.

4. She pointed out that her deceased mother had several children one of whom is deceased while others were not involved in this litigation. She dismisses the motion as unprocedural and premature and takes issue with the fact that the deponent to the supporting affidavit to the motion is the advocate, rather than the applicants themselves. She asserts that the money is in safe hands and no prejudice will be occasioned to the Respondent /Applicants since the matter involves many members of the family, some of whom are not parties in this suit and that no succession cause has yet been commenced in respect of the mother's estate.

5. During the oral canvassing of the motion Mr. Okeyo for the Respondent/Applicants argued that the disputed funds belong to the decree

holder having been deposited as security for stay of execution. He asserted that his court is *functus officio* and that no orders as to distribution can be made herein.

6. Ms. Muhuhu for the 1st Appellant and holding brief for counsel for the 2nd Appellant relied on the replying affidavit of the former. She reiterated the decree of the lower court to the effect that adjudged funds were to be paid into the estate of the deceased **Leah Wanjiku Kinyanjui**; that the grant *ad litem* held by the 1st Respondent/Applicant does not authorize him to receive funds on behalf of other beneficiaries; that some of these beneficiaries are not represented by the advocate for Applicants. She submitted that the application is premature and that succession proceedings should be taken out with the participation of all the beneficiaries.

7. In a brief rejoinder, Mr. Okeyo reiterated that the funds in dispute ought to be paid to the 1st Respondent/Applicant who holds the grant *ad litem* and that the advocates for the Respondent/Applicants did not wish to continue holding the funds.

8. The court has considered the material canvassed in respect of the motion. In addition, the court has perused the record including the judgment of the court on appeal and that of the lower court as contained in the record of appeal. There is no dispute that the sums in dispute were deposited into court as security for stay of execution orders that subsisted during the appeal. No order was made concerning these funds in the judgment delivered on 25th October, 2019. Nevertheless, in dismissing the appeal, the court effectively confirmed the judgment and decree of the lower court.

9. It is evident from the record that Leah Wanjiku Kinyanjui died during the pendency of the lower court suit. The trial court stated in its judgment that it had not found any proof that the deceased held shares in the 2nd Appellant in trust for the 2nd to 4th Plaintiffs (herein the 2nd to 4th Respondent/Applicants). Thus, the court ordered that shares owned by the said deceased were to revert to the estate of the deceased. It was further found that the 2nd Appellant here had illegally and fraudulently received the sum of Kshs. 855,000/= for 45 shares “*which she shall refund to the estate of the 1st plaintiff (deceased).*”

10. The trial court further ordered that:

“(iii) The 2nd Defendant (2nd Appellant herein) shall refund the equivalent of the dividend value for the remaining 60 shares as declared by the 2nd defendant about June/July 2011.

(iv) All outstanding dividends payable by the 2nd defendant on account of membership number 78 shall be paid to the estate of the deceased 1st plaintiff.”

11. The 1st Appellant had upon filing appeal herein successfully obtained an order to stay execution pending appeal on condition that she deposits the sum of Kshs 855,000/= in a joint interest earning account in the names of the advocates for both parties in 60 days of the order, made on 1st March 2018 by Ngugi J. However, before the expiry of this period, the parties filed a consent on 11/04/2018, adopted by the court on 18th July, 2018. The terms of the consent were *inter alia* that the appeals filed separately by each appellant be consolidated, further that:

“2. THAT a sum of Kshs, 2,275,515/= being the equivalent value of the 45 shares be deposited by Buxton Farmers Ltd [2nd Appellant] in an interest earning bank account to be opened forthwith in the joint names of advocates of m/s J. M. Njenga & Co. Advocates for the Respondent and R. W. Muhohu & Co. Advocates within a period of 21 days

3.THAT the said amount be held in the said joint account pending hearing and final determination of subject consolidated appeals.

4.THAT upon deposit of the above sum, the order made on 1st March, 2018 by Hon. Joel Ngugi J. against the appellant in Civil Appeal No. 57 of 2017 (1st Appellant) be and is hereby suspended pending hearing and determination of the consolidated appeal.

5.THAT in default of the said deposit within the said timelines the respondent be at liberty to apply for execution against both appellants.

12. The effect of this consent order was to secure the stay order in favour of both Appellants on the basis of the deposit of sums of money determined to be the equivalent of 45 shares and ordered by the trial court to be reinstated to the estate of the deceased Leah Wanjiku Kinyanjui. It is therefore self-evident from this record that the sums deposited in the account were in respect of 45 shares owned by the deceased and deposited as security for the performance of the decree against the Appellants in that regard.

13. The appeal having been dismissed, these sums rightfully belong to the estate of the deceased **Leah Wanjiku Kinyanjui** and not any of the Applicants herein. It is true that subsequent to the death of the said Leah Wanjiku Kinyanjui a limited grant *ad litem* was issued in **Nairobi Probate and Administration cause NO. 2406 of 2014**, in favour of **Njenga Kinyanjui** (1st Respondent/Applicant). The copy of the said grant annexed to the 1st Appellant’s replying affidavit as ‘**JWK1**’ clearly states that it is “**limited only to the purpose of prosecuting CMCC 360 of 2011 at Senior Principle (sic) Magistrate in Limuru Law Courts**”. *Ex facie*, the grant does not authorize the grant holder to receive and administer any assets of the estate of the deceased Leah Wanjiku Kinyanjui, or worse to apply any proceeds of the primary cause to his own personal needs as suggested in the certificate of urgency filed in his behalf in regard to the instant motion.

14. The law and the disclosed circumstances of this matter do not support the release of the funds clearly held for the benefit of the estate of

the deceased Leah Wanjiku Kinyanjui to one or some of her admitted children surviving her. The grant *ad litem* is essentially spent for all purpose save execution. Section 54 of the Law of Succession Act which the ad litem grant was made provides that:

Limited grants

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act. Section 45 of the Law of Succession makes it an offence for any person who does not hold a grant in his favour in respect of an estate to intermeddle with any free property of a deceased person.

15. The Respondent/Applicants are caught up by the provisions of the Law of Succession Act together with their advocates. A grant must be obtained appointing any of the claimants as administrators of the estate of the deceased Leah Wanjiku Kinyanjui to enable them to receive the proceeds of her estate and distribute the same in accordance with the orders the court may make upon confirmation of the grant. This court cannot accept the Applicants’ invitation to sidestep the provisions of the Law of Succession Act by acceding to their application. More so given the contentious circumstances of the matter.

16. The respective advocates of the parties and the bank must continue to hold the proceeds of the litigation in a fiduciary capacity until appropriate orders are made in a succession cause in respect of Leah Wanjiku Kinyanjui. Then, it will be clear who the rightful administrator(s) and beneficiaries of the estate are and the disputed sums can be released in accordance with court orders. For all these reasons, the application filed on 6th December, 2019 is dismissed. Parties will bear own costs.

Dated and signed electronically this 16th day of March 2021.

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021.

M. KASANGO

JUDGE

In the presence of:

..... for the Appellant/Respondents

..... for the Respondent/Applicants

C.A: