



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. E040 OF 2020
IN THE MATTER OF THE ESTATE OF FATUMA JEPKEMBOI SALIM (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR STAY OF EXECUTION

BETWEEN

MAHMOUD CHEMWOR TARUS.....APPELLANT

AND

MUBARAK KIPTOO SALIM AND 9 OTHERS.....RESPONDENTS

RULING

[1] The Notice of Motion dated **23 December 2020** was filed by the appellant herein, **Mahmoud Chemwor Tarus**, for orders that execution of the order made on **23 November 2020** by the Kadhi in **Eldoret Kadhi's Court's Succession Miscellaneous Cause No. 1 of 2018** be stayed pending the hearing and determination of this appeal. He also prayed for an order that costs of the application be costs in the cause.

[2] The application was premised on the grounds that the applicant successfully petitioned the Kadhi's Court in **Eldoret Kadhi's Court Succession Cause No. 16 of 2006** and was issued with a grant of letters of administration respect of the estate of **Fatuma Jepkemboi Salim** (the deceased) which was duly confirmed and the estate distributed in accordance with the Schedule approved by the Kadhi's Court. The applicant was accordingly aggrieved that, thereafter, **Mubarak Kiptoo Salim**, the 1st respondent herein, proceeded to file **Eldoret Kadhi's Court Succession Miscellaneous Cause No. 1 of 2018**, seeking the revocation of the grant; which application was allowed to his detriment in a ruling delivered on **23 November 2020**.

[3] It was, thus, the contention of the applicant that the process leading up to the creation of **Miscellaneous File No. 1 of 2018**, including the issuance of the impugned orders, was illegal, granted that the original file was all along available and had not been declared lost. It was therefore the applicant's contention that there was no justification for the revocation orders to be made in a miscellaneous file. He further complained that following the revocation, the original title for the estate property, namely WAITALUK/MABONDE BLOCK 9/KIBULWET/71, was cancelled and new titles issued in favour of third parties who were not part of the original petition. He explained in his Supporting Affidavit that the suit property was his share of the deceased's estate; and that the other beneficiaries of the deceased had been given their separate shares which have since been registered in their respective names. Thus, he asserted that any dealings purporting to redistribute the suit property are nothing but attempts to disinherit him. The applicant annexed several documents to his Supporting Affidavit in support of his averments; and on the basis thereof, urged the Court to allow his application and grant the orders sought.

[4] In response to the application, the respondent filed a Replying Affidavit, sworn by him on **22 January 2021**. He averred therein that the suit property was initially the property of their deceased mother, **Fatuma Salim**; and that the applicant proceeded to initiate succession proceedings before the **Kadhi's Court vide Succession Case No. 16 of 2006** without involving him or any of the other children of the deceased. The respondent further averred that the grant, the basis of which the applicant transferred the suit property to himself, was fraudulently obtained. He added that when the fraud was discovered, he promptly moved the Kadhi's Court, on behalf of himself and all his siblings, for revocation of the grant and for cancellation of the applicant's title to pave way for redistribution of the deceased's estate.

[5] Thus, the respondent defended the impugned ruling and contended that it was made by the Kadhi after hearing all the concerned parties; including the applicant. He exhibited a copy of the decree as **Annexure MCT S** to demonstrate that the applicant has not been disinherited at all; but is one of the beneficiaries with a designated share of the estate. The respondent concluded his averments by asserting that it would be

in the interest of justice, and in the interest of all the concerned parties, for the redistribution to be upheld; and therefore that the instant application lacks merit and ought to be dismissed.

[6] The application was canvassed by way of written submissions, pursuant to the directions given herein on **26 January 2021**. Thus, **Mr. Cheluget** for the applicant, filed his written submissions herein on **1 February 2021**; while the respondent's written submissions were filed by **Mr. Korir** on **23 February 2021**. **Mr. Cheluget** dealt at length with what appears to be the merits of the pending appeal and gave various reasons why he thinks the appeal has high chances of success. On the basis thereof, he submitted that the applicant has satisfied all the conditions for the granting of stay of execution of the orders issued on **23 November 2018**.

[7] **Mr. Cheluget** further submitted that the respondents have not demonstrated any prejudice that is likely to be suffered by them. He reiterated the applicant's stance that the process employed in the revocation of grant and cancellation of title to the suit property is illegal and ought not to be countenanced by the Court. He concluded his submissions by pointing out that, as matters stand, the estate has been left without an administrator; a scenario that he described as an "unfortunate tragedy". He therefore prayed that the application be allowed as prayed with costs pending the hearing and determination of the appeal.

[8] **Mr. Korir** on his part submitted that the application is incompetent in that the applicant has not invoked the proper provisions of the law under which it has been brought. He also submitted that the applicant has not met the threshold provided for under **Order 42 Rule 6** of the **Civil Procedure Rules**; namely:

- [a] That substantial loss will be occasioned if stay is not granted;
- [b] That the application has been brought without unreasonable delay;
- [c] That there is provision of security for the due performance of the decree.

[9] **Mr. Korir** pointed out that the strength and/or merits of the appeal, which issue dominated the applicant's written submissions, is not one of the conditions for stay of execution. He consequently prayed for the dismissal of the application, adding that no explanation was proffered as to why it was filed two months down the line.

[10] I have given due consideration to the application, the affidavits filed in respect thereof as well as the written submissions filed by learned counsel for the parties. It is true that the drafting of the motion appears somewhat sloppy in that it is expressed to have been filed "**(under order rule 6 and section 3 & 3A OF CPA)**". The specific Order of the **Civil Procedure Rules** was not stated. I however have no hesitation in dismissing the argument that the application is, for that reason, incompetent and a non-starter, granted the provisions of **Order 51 Rule 10** of the **Civil Procedure Rules**. That provision states thus:

"(a) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(b) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

[11] And, whereas it may be presumed that counsel had in mind **Order 42 Rule 6** of the **Civil Procedure Rules**, **Rule 63** of the **Probate and Administration Rules** is explicit that:

"(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.), ... shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased person shall be those existing and in force immediately prior to the coming into operation of these Rules."

[12] I therefore subscribe to the view that, since **Order 42 Rule 6** of the **Civil Procedure Rules** was consciously omitted in **Rule 63** aforesaid and was consequently not imported for purposes of the **Law of Succession Act**, it is inapplicable to the instant application. The same viewpoint was taken in **Re Estate of Kesiah Wanjiku (Deceased)** [2020] eKLR thus:

"...Section 47 of the Law of Succession Act empowers the High Court to entertain any application and to make such orders as may be expedient, while Rule 73 of the Probate and Administration Rules saves 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"... Indeed, none of the sections of the Civil Procedure Act invoked on the face of the Summons before me are applied to succession causes by that rule..."

[13] Needless to say that the **Law of Succession Act** was intended to be a stand-alone piece of legislation. The Court of Appeal made this plain in **Josephine Wambui vs. Margaret Wanjiru Kamau & Another** [2013] eKLR, wherein it stated thus:

"We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and

Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1)."

[14] The foregoing notwithstanding, **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules** are explicit as to the jurisdiction of the Court in Succession matter; which provisions are sufficient in my view to guide the exercise of the Court's discretion for purposes of stay of execution pending appeal. In particular, **Section 47** of the **Law of Succession Act** stipulates that:

"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..."

[15] **Rule 73** of the **Probate and Administration Rules** on the other hand provides that:

"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."

[16] Thus, the only issue for my determination herein is whether a sound and justifiable basis has been shown for the issuance of stay of execution; and whether the orders are necessary for *the ends of justice in this matter*. From the material availed before the Court, it is manifest that the disputants are siblings and that they are squabbling over a piece of property, namely: WAITALUK/MABONDE BLOCK 9/KIBULWET/71, that forms part of the estate of their deceased mother, **Fatuma Jepkemboi Salim**. While it is the contention of the applicant that each of his siblings has been given separate shares of the estate; and that the suit property is his inheritance; the respondent is of the posturing that the suit property ought to be and has been shared equally amongst all the deceased's children vide the impugned ruling.

[17] The applicant has filed an appeal against the cancellation of his title and the revocation of the grant that had been issued to him. He understandably complained that it was irregular for the revocation to be handled in a separate miscellaneous file yet the original file was always available; and that, by reason of the revocation, the estate has been left without an administrator. Accordingly, having weighed the competing interests of the parties, I am satisfied that there is sufficient cause for granting stay of execution pending the hearing and determination of the appeal.

[18] In the result, it is hereby ordered that:

[a] Pending the hearing and determination of the appeal filed herein, there be stay of execution or further execution of the Order made on **23 November 2020** by the Hon. Senior Resident Kadhi in **Eldoret Kadhi's Court Succession Miscellaneous Case No. 1 of 2018**.

[b] That the costs of the application shall be costs in the appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF MARCH 2021

OLGA SEWE

JUDGE