



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 193 OF 2019

IN THE MATTER OF THE ESTATE OF STANLEY NDUGNU MWAURA (DECEASED)

MARY WANGARI NDUNGU.....APPELLANT

VERSUS

JAMES MWAURA NJOKI.....RESPONDENT

RULING

1. MARY WANGARI NDUNGU (Mary) has brought before this Court an application by way of summons dated 18th December, 2019. Mary seeks stay of execution of the judgment of Thika Chief Magistrate's court Succession Cause No. 620 of 2014. That stay is sought pending the determination of this appeal.

BACKGROUND

2. JAMES MWAURA NJOKA (James) petitioned for grant of Letter of administration before the Thika court, succession cause No. 620 of 2014, in respect to the estate of **STANLEY NDUNGU MWAURA** deceased. He petitioned as the son of the deceased's first wife. A grant was issued to James by the said court on 6th March, 2014. Mary filed an affidavit of protest against the petition by James on the basis that she was the only wife of the deceased. The matter was fixed for hearing by viva voce evidence on 5th August, 2019. The trial court noted that Mary and her counsel on record failed to attend the hearing of the protest despite having been served. The trial court proceeded to entertain James and his witnesses who testified before court.

3. The trial court delivered its judgment dated 25th November, 2019 and it is that judgment that Mary has appealed against in this appeal. By that judgment the trial court confirmed the grant issued to James on 13th October, 2015 in the following terms:-

- The protestor (Mary) having already transferred L.R. NO. 13097/2 to herself. I find this would be her share of the estate jointly with her three children.
- L.R. 13097/3 be registered in the name of the petitioner (James) and his siblings (Grace Njeri Ndungu, Wambui Ndungu, Margaret Njambi and Eunice Mugure) from the first family in equal shares.
- Kenya Commercial Bank Ltd. Shares be registered in the names of all children of the deceased and the protestor in equal shares.

4. It needs to be stated that Mary was the second wife of the deceased. It is that judgment that Mary seeks to stay by her application. She seeks that stay on the grounds that she was aggrieved by that judgment has filed this appeal against that judgment which appeal has overwhelming success; and that if stay of execution of that judgment is not granted this appeal will be rendered nugatory. Mary further highlighted, by her affidavit in support, that there was irregularity in the date of the grant issued to James because it is dated 6th March, 2014 which was a date prior to the gazette of the succession cause of No. 620 of 2014, which gazette was on 30th January, 2015. Mary further deposed that her protest was heard by viva voce evidence in her absence and without her being informed. She therefore stated that her constitutional right was violated.

5. The application was opposed by James, through his affidavit dated 14th January, 2020. He deposed that Mary's affidavit contained falsehoods and misrepresentations. He elaborated those depositions by stating that the date of the grant had a typographical error. James stated that when he filed the succession before the Thika court he included Mary and her children and his siblings. That it is later on he became aware that Mary had previously filed another succession cause by which she excluded James and his siblings.

ANALYSIS AND DETERMINATION

6. I have considered the application before me. I need to begin by stating that the trial court did issue an amended grant dated 17th January, 2020. It follows that the perceived anomaly of the date of the previous grant is ameliorated.

7. Mary did not respond by affidavit evidence on the deposition of James that she was served with hearing notices and that on the day of hearing she was present in court but left without adducing evidence. It was not enough for Mary to merely respond to that deposition in her written submissions. That being so the depositions to that effect by James remain uncontested and accordingly there was no error in the trial court proceedings to receive the viva voce evidence of James and his witnesses. It is because of that holding that I find there is no basis for seeking to stay a judgment that was a result of uncontested evidence of James and his witnesses.

DISPOSITION

8. In the light of the above findings that the summons dated 18th December, 2019 is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 19TH DAY OF APRIL, 2021

MARY KASANGO

JUDGE

Coram:

C/A

For the Appellant.....Ms. Kiarie H/B Ndungu Mwaura

For the Respondent.....Ms. Waithera Mwangi

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE