



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CIVIL SUIT NO. 2 OF 2020**

**MILKA HABWOYA DECHE.....APPLICANT**

**VERSUS**

**ZILPA GAMACHANA KOMORA .....1<sup>ST</sup> RESPONDENT**

**KENYA FOREST SERVICE - HOLA .....2<sup>ND</sup> RESPONDENT**

**MAZINGIRA WELFARE & SPORTS ASSOCIATION.....3<sup>RD</sup> RESPONDENT**

**ASILI SACCO SOCIETY LIMITED .....4<sup>TH</sup> RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**A. M. Omwancha Advocate For The Applicant**

**Kilonzo & Aziz Advocates For The 1st Respondent**

**Bw'oigara, Getange Advocates For The 4th Respondent**

**R U L I N G**

This is an interlocutory application to the High Court from the on-going proceedings before Garsen Senior Principal Magistrate's Court Succession Cause No. 1 of 2020. The issues applied for by the applicant in the Chamber Summons filed in Court on 10.8.2020 as reasonably crafted revolves around the following reliefs:

- 1. That the Principal Registrar High Court of Kenya Milimani – Nairobi be ordered and directed not to issue Form 30 and the transmission for publication of the Notice of the Kenya Government Printers for gazettelement pursuant to the provisions of Rule 7 (4) of the Probate & Administration Rules of the Law of Succession Act Cap. 160 Laws of Kenya.***
- 2. That this Honorable Court be pleased to issue a temporary order restraining the 2<sup>nd</sup> respondent herein Kenya Forest Service from computing and releasing all the benefits in respect of the estate of Michael Gobu Samuel (Deceased) to the 1<sup>st</sup> respondent pending inter-partes hearing of the instant application herein.***
- 3. That this Honorable Court be further pleased to issue a temporary order directing the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein Mazingira Welfare and Sports Association and Asili Sacco Society Limited respectively to compute and disclose to the Court all benefits and savings made by the deceased who was a member, contributor and share holder of the Saccos and a subsequent interim order restraining the 3<sup>rd</sup> and 4<sup>th</sup> respondents from releasing the said benefits and savings of the deceased to the 1<sup>st</sup> respondent pending inter-partes hearing of the instant application.***
- 4. That upon interpartes hearing, this Honourable Court be pleased to transfer Garsen Senior Principal Magistrate's Court Succession Cause No. 1 of 2020 to Hola Resident Magistrate's Court for hearing and determination.***
- 5. That upon inter-partes hearing, the Principal Registrar High Court of Kenya Milimani-Nairobi be ordered and directed to return the notices issues by the Garsen Senior Principal Magistrate's Court to the Hola Resident Magistrate's Court for re-issuance.***

*6. That upon inter-partes hearing, this Honorable Court be pleased to issue a temporary order restraining the 2<sup>nd</sup> respondent herein Kenya Forest Service from computing and releasing all the benefits in respect of the estate of Michael Gobu Samuel (Deceased) to the 1<sup>st</sup> respondent pending the hearing and determination of the main suit herein.*

*7. That upon inter-partes hearing, this Honorable Court be further pleased to issue a temporary order directing the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein Mazingira Welfare and Sports Association and Asili Sacco Society Limited respectively to compute and disclose to the Court all benefits and savings made by the deceased who was a member, contributor and shareholder of the Saccos and a subsequent interim order restraining the 3<sup>rd</sup> and 4<sup>th</sup> respondents from releasing the said benefits and savings of the deceased to the 1<sup>st</sup> respondent pending the hearing and determination of the main suit herein.*

*8. That costs of this application be in the cause.*

In essence the application concerns stay of proceedings, transfer of suit from one subordinate Court to another for adjudication and determination. The applicant's case can be deduced from the supporting affidavit to the originating summons annexed therein to the main claim.

The respondents in a rejoinder filed a replying affidavit with various annexures to demonstrate that the chamber summons lacks merit to be entertained by the Court. Following the materials filed each of the respective counsels filed brief written submissions. In the ensuing determination, their contribution to decision making process by this Court would be appropriately captured.

### **Resolution**

On the issue of stay of proceedings, the evidence before the Court comprises issues to do with a succession cause filed for the sole purpose of administering the intestate Estate of the deceased. The majority of the cases on this issue i.e. **Eng. Michael Mwaura v The Ethics & Anti-Corruption Commission & 3 others CA No. 173 of 2015** and **Diana Kethi Kilonzo v R {2016} eKLR; Mary Ngethe v The Attorney General & Another CA No. 157 of 2012**, mirror the guidelines upon which such an application may or may not be granted.

Going by the principles in the aforesaid referenced authorities, the applicant invited me to consider that need of staying the proceedings until certain condition precedents are met before the matter proceeds further before that Court or at Hola which has concurrent jurisdiction with Garsen. The point of concede importance on stay of proceedings lies in the answer to the parties observing proportionality, in relation to the litigation.

The further question that has to be answered is in regard to the overriding objective in terms of Section 1A and 1B of the Civil Procedure Act which espouses key canons of the Courts facilitation of a just, expeditious, proportionate and affordable resolution of cases, either under this Act or the Succession Act. What is to be the likely scope of that stay of proceedings as evinced by the applicant is the aspect of promoting delay in the adjudication and determination of the Succession Cause.

I would approach that further question on stay of proceedings before Garsen Court in this way. The method by which issues of fact are tried in the probate Court is well settled. After the normal processes of petition, gazettelement, its discovery and interrogatories have been completed, the Court is allowed to issue the initial grant of Letters of Administration, intestate. Thereafter the Court is required to determine the real issues, where the truth of the Estate lies, in the light of the assets and beneficiaries. To that extent, as a matter of Law, the issued grant of Letters can be applied for to be confirmed within the six month period or with exceptions earlier than the set period of six (6) months.

In the chamber summons, it is possible to say with confidence that the factual basis for the reliefs sought on stay of proceedings is fanciful because its entirety without substance. Secondly, the pleaded case in this Court on restraining Kenya Forest Service from confiscating all the benefits of the Estate of the deceased and also Mazingira Welfare and Sports Association and Asili Sacco Society Ltd, from also dealing with the issue of compelling and disclosing any benefits to the Succession Court, goes against Section 36 A of the Retirement Benefits Act Regulation 23 of the Retirements Benefits (Occupation Retirements Benefits Schemes Regulation 2000). It also touches on the novel provisions of Section 13 of the Pensions Act. In light of the fact that the deceased was a member of Asili Co-operative Sacco and Mazingira Welfare and Sports Association, it's clear that Section 39 of the Co-operative Societies Act provides for the settlement of dues raised by the applicant in the chamber summons.

The factual matters relied upon in support of the recast of the applicant's case are however essentially the same as those set to be resolved under the provisions of the Co-operatives Societies Act. The Retirement Benefits Act, the Retirement Benefits Occupational Retirements Benefits Scheme Regulations 2000 and the Pensions Act.

In summary, the Succession Cause as alleged does not exercise high degree of control, direction and oversight in respect of other statutory instruments the remuneration scheme. In those other legislation and regulations in their specific provisions do set legal and regulatory framework for dealing with corresponding benefits, or payments that accrue to a deceased employee or member of Co-operative Society.

On the basis of this analysis of the affidavit evidence, I therefore conclude that it cannot be said that the applicant has presented a prima facie case for stay of proceedings or interim orders of injunction against the gazettelement of the Succession Cause to defeat the requirement of the Law.

I completely endorse the submissions by the respondents thereto, upon which the proper trajectory of the issues on stay of proceedings and interim interdict over the gazettelement of the petition for grant of Letters of Administration as they are present the command of the Law. It is obvious, that the applicants approach was wrong as she seemed to have misconceived the issues joined, without respondent.

Finally, the relief by the applicant is on transfer of **Succession Cause Garsen No. 1 of 2020 to Hola Principal Magistrates Court**. The right to move the High Court to transfer an existing suit from one subordinate Court to another is provided for under Section 18 of the Civil Procedure Act. In the case of **Hang Shou Agro Chemicals Industries Ltd v Panda Flowers Ltd {2012} eKLR**, the Court in construing the provisions of Section 18 held as follows:

*“That the Court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting the witnesses, balance of inconvenience, questions of expense, interest of justice and possibilities of undue hardship. If the Court is left in doubt as to whether, under all the circumstances, it is proper to order transfer, the application must be refused.”*

Being a discretionary power, the decision whether or not to exercise it, depends largely on the facts and circumstances of a particular case: As per the affidavit evidence and the trails that would be conducted in the probate Court at Garsen, there are no valid grounds for such a transfer to be effected by this Court as adverted to by the applicant. I hold the view that power of transfer under Section 18 of the Act must be exercised with due care, caution and circumspection and in the interest of justice. Unfortunately, this is not the case here as alluded to by the applicant. The chamber summons of the applicant ought to and must be dismissed for want of merit with costs.

**DATED, SIGNED AND DISPATCHED AT MALINDI VIA EMAIL ON 27TH DAY OF OCTOBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Ms. Mulwa holding brief for Thuku advocate for the respondent