



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO 31 OF 2019**

**IN THE MATTER OF ESTATE OF KANWALJIT SINGH CHADDA**

**PARMINDER SINGH CHADDA.....OBJECTOR/RESPONDENT**

**VERSUS**

**MARILYN MERCY WANJIRU.....ADMINISTRATOR/APPLICANT**

**RULING**

**Introduction**

There are three applications pending determination in this matter. The first application was filed by Parminder Singh Chadda, the Objector. It is the Notice of Motion dated 25<sup>th</sup> October 2019. It is seeking the following prayers:

1. That this Application be certified urgent and heard ex-parte in the first instance.
2. That pursuant to prayers 3, 4, and 5 of the Summons for Revocation of the Grant herein dated 3<sup>rd</sup> September, 2019, the said Marilyn Mercy Wanjiru be ordered to deposit in court all the money she collects and/or has collected on her behalf by any servants, agents or whosoever being rent due from the Deceased's properties in Nairobi namely the building on L.R 209/118/38 and L. R 1870.IV/157.
3. That costs be in the cause.

The main ground in support of this Application is that the Marilyn Mercy Wanjiru, the Administrator, was issued with a grant of letters of administration in respect of the estate of the deceased herein on the strength of a marriage certificate that she was the wife of the deceased. It is claimed that she had forged that marriage certificate and that this matter is subject to criminal investigations and a criminal case against her.

The 2<sup>nd</sup> application is the Notice of Motion dated 25<sup>th</sup> November 2019 brought by Marilyn Mercy Wanjiru seeking the following prayers:

1. 1at costs be in the cause.

The 3<sup>rd</sup> application dated 24<sup>th</sup> May, 2021 is a Notice of Motion brought by Marilyn Mercy Wanjiru. She has cited Article 159 of the Constitution of Kenya, Rule 73 of the Probate and Administration Rules, Section 1A, 1B, 3A and 90 of the Civil procedure Act and Order 51 rule 1 of the Civil Procedure Rules 2010. She is seeking the following orders:

1. That this Application be certified urgent.
2. That pending the hearing and determination of this application, this Honourable Court be pleased to stay the hearing of the Notices of Motion dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November 2019.
3. That this Honourable Court do order stay of all proceedings in this matter pending the hearing and determination of Milimani Criminal Case No. 1996 of 2019 and 2077 of 2019 Republic -vs- Marilyn Mercy Wanjiru and Christopher Mutira (consolidated) and Judicial Review cause JR MISC. NO 341 OF 2019 consolidated with JR NO 356 of 2019 Marilyn Mercy Wanjiru and Christopher Mutira -vs- the Director of Public Prosecution and 2 others.

4. That this Honourable Court to order that the application dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November 2019 be heard together as directed by the Hon. Justice Onyiego on 25<sup>th</sup> November, 2019.

5. That costs be in the cause.

Both counsel, Mr. Oigarah for the Parminder Singh Chadda and Mr. Simiyu for Marilyn Mercy Wanjiru, argued at length which of the three applications should be heard first. This court directed that it would determine which of the three applications should be heard first. I have considered the three applications and noted the orders being sought in each of the three applications. It is my considered view that the application dated 24<sup>th</sup> May 2021 should be determined first. The reasons for this are obvious. The application seeks to stay the hearing of the other two applications dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November 2019. The determination of this application will guide the direction the other two applications will take. It makes good sense to have it determined first.

### **The Application**

The grounds in support of the Application dated 24<sup>th</sup> May, 2021 are found on the face of it and on the Supporting Affidavit sworn by Marilyn Mercy Wanjiru on 24<sup>th</sup> May 2021 to the effect that she is the Administrator of the estate of her deceased husband Kanwaljit Singh Chadda. She states that the Objector's advocate moved this honorable court orally on 7<sup>th</sup> October, 2019 and obtained an order dated 9<sup>th</sup> October, 2019 directing the Directorate of Criminal Investigations, in conjunction with parties to this suit, to analyze and examine the signatures contained in the Power of Attorney of the deceased, in the email drawn by the deceased and in the Marriage Certificate between the deceased and Marilyn Mercy Wanjiru and compare the same with the signatures contained in the deceased's ID No. 4847134. She states that the said order was obtained through non-disclosure of the fact that the Objector in conjunction with the officers at the DCI had independently begun the process of examining the aforementioned signatures long before the order by this honorable court was issued and at the exclusion of the Administrator of the Estate; that the DCI prepared a forensic report after examining photocopies of the documents in dispute on the basis of which they made conclusions.

She further stated that the opinion is not conclusive since differences in the signatures have not been explained by the examiner and that the allegations that the signatures were forged is not well founded given that no proof of intention to defraud has been submitted; that the examiner's duty was to establish whether the signatures were genuine which they were since she and the deceased appeared before Irene Wamaitha Waweru Advocate on 8<sup>th</sup> June, 2016 and executed the disputed Power of Attorney; that the disputed DCI forensic Document Examination Report has been produced by the Respondent in his application dated 25<sup>th</sup> October, 2019; that on 25<sup>th</sup> November, 2019 Hon. Justice Onyiego gave directions that both the applications dated 25<sup>th</sup> October, 2019 and 25<sup>th</sup> November, 2019 would be heard together on 25<sup>th</sup> February, 2020; that on 13<sup>th</sup> December, 2019 she took a plea of not guilty in Milimani Criminal Case 1996 of 2019 Republic -vs- Marilyn Mercy Wanjiru; that one of the key witnesses in the criminal case is the document examiner who prepared the disputed DCI Forensic Document Examination Report and which document is an exhibit and whose validity is challenged in Criminal Case 1996 of 2019 and 2077 of 2019 Republic -vs- Marilyn Mercy Wanjiru and Christopher Mutira (consolidated).

She further stated that she has filed a Judicial Review application being JR MISC NO. 341 of 2019 consolidated with JR NO 356 of 2019 Marilyn Mercy Wanjiru and Christopher Mutira -vs- Director of Public Prosecutions and 2 others seeking prohibitory and certiorari orders quashing the charges levelled against her which was scheduled to be heard on 15<sup>th</sup> June, 2021; that it is in the interest of Justice that the forgery allegations in the above-mentioned criminal cases and the Judicial review cases be heard and determined first.

The Objector/ Respondent filed Grounds of Opposition dated 9<sup>th</sup> June, 2021 on the grounds that:

1. That the orders sought do not comply with the provisions of Section 6 of the Civil Procedure Act which stipulates that a fresh suit (Application) cannot be heard before suits (applications) which were filed previously are heard.
2. The orders sought do not comply with the Provisions of Order 18 rules 1 and 2 and Order 21 Rule 1 where a court is required to hear a case (application) by having the party with the right to begin state his case and then the other party states his case and then a judgment/ruling given at once and if not then within 60 days.
3. The Application herein has been heard in full; both parties have filed their submissions and what remains is for this court to give a ruling date for its ruling based on the evidence on record.
4. The ruling or judgment offends the requirements of a fair hearing as provided for by the Constitution of Kenya if a court is influenced and/or incorporates evidence which is not on record.
5. The Judicial Review Court which has the mandate under the provisions of Order 53(1)(4) to stay proceedings in all courts declined to grant an Order of Stay of Proceedings in the proceedings filed by the said Marilyn Mercy Wanjiru.

### **Submissions**

The Application was canvassed by way of written submissions. Both parties have filed their submissions. The Administrator's/Applicant's submissions are dated 21<sup>st</sup> July, 2021. She has raised the following issues for determination:

- i. Whether all proceedings in this matter should be stayed pending the hearing and determination of Milimani Criminal Cause No. 1996 of 2019 and 2077 of 2019 Republic -vs- Marilyn Mercy Wanjiru and Christopher Mutira (consolidated) and Judicial Review cause JR MISC. NO 341 of 2019 consolidated with JR NO. 356 of 2019 Marilyn Mercy Wanjiru -vs- the Director of Public Prosecution and 2 others.

ii. Whether the application dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November 2019 should be heard together as directed by Hon. Justice Onyiego on 25<sup>th</sup> November 2019.

iii. Who bears the cost of this application?

On the first issue she has submitted that this Honourable Court is clothed with inherent power under Rule 73 of the Probate and Administration Rules, 1980, to stay the instant proceedings including the pending applications dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November, 2019; that in the event the Applicant is acquitted, then the application dated 25<sup>th</sup> October 2019 will lack merit as it will have been that the marriage certificate is valid.

She submitted that under Article 50(2) of the Constitution every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved. She contends that there was malice and ulterior motive on the part of the Respondent and the Director of Criminal Investigations whose actions may result in a likelihood that she might not get fair trial as provided for under Article 50 of the Constitution. That this is evidenced in paragraphs 4 and 7 of her supporting affidavit which the Respondent has not filed any response to disputing the averments. She submitted that the charges levelled against her were instigated to advance the Respondent's application for revocation of grant and all pending applications maliciously instigated. That it is only right and fair that there be stay of any proceedings pending the hearing of the criminal cases as it will avoid a possibility of conflicting court findings with respect to the Forensic Examination Report.

She submitted that the finding whether or not the signature in the Marriage Certificate is valid or forged are criminal allegations and should therefore be reserved for the Criminal Division. She relied on the case of **Feisal Mohamed (Administrator to the Estate of Mary Njeri) - vs- Feisal Mohamed (Administrator of the Estate of Mary Njeri) (2019) eKLR** where Hon. Muchemi J in granted a stay of further proceedings in a civil suit pending the hearing and determination of a succession matter where the Court held that:

***“As this court is not a probate court, it lacks jurisdiction to entertain any proceedings touching on the suit property pending the determination of the cases before the Kadhis courts.”***

She submitted that this Honourable Court should consider the provisions of section 6 of the Civil procedure Act provides that:

***“No court shall proceed with the trial of any suit or proceedings in which the same matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties where the suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”***

On the second issue she submitted that the applications dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November 2029 should be heard together as directed by the court and that since the Respondent affirms that the order to that effect was made, then this matter is concluded and therefore this issue is not disputed.

The Objector/Respondent filed his submissions dated 9<sup>th</sup> June, 2021. He has submitted that on Prayer 4 of the Applicant's application under consideration, the orders and directions given by Justice Onyiego on 25<sup>th</sup> November 2020 have been complied with since the Administrator in her submissions dated 24<sup>th</sup> May, 2021 addressed both Applications. In addition, on 22<sup>nd</sup> March, 2021 it was on record that the court confirmed that the two said applications be heard simultaneously. He also submitted that orders prayed for in prayers 2 and 3 are addressed in his statement of Grounds of Opposition stated above. That the findings in Criminal Case 1996 of 2019 are not relevant to this civil application in that in criminal proceedings the standard of proof is beyond reasonable doubt while in civil proceedings it is on a balance of probability. Hence it is possible to be acquitted in a criminal case and yet be held liable in a civil case for the same actions.

He submitted that even if the court is inclined to wait and deliver a Ruling based on evidence which is not on record and does not exist at this time and may not be available for the next one year or so, the court must take note that such evidence of acquittal will have no impact in a civil case where the standard of proof is to a lower degree.

He submitted further that under the provisions of Order 53 Rule (1)(4) the High Court has the jurisdiction to grant leave to file for orders of Prohibitions and or Certiorari and direct that such leave shall operate as stay of proceedings in the courts currently seized of the case which is the source of the judicial review. That the Applicant was not granted such orders of stay when she was granted leave to pursue her case for Judicial Review. That this court does not have jurisdiction to grant similar orders of stay of proceedings as this is purely within the mandate of Judicial Review proceedings.

### **Analysis and Determination**

I have analyzed the Applications, the supporting Affidavit and the Responses. The gist of the matter is that the Administrator/Applicant is requesting this Honourable Court to stay all proceedings in this matter pending the hearing and determination of Milimani Criminal Case No. 1996 of 2019 and 2077 of 2019 Republic -vs- Marilyn Mercy Wanjiru and Christopher Mutira (consolidated) and Judicial review cause JR MISC No. 341 of 2019 consolidated with JR No. 356 of 2019 Marilyn Mercy Wanjiru and Christopher Mutira -vs- the Director of Public Prosecutions and 2 others.

The main argument by the Administrator/Applicant is that this court should grant stay proceeding to avoid a possibility of conflicting court findings with respect to the Forensic Examination Report and also that forgery allegations are criminal allegations reserved for the criminal court. The Objector/Respondent in turn argued that findings in the criminal cases are not relevant to this civil application and that the standard of proof is different for criminal and civil cases. That even though the Administrator/Applicant is acquitted in the criminal cases where she is charged with forging the marriage certificate, in probate proceedings it is still open to the court to decide that the Marriage

certificate is dubious based on the same evidence and decline to admit it as proof of her marriage.

The Administrator/Applicant has quoted Section 6 of the Civil Procedure Act in her submissions in support of her case. I fail to see the relevance of this section in respect of this matter. Each of the three applications before me seek different prayers and the criminal matter facing the Respondent, though relating to the allegations of forgery of the documents in use in this Cause, is a criminal matter while this matter is of a civil nature.

I have considered this matter. It is not lost to me that there is an application to have the grant issued to Marilyn Mercy Wanjiru revoked. I am also alive to the fact that this court differently constituted ordered for forensic examination of the documents with questioned signatures for the purposes of this Succession Cause. The outcome of that examination is being questioned through the application dated 25<sup>th</sup> November 2019. From the Notice of Motion dated 25<sup>th</sup> October 2019 and the Summons for revocation, it is clear to me that the actions of Marilyn Mercy Wanjiru as the administratrix of this estate is being questioned. It is for me to determine whether it is in the best interest of all the parties to grant stay of these proceedings as sought in this application.

To grant or decline granting a stay of proceedings is a matter of judicial discretion which must be exercised in the interest of justice. I have weighed the pros and cons in this case. It is not explained the stage where the criminal matters facing the Applicant herein are at and there is no evidence as to how long those matters will take. An administrator of an estate of a deceased person has certain duties as provided under Section 83 of the Law of Succession Act. These duties include completion of the administration of the estate within a given period. They include providing full and accurate accounts of the estate on application by any party or by order of the court *suo moto*.

By asking the court to stay all proceedings in this matter to await the hearing and determination of the criminal matters against the administratrix is akin to asking the court to stop the administration of the estate until those matters are determined. In my considered view, such an action is not in the best interest of justice. To my mind the expectations of the law are that an estate be administered to the conclusion. There are other interested parties in the estate, other beneficiaries. They have a right to be heard and their interest determined without unnecessarily holding them at ransom as we await the outcome of other pending matters.

The circumstances of this Cause dictate that this court declines to intervene in the natural course of this succession matter. I note that prayer one (1) of the application under consideration has been spent. Prayer four (4) has also been overtaken by events given that there are directions by Onyiego J that the two applications dated 25<sup>th</sup> October 2019 and 25<sup>th</sup> November 2019 be heard together. This leaves me with prayers 2 and 3. As I have reasoned above, it is not in the best interest of justice to grant stay of the two applications and all the proceedings in this Cause. Consequently, I decline to grant prayers 2 and 3 of the Notice of Motion dated 24<sup>th</sup> May 2021. Let parties proceed to move the court to hear the remaining two applications to pave way for the main Cause. The outcome of this is that the Notice of Motion dated 24<sup>th</sup> May 2021 stands dismissed. Each party to bear own costs. It is so ordered.

**Dated, signed and delivered this 23<sup>rd</sup> Day of November 2021.**

**S. N. MUTUKU**

**JUDGE**