



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO 321 OF 2015

IN THE MATTER OF ESTATE OF JOHNSON OKEMWA NYAKUNDI – DECEASED

DINAH BOSIBORI OKEMWA.....APPLICANT

VERSUS

JANE BOSIBORI OKEMWA.....1ST RESPONDENT

MARY KERUBO OKEMWA.....2ND RESPONDENT

KEPHA MARITA OKEMWA.....3RD RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 28th September 2021 made by Dinah Bosibori. The applicant has moved this court seeking the following reliefs:

“(b) THAT this application be certified urgent and service thereof be dispensed with in the first instance.

(c) THAT pending hearing and determination of this Application interparties, the Manager ABSA BANK Kisii branch do release Kshs. 400,000/- and Kshs. 100,000/- to the applicant DINAH BOSIBORI OKEMWA and JANE BOSIBORI OKEMWA respectively as per its order dated 30th June 2021.

(d) Pending hearing and determination of this application this court be pleased to release the Kshs. 400,000/- and Kshs 100,000/- to Dinah Bosibori Okemwa and Mary Kerubo Okemwa respectively.

(e) THAT Order number 3 be reviewed and set aside and each widow be at liberty to collect their dues directly.”

2. Prayers (b), (c) and (d) of the application are spent. The applicant is seeking for review of the orders granted by this court on 30th June 2021. The orders were granted following a notice of motion application dated 9th June 2021.

3. The said order reads as follows:

“3. THAT the manager ABSA Bank Limited, Kisii Branch is hereby ordered to facilitate the withdrawal and release of the said monies to the administrators for onward transmission to the widows aforesaid”

4. The only ground upon which the application rests is that MARY KERUBO OKEMWA has refused to avail herself before the bank to facilitate the said withdrawal of money as per the court dated 30th June 2021. The applicant claims that her refusal has grave consequences especially to Dinah Bosibori who is sickly and has no dwelling place.

5. Jane Bosibori Okemwa in a replying affidavit dated 8th October 2021 filed on 12th October 2021 supported the applicant’s application. She averred that in the month of June 2021 they visited ABSA Bank Limited but the said Mary Kerubo Okemwa declined to accompany them to the bank.

6. The 2nd and 3rd respondents opposed the application. In the replying affidavit sworn by Kepha Marita Okemwa it was deposed that the application is lacking in merit as no foundation has been laid to warrant issuance of the orders sought. They also challenged the applicant's decision to enjoin the interested party as it is illegal.

7. The 3rd and 4th respondent further challenged the form of the application before the court. It was averred that despite the affidavit being sworn by Dinah Bosibori Okemwa has been signed by the deponent, who is the advocate Samwel Kerosi by thumb print.

SUBMISSIONS

8. **Mr. Kerosi**, counsel for the applicant attributed his name appearing in the supporting affidavit as a typographical error that can be corrected. He submitted that the court should allow each widow personally approach the bank to be given the money due as per the court order.

9. Counsel for the 3rd and 4th respondent, **Mr. Ochwangi**, submitted that the order sought to be reviewed is a consent order which can only be reviewed on grounds of no fraud or coercion none of which has been proved. On the affidavit it was submitted that the defect on the face of the affidavit meant that the application was filed without a supporting affidavit. Mr. Ochwangi contends that since the order has been captured in the main judgment which they intend to appeal against, the order of 30th June 2021 has been overtaken by events.

ANALYSIS AND DETERMINATION

10. Before dealing with the crux of the application, I note that the applicant has in the most unorthodox manner introduced a fresh party, Barclays Bank Limited (now **Absa Bank Kenya PLC**) as an interested party, by simply adding its name in the application. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as “*a person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation*”. The court in **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR**, stated:

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.

11. The proceedings before concern the distribution of the deceased estate to his beneficiaries. It is clear that Absa Bank Kenya PLC has no legal stake in the deceased's estate. In any event no formal application was made to enjoin Absa Bank Kenya PLC as an interested party. I therefore find no reasonable cause for the including the intended interested party to these proceedings.

12. I now turn to consider whether the applicant have proved any ground for the setting aside of a consent order. The orders sought to be varied by the applicant arise from the consent entered into by the parties and adopted by the court on 30th June 2021. The only reason given for the review is that only ground upon which the application rests is that the 2nd respondent has refused to avail herself before Absa Bank Kenya PLC to facilitate withdrawal of money as per the court order dated 30th June 2021.

13. The *locus classicus* on factors to be considered when setting aside of consent orders was discussed in the case of **Flora Wasike v Desterio Wamboko [1982-1988] IKAR 625**, at page 626 wherein it was held:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

14. In **National Bank of Kenya Limited v James Orengo [2005] eKLR** the court stated:

“Now, there is nothing in this case to show that such circumstances existed. There is no claim of fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hiranj's case, “a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

.....

...I find that there were no such circumstances – there was no suggestion of fraud, misrepresentation, or collusion, and as I have found, no possibility of mistake. No specific statute or provision of law was cited to show that the consent judgment was contrary to such law, or public policy. The lower court had absolutely no jurisdiction to re-write the consent between the parties and order that interest “would be at court rates”.

15. The applicant has not demonstrated that the consent was entered into as a result of fraud, collusion, illegality, mistake, or it was contrary to the policy of the court or based on ignorance of material facts.

16. In any event at this stage of the proceedings, that is after the delivery of the final judgment, an application for review of an interlocutory order appears to be strange. It is trite law that any and all interlocutory orders lapse upon delivery of judgment after the full and final determination of a suit. This was the position held by the Court of Appeal in **Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR** where the court observed that;

“77. We agree that this Court should not make orders in vain. We reiterate that this appeal arises from an interlocutory ruling and it is trite law that any and all interlocutory orders lapse upon delivery of judgment after the full and final determination of a suit. In this matter, all counsel disclosed to this Court that judgment on the amended Petition is due for delivery on 6th April 2016. It is our considered view that upon delivery of judgment in the substantive Petition as amended, the interlocutory orders made on 18th December 2015 shall automatically lapse. The effective orders in this matter and Petition shall be as per the decree and orders made in the final judgment delivered by the trial court.”

17. In my view, if there was any disobedience of court orders by the 2nd respondent, then contempt proceedings ought to have been instituted.

18. In the end, the Notice of Motion application dated 28th September 2021 is hereby dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF NOVEMBER, 2021.

R. E. OUGO

JUDGE

IN THE PRESENCE OF;

MR. KEROSI FOR THE APPLICANT

MR. OCHWANGI FOR THE RESPONDENT

MS. RAEL COURT ASSISTANT