



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO.212 OF 2015

ESTATE OF THE LATE GITONGA INANGA EMONGI - (DECEASED)

LOICE MUTHONI GITONGA.....1ST ADMINISTRATOR

VERSES

JAMES KABII MIRITI.....2ND ADMINISTRATOR

RULING

1. There are two sets of applications herein, namely the application dated **18th June, 2019** by the 2nd Administrator and that of the 1st Administrator dated **31st July, 2019**. The court proposes to issue the two rulings simultaneously herein.

2. The application dated 18th June, 2019 prays for the following orders;

(a) This court be pleased to review its judgment delivered on 28th May, 2019 to include Plot No.04 (Garage) in Lodwar Township in the distribution schedule and amend the acreage of Land Parcel No. Kitale Municipality /Kaura Wa Bichau/1168 to read 1.5 acres instead of 0.5 acres.

(b) The 2nd Administrator on behalf of the 1st house be authorized to receive half of the rental income from plots Nos. 273B, 164B, 66 and 04 in Lodwar Township amounting to Kshs. 240,500 from the month of July, 2019 until the grant is confirmed in regard to the shares of each beneficiary in the 2 houses.

(c) The 1st Administrator to give account of all the money she has received as rent from Plot No. 273B, 164B, 66 and 04 in Lodwar Township amounting to Kshs. 481,000 per month from May 2015 to June 2019.

(d) The 1st Administrator be ordered to surrender a half the amount of rent collected above to the 2nd Administrator to receive on behalf of the first house.

3. The application is supported by the affidavit of **JAMES KABII MIRITI** sworn on the same date. He has laid out a narration that the deceased rental income from the aforementioned houses in Lodwar brings a total of Kshs. 481,000 per month and that the first house has never benefited from the same.

4. He has further indicated that Land Parcel No. **KITALE MUNICIPALITY /KAURA WA BACHAU/1168 (MERU FARM)** purchased by the deceased on 5/8/2006 measures 1.5 acres and not 0.5 acres and that the same ought to be corrected. He equally spoke of the existence of Plot No.4 at Lodwar Township which apparently the court did not take into consideration.

5. He deponed that the 1st Administrator ought not only to be compelled to surrender the half of the rent she collects from the Lodwar rental units but also to give an account of the rent collected from May 2015.

6. The 1st Administrator has opposed the above application vide the grounds dated 3rd of December, 2019 in which she states that the review cannot be undertaken while an appeal was pending before the Court of Appeal. That the application of giving of accounts cannot be entertained at this juncture as the same ought to have been raised before delivering of the judgement on 28th May 2019.

7. Parties were then ordered to file written submissions which they did and the court has perused the same.

8. It is not contested that there are two parcels of land which this court may not have captured during trial namely the plot at Lodwar Township No. 04 as well as the parcel at Meru Farm specifically its size.

9. There is no prejudice to be suffered by either of the parties should this correction be done. In any case the application for the confirmation of grant is yet to be effected. The 1st Administrator has argued that no review can be undertaken as long as there is a pending appeal.

10 . Whereas that is ordinarily the legal position, in the case at hand the Applicant, 2nd Respondent, has not file any appeal. Secondly, the error to be corrected does not prejudice anybody but harmonises the estate by bringing in corrections which this court could have corrected *suo moto*. The two properties in any event belongs to the estate.

11 . Consequently, the judgment of the court dated 25th May 2019, is hereby reviewed so as to capture the following, namely, parcel number KITALE MUNICIPALITY /KAURA WA BICHAU/1168 to read 1.5 acres instead of 0.5 acres. Secondly, parcel no.04 at Lodwar Township constitutes the estate of the deceased.

12 . On the question of the 2nd Administrator collecting part of the rent from the Lodwar properties, it is not in dispute that all along the rent has been collected by the 1st Administrator. At least she has not disputed. Neither has she counteracted the contention by the Applicant that indeed the said rental income emanates from the deceased estate.

13 . Taking into account the above facts, it is necessary that pending any further action by this court or the Court of Appeal in regard to the estate, the beneficiaries ought to enjoy the proceeds from the estate.

14 . Earlier this court had allowed the Applicants house to be paid the sum of Kshs. 240,500 or half of the amount collected. It is judicially noted that the said buildings or premises may require repairs and such other facelifts occasionally beside other management costs. To this end this court shall reduce the amount due to the 2nd house by a sum of kshs. 20,000 so that they be paid a sum of kshs. 220,000 per month. The deducted amount of kshs. 20,000 shall go towards any service charge or any outgoings in form of taxes or any other statutory deductions.

15 . Further and so as to forestall any conflicts pending the confirmation of the grant and or the directions by the Court of Appeal the sole management of the aforesated properties should remain as it was namely under the management of the 1st Administrator unless there is evidence to the contrary. To that extent there should be remittance of the above amount from the delivery of this ruling by this court.

16 .The orders issued on 25th July, 2019 be complied with up to the delivery of this ruling. In other words, the amount of kshs. 240,500 ought to have been paid from July, 2019 until the delivery of this ruling.

17 . The other prayers for the giving of accounts may not be necessary at this juncture for the reason that it would have been prudent to have raised the same prior to the delivery of the judgment.

CONCLUSION

18 . The application dated 18th June, 2019 is hereby allowed as follows;

(a) Land Parcel number Kitale Municipality /Kaura Wa Bichau /1168 should be indicated in the judgment of this court dated 25th day of May, 2019 as measuring 1.5 acres and not 0.5 acres.

(b) Land parcel number 04 situate at Lodwar Township constitute the deceased's estate.

(c) The 1st Administrator do pay a monthly sum of kshs. 220,000 to the 2nd Administrator on behalf of their house, being proceeds from the rental income collected from the deceased's premises and or houses at Lodwar township namely Plots numbers 273B, 164B, 66 and O4 with effect from 30th March, 2019.

(d) Each party shall bear their respective costs.

19 . Turning now to the application by the 1st administrator dated **31st July 2019**, she has essentially prayed for orders that she be granted leave to appeal out of time and a stay of execution of the judgment of this court dated 28th May, 2019. She has prayed alternatively for maintenance of status quo pending the decision of the intended appeal.

20 . She has supported her application by her affidavit dated the same date and has attached copies of the notice of appeal to the Court of Appeal as well as the letter requesting for the typed proceedings.

21 . From the submissions on record, the Applicant did concede that the prayer for leave pending appeal was not necessary and the same was made in error. That prayer was thus abandoned rightly.

22 . On the issue of stay pending appeal, it is noted that the grant issued has not been confirmed and neither of the parties has made such application.

23 . The Respondent, the 2nd Administrator, has argued in his grounds of opposition that the application ought to be disallowed for the simple reason that the trial court captured the issues well noting that this was a polygamous set up and Section 40 of the Law of Succession

Act applied in all fours.

24 . He urged the court to take into consideration the fact that the Court of Appeal may take a long time to resolve the appeal due to the current backlog.

25 . The court has again read the rival submissions by the parties on record and it does not intent to reproduce them here. The grounds of stay pending appeal are well stated under **Order 42 rule 6 (1) and (2) of the Civil Procedure rules**, that is;

under **Order 42 rule 6 (1) and (2) of the Civil Procedure rules**, that is;

(1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

26 . Will the estate suffer any prejudice if stay is granted? I do not think so since the parties as at the demise of the deceased were well settled and operating well. Save for the orders earlier given above on the payment of the proceeds to the 2nd Administrators house for their use and upkeep pending further decision of this court or the Court of Appeal, the circumstances obtaining as at the date of deceased demise ought to be maintained.

27 . In any even the issues of titles and such other transfers must await the outcome of the confirmation of the grant.

28 . In the premises, this application is allowed as follows,

(a) There be maintained status quo in the estate herein pending the outcome of the appeal to the Court of Appeal.

(b) Each party shall meet its respective costs.

Dated, signed and delivered in open court at Kitale this 10th day of March, 2020.

H. K. CHEMITEI

JUDGE

10/03/2020