



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1559 OF 1995

IN THE MATTER OF THE ESTATE OF ZAKAYO KIPKOECH KIRUI (DECEASED)

ROSEMARY CHEPKORIR SANG.....ADMINISTRATRIX/ APPLICANT

VERSUS

MARGRET ISUTSA KIRUI.....RESPONDENT

RULING

1. This Ruling relates to 2 Applications dated the **5th November 2014** and **4th August 2016**. In the application dated the 5TH November 2014 the applicant seeks the following orders;

- i. That the Court be pleased to set aside or as the case may vary the ruling/ order dated 21st March 2014 together with all consequential orders arising therefrom thereby allowing the orders that the Applicant sought in her application dated 6th June 2014.
- ii. That in the alternative and without prejudice to the foregoing prayers, if prayer (2) above shall not be allowed, then Respondent be ordered to desist from interfering, stopping or in any other manner preventing the Applicant from performing her statutory duties as an Administrator of the late Zakayo Kipkoech Kirui's estate.
- iii. That necessary directions be given.
- iv. That then costs of this application be borne by the Respondent.

The application is premised on the following grounds that;

- (a) By the time the application dated 27th May 2013 was presented in Court by the Respondent a Certificate of Confirmation of Grant had already been issued.
- (b) Application dated 27th May 2013 and the subsequent ruling was therefore overtaken by events upon issuance of a Certificate of Confirmation of Grant.
- (c) The Respondent has not preferred any appeal against the ruling/ decision given by the court on 9th May 2013.
- (d) Culture of impunity practised by the Respondent should be stopped by a Court order.
- (e) The Applicant who is the holder of Letters of Administration has been prevented from performing her statutory duties by the Respondent.
- (f) Earlier attempts to cite the Respondent for being in contempt of Court was met with numerous applications culminating with one dated 3rd November 2009 that was dismissed by Hon. Lady Justice Nambuye (now Judge of Appeal) who was then sitting in Nairobi High Court Family Division.
- (g) Authorities/ precedents that were presented by the Respondent in support of her application dated 27th May 2013 does not apply in succession matters. It could apply in civil matters. Rules of Civil Procedure that are applicable in succession matters are well stated under Rule 63 (1) of The Probate and Administration Rules.
- (h) It is in the interest of justice that the Court makes a final decision on this long-standing matter.

(i) The respondent and Raphael K. Ng'ethe have arrogated themselves the duties of the Administrator when they do not hold any grant of Letters of Administration

2. Rosemary Chepkorir in her affidavits avers as follows; she is the administratrix of the estate of the deceased Zakayo Kipkoech Kirui. That after Justice Kimaru confirmed the grant there has been no application made by the Respondent to revoke or annul the said grant. That in the application dated 27.05.2013 there was no mention of the confirmed grant and that the Respondent was simply seeking for stay of execution of the decision and or distribution as was ordered in the ruling. That the intended appeal against the ruling delivered by Justice Kimaru on 9.5.2013 will be an exercise in futility as the confirmed grant will remain unchallenged and that she should be allowed to execute her duties as the administratrix. That since 21.3.2014 the Respondent has not taken any further step, she has failed to file any accounts for over twenty years. That the Notice of Appeal filed does not relate to the confirmed grant. That the stay orders is unenforceable on the face of the confirmed grant. That if the stay order is set aside then the Court should allow her application dated the 6.6.2013 which was dismissed. That the Respondent should be ordered to desist from intermeddling with the subject estate and allow her unlimited access to administer the estate. That the Respondent has no legal standing to claim to be managing the estate. That there is no law or section of the Law of Succession Act that allows a stay of a grant. That the Act deals with revocation or annulment of a grant. That the Respondent has a habit of filing numerous notices of appeal. That the issue of the non-existent Will was decided by the Court and the Court cannot revisit the issue.

3. The application was opposed by the Respondent. The Respondent avers in her affidavit dated 16.6.2017 that the Applicant filed another application dated the 5.11.2014 which was heard by the court and dismissed. That though the application was filed on the 7.11.2014 it was served on her on the 12.6.2017. That there has been no review or appeal against the stay order of 21.3.2014 and thus the application is an attempt to have the Court sit on appeal against its own orders. That the estate herein was distributed by the court on the 9th May 2013 and a certificate of confirmation of grant issued. That being dissatisfied with the said decision she filed a Notice of Appeal against the distribution. That by a Ruling dated the 21.3.2014 the Court allowed her application and granted a stay of pending appeal and dismissed the application dated 6.6.2013. That the Ruling of 21.3. 2014 stayed the confirmed grant. That her application for stay could only be filed after the order of confirmation and distribution of the estate made on the 9.3.2013. That the allegation that the application and ruling were overtaken by events is misconceived and unfounded. That her intended appeal has substance as the deceased left a Will which has not been invalidated by a competent court. That there has been multiple applications by the Respondent and the delay in having the proceedings typed have been partly caused by movement of the court file from the court registry to the Judicial Service Commission. That she has not intermeddled with the estate as alleged and that the Respondent has not demonstrated how she has prevented her from discharging her duties.

DETERMINATION

4. After considering the affidavits filed and the rival submissions and the history of this matter I find as follows; after the grant was confirmed and the certificate of confirmation of grant issued the Respondent filed an application seeking stay. The said application was granted by Justice Musyoka on the 21.3.2104. The Respondent claims that she has not been able to have the proceedings typed because of the movement of the file to JSC and multiple applications by the Respondent. The Applicant seeks to have this court set aside the order of 21.3.2014 or to vary the Ruling. It is my view that I cannot set aside the said order or vary it. There is a stay in place pending appeal. Any of the parties are at liberty to move to the Court of Appeal to have the issues raised on the stay order heard on appeal. The said Ruling also dismissed the Applicant's application dated 6.6.2014. What the Applicant/ Administratrix should do is to appeal against the dismissal order of her application dated the 6.6.2014.

5. In the application dated 4th August 2016 the applicant **Elijah Cheruiyot Chebelyon** seeks the following orders;

i. That this Honourable Court be pleased to set aside or as the case may vary the ruling/ order dated 21st March 2014 that was delivered on 21st March 2014 together with all the consequential orders arising therefrom thereby allowing the prayers that the Administratrix Rosemary Chepkorir Sang sought for in her Application dated 6th June 2014.

ii. That in the alternative and without prejudice to prayer (2) above, a specific order enabling the Administratrix to execute a deed of partition of **MOLO LR. NO. 11336 (I. R. NO. 20773)** do issue and that the Administratrix does sign all the necessary documents that will enable the Land Registrar/ Registrar of Titles to issue a title deed exclusively in the name of the Applicant for the 402 acres entitlement as per then confirmed grant issued on 9th May 2013.

iii. That the cost of this application be borne by then Respondent.

The application is premised on the following grounds;

(a) The Applicant has no interest in the estate of Zakayo Kipkoech Kirui (deceased) and yet he cannot freely enjoy his proprietary and constitutional rights over his portion in land parcel number MOLO LR. NO. 11336 (IR. NO. 20773) because of the protracted succession proceeding between the Respondent and the family of the late Kirui.

(b) Orders sought shall not prejudice parties that have interest in the late Kirui's estate.

(c) For as long as the distribution of the subject estate is not concluded, the Applicant shall continue to suffer irreparable loss. The Applicant cannot utilize his land and get maximum returns at the moment.

6. In his affidavit in support of his application dated the 4th April 2016 the applicant (Elijah) avers that he is an interested party. That his interest in the matter is the land situate in Molo known as I.R.No.20773, the same was registered in the name of the deceased and him as tenants in common. According to him the order issue on the 21.3.2014 was blanket order and that the Respondent has never preferred any appeal. That the said order never took into account his interests. He has suffered as a rest of the said orders as he has no title document of his right share, he cannot get a loan from AFC nor can he subdivide the property.

7. The Respondent filed an affidavit dated the 3rd May 2017 in response to the application filed by Elijah. She avers that whilst it true that during the deceased's life time the deceased co-owned the property known as L.R.No 11336 (I.R. No. 20773) with the Applicant there was a dispute between the two as shown in the documents she annexed. That the property is part of the impugned decision which is pending appeal. That interfering with the decision will interfere with her appeal. That the Ruling of 21.3.2014 stayed the distribution of the estate pending the hearing and determination of the appeal. That the Court cannot sit on appeal against its own ruling.

DETERMINATION

8. The Applicant in this application too seeks to have the orders of 21.3.2014 set aside and to have the orders sought in the application dated 6.6.2014 granted. The orders of 21.3.2014 stayed the distribution of the deceased's estate. As already stated any of the parties could have moved to the Court of Appeal to have the order set aside or varied. This Court cannot sit on appeal on it's the orders issued by Justice Musyoka. Secondly on the Application dated 6.6.2014, any of the affected parties was at liberty to file an appeal.

9. On the prayer to have a specific order enabling the Administratrix execute a deed of partition of **Molo L.R. No. 11336(I.R.No. 20773)**, my understanding of the stay order is that the Administratrix cannot continue with the distribution of the estate. The Administratrix has also not demonstrated how the Respondent is intermeddling with the estate or how she is being stopped from performing her statutory duties as the administrator of the late Zakayo Kipkoech Kirui.

10. Lastly when a Court is asked to review or set aside an order it is guided by the provisions of Order 45 of the Civil Procedure Code. The standards set out by the law are very clear. There must be discovery of a new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or there is some mistake or error apparent on the face of the record; or for any other sufficient reason and that the application has been made without unreasonable delay. I am constrained to agree with the Respondent that nothing in the grounds or the supporting affidavits of the Applicant's reveal any of the required standard requirements set out in Order 45. I find too that the Applicants have raised issues in their submission which in my view should be dealt with at the hearing of the Appeal.

11. All in all I find no merit in the 2 applications and I dismiss each one. This matter has been in court for close to 30 years. The parties need to move on. Any of the aggrieved parties can move to the Court of Appeal. The Deputy Registrar is requested to ensure that the parties are supplied with certified copies of the proceedings and the necessary certificate to enable the parties pursue the appeal. Each party to bear its own costs.

12. Before I conclude I must apologise in delivering this Ruling late, I was transferred from the Family division Nairobi in April 2018. The court file was not in my possession for some time as I was informed that it had been taken to JSC on 3 occasions. On its return to the Division the file was placed in the strong room and was handed over to me sometime in February 2019.

Dated signed and delivered at Nairobi this 30th day of May 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Sigira **For the Applicants**

Mr. Ngeru h/b for Mrs. Judy Thongori **For the Respondents**

Ms Mercy **Court clerk**