



mREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1940 OF 1996

IN THE MATTER OF THE ESTATE OF FREDRICK POLWARTH KIBUTHU KUBAI – (DECEASED)

CHRISTINA GAKUHI KUBAIAPPLICANT

VERSUS

MOSES MENDA KIBUITURESPONDENT

RULING

1. The Application coming for consideration in this ruling is the summons dated 29.8.2019 seeking the following orders:

(i) THAT this Honorable Court do grant leave to the Applicant to appeal against its ruling and orders of 2.8.2019.

(ii) THAT this Honorable Court be pleased to grant an order for Stay of Execution of the Ruling delivered on 2.8.2019 confirming grant of Probate issued 19.12.2013 pending the hearing and determination of the Applicant's intended appeal

(iii) THAT the costs of the Application be provided for.

2. The Application which is brought under section 50 of the Law of Succession Act and Rule 59 of the Probate and Administration Rules and also Article 48 of the Constitution of Kenya 2010 is supported by the Affidavit of the Applicant ANDREW KAMAU DENIS KUBAI (hereafter referred to as the Applicant) sworn on 29.8.2019.

3. The Respondent CHRISTINA GAKUHI KUBAI (hereafter referred to as Executrix/Respondent) filed a Replying Affidavit sworn on 14.10.2019 in opposition to the Application dated 29.8.2019.

4. The Court directed that the parties file written submissions in the Application dated 29.8.2019. The Applicant filed his submissions on 29.10.2019 and the Respondent filed Submissions dated 4.11.2019. DR. JOHN KHAMINWA SC who was representing MOSES MENDZA KIBUTHU KUBAI (the 1st Respondent in the Judgment dated 2.8.2019) made oral submissions in support of the Application dated 29.8.2019.

5. DR. KHAMINWA SC had filed a Notice of Appeal dated 13.8.2019 and in his oral submissions, he said he fully endorsed the submissions and authorities filed by the firm of AGN KAMAU for the Applicants.

6. DR. KAMAU KURIA SC for the Executrix/Respondent also made oral submissions in court responding to the submissions by DR. JOHN KHAMINWA.

7. This case has been pending before this Court for 23 years since the year 1996. The deceased herein FREDRICK POLWARTH KIBUTHU KUBAI died on 1/6/1996.

8. In the same year, two Succession Causes were filed being Succession Cause No. 1860 of 1996 (filed by the Executrix/Respondent herein) and Succession Cause No. 1940 of 1996 (filed by MOSES MENDZA, MARY SIDI and FLORENCE MUKUHI). The two Succession causes were consolidated and subsequently the Court validated the handwritten Will dated 19.1.1991 in its judgment dated 19/12/2013 and found that the Executrix/Respondent was a widow of the deceased.

9. The 1st and 2nd Applicants did not appeal against the Judgment dated 19.12.2013 which validated the will but instead lodged a complaint with police resulting in Chief Magistrate's Criminal case No. 1495 of 2014 REPUBLIC VS. CHRISTINA GAKUHI KUBAI alias

CHRISTINA GAKUHI KIRAGU.

10. The Applicants filed a summons for review dated 4/4/2014 in which they sought to review the Judgment dated 19.12.2013 and the said summons for review was dismissed by Hon. Justice Kimaru on 14.6.2014.

11. The Applicants also filed another Summons for Review and Setting aside of the said Judgment dated 25.11.2014 on the grounds that the Will was a forgery and the same was also struck out on 13.3.2015.

12. The Applicants also filed a Summons dated 12.5.2016 seeking prohibitory orders and Review of the orders of 13.3.2015 and Judgment dated 19.12.2013 which was also dismissed on 26.1.2017.

13. The parties filed several applications and on 1.4.2019 this Court ordered that in order to expedite the disposal of this case, the executrix/Respondent was directed to file a Summons for Confirmation and the other parties were at Liberty to raise objections within 30 days.

14. The Executrix/Respondent filed a summons for confirmation dated 23.4.2019 and on 22.10.2019 the Court directed that the said summons be canvassed by way of written submissions.

15. The applicant filed an affidavit of protest and a summons for dependency and also written submissions which the Court considered.

16. The Court subsequently ruled as follows:

(i) THAT the Court having proved the handwritten Will of the deceased in the Judgment dated 19.12.2013 and the Protestors having failed to file an appeal against the Judgment, they have no basis for challenging the validity of the said Will.

(ii) THAT the Summons for Confirmation of grant of Probate issued to the Executrix of the Will of 19.12.2013 be and is hereby confirmed.

(iii) THAT the Protestors having failed to prove that the Will did not make reasonable provision for all the beneficiaries of the deceased, this court is duty bound to respect the wishes of the deceased and directed that the property of the estate to devolve in accordance with the bequest in the handwritten Will dated 19.1.1991.

17. I have considered the submissions filed in the Application dated 29.3.2019 and also the oral submissions by the Learned Senior Counsel Dr. JOHN KHAMINWA and I find that the said issues ought to be raised in the Court of Appeal and for that reason I will not refer to the same in this ruling.

18. The Application before me is seeking leave to appeal against the orders issued on 2.8.2019 and also stay of execution of the Ruling of this Court delivered on 2.8.2019.

19. The Conditions for grant of stay pending appeal are as follows as per The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

20. I find a notice of appeal was filed on 13.8.2019 and this Application was filed on 29.8.2019. The Application is accordingly allowed in the following terms:

(i) THAT 28 days leave to appeal against the Ruling and orders of this Court made on 2.8.2019 be and is hereby granted

(ii) THAT stay of execution of the said Ruling is granted pending the intended appeal.

(iii) THAT each party to bear its own costs of the application.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 22ND DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.