



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 955 OF 2013

IN THE MATTER OF THE ESTATE OF RODGER ROBSON (DECEASED)

RULING

1. The application before me for determination is dated 21st September 2017 but filed on 3rd October 2017 under certificate of urgency seeking stay of execution and revocation or annulment of grant issued to the respondent on 30th October 2013 in relation to the estate of Rodger Robson (deceased) pending hearing and determination of the application.
2. Application which is filed pursuant to Section 76 of the Law of Succession is based on grounds on the face of it and an affidavit in support deposed on 21st September 2017 by Agnes Kagure Kariuki the applicant herein who contends that the grant was obtained fraudulently by making false statement as the written Will attached to the petition application was a forgery.
3. In response, the respondent (Executor) one Guy Spenser Elms filed a replying affidavit deposed on 30th October 2017 but filed on 2nd November 2017 challenging the application.
4. According to the applicant's averment in her affidavit in support, she claimed that sometime in 2013, she bought property from the deceased herein being LR. 2327/10 and 2327/117 worth Kshs.100,000,000/= (See annexure marked "A" being Sale Agreement) and subsequently had the deceased execute a transfer through a conveyance deed dated 18th November 2011 (see transfer marked B).
5. That to the applicant's surprise, when the deceased died, the respondent petitioned for a grant of probate with written Will annexed reflecting his name as the executor besides Sean Robert Battye the co-executor.
6. Subsequently, the respondent reported to the police alleging that the applicant had fraudulently obtained transfer documents in respect of the said property culminating to further investigations. That after presenting her documents to the police and following intensive forensic investigation, it turned out that the respondent had forged the said Will and a Power of Attorney leading to his arrest and prosecution on 7th September 2017 vide Nairobi Chief Magistrates' Cr. C. No. 1537/2017 (See copy of Charge Sheet marked "J").
7. On the other hand, the respondent stated in his replying affidavit that, the application before court is an abuse of the court process as the applicant had already filed similar application dated 16th March, 2017 which is currently being heard and is yet to be determined. He further contended that the application is a delaying tactic with the sole purpose of further delaying this matter. The respondent nevertheless admitted having been charged with forgery of the Will in question but averred that he was innocent until proven guilty in a court of law.
8. During the hearing, Mr. Maloba Advocate who stated that he was appearing for the applicant jointly with Mr. Osundwa, abandoned the rest of the prayers save for stay of execution orders pending the hearing of the already filed application for revocation which is partly heard. Mr. Shah for the respondent however had no objection with the abandonment of the rest of the prayers. It is however worthy noting that in prayer two, the applicant only prayed for stay of execution of grant pending hearing and determination of the application.
9. Basically, Mr. Maloba reiterated the averments contained in the supporting affidavit of the applicant urging the court to be conscious and cautious of the fact that a grant that had been obtained through a forged Will cannot be executed hence the need to stay the same until the application for nullification of grant already filed is heard and determined.
10. In submission, Mr. Shah equally adopted the averments contained in the respondent's replying affidavit asserting that, the respondent is innocent until proven guilty before a court of law. Mr. Shah further submitted that Section 76 does not apply to applications for stay hence the application is bad in law. Learned counsel further stated that, there was no proof of intermeddling with the estate as provided under Section 45 of the Law of Succession Act. Mr. Shah urged the court to dismiss the application and hearing be expedited for quick disposal of the matter.
11. I have considered application herein, supporting affidavit, replying affidavit and submissions by both counsels. There is no dispute that a grant of probate with Will attached was issued on 30th October 2013 with the respondent being the only surviving brother and sole dependant to the deceased and one of the executors besides Sean Robert Battye who signed a renunciation of right of probate with Will on 6th May

2013.

12. After perusing the court record, it is apparent that the applicant had on 16th March 2017 filed similar application seeking revocation of the grant herein save for stay of execution. The application is partly heard with one Thomas Murima one of the objectors having testified.

13. I have further noted from the court record that, on 24th March 2015, the application for partial confirmation of grant was allowed by Judge Achode but with the exclusion of the two properties now claimed by the applicant. The court further directed and advised the parties to seek redress before Environment and Land Court which they did vide ELC Case No.80/2015 for purposes of determining ownership. The matter understantly is still pending determination.

14. In the circumstances, there is no eminent danger that the applicant will suffer or lose out in the event the orders sought are not granted. On the same vein, the application for revocation dated 16th March, 2017 filed by the applicant has been heard partly hence the need to expedite the process. There is no way the respondent will intermeddle with and dispose of the property herein in dispute without a confirmed grant which is begged on the outcome of the Environment and Land Court case. A grant perse does not confer any power to the executor to transfer any property before confirmation.

15. Since those affected by the partially confirmed grant have not raised any concern with regard to their property, the applicant cannot claim a likelihood of her property being disposed of before her application for revocation of grant is heard and determined.

16. As to whether the Will used to obtain the grant and subsequently the partially confirmed grant was a forgery, this is a matter of evidence which is yet to be determined after fully hearing the application for revocation.

17. Lastly, the application herein sought stay of grant of probate of written Will and any orders issued in this case pending hearing and determination of this application. When this application was filed under certificate of urgency, the applicant anticipated exparte stay orders pending hearing and determination of the application. Since no orders pending hearing and determination of the application were granted at the exparte stage, prayer two cannot apply at this stage as the same is spent. The second limb of that prayer is in relation to stay of execution in respect of any orders in this file. This prayer is too general and ambiguous hence cannot be granted in the manner in which it is worded.

18. For the above reasons stated, application herein is disallowed and the same is therefore dismissed with no order as to costs.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JANUARY 2018.

J.N. ONYIEGO (JUDGE)

In the presence of

No appearance for the Applicant

Mr. Shah..... Counsel for the Respondent

Edwin.....Court Assistant