



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 150 OF 1992**

**IN THE MATTER OF THE ESTATE OF JAMES MAIA LUA (DECEASED)**

**1. STANLEY KYOVO LUA**

**2. KYALO LUA**

**3. WAMBUA LUA.....ADMINISTRATORS/RESPONDENTS**

**VERSUS**

**1. ANNAH KASALU LUA**

**2. JOHN KITHENDU LUA**

**3. KASONGO LUA**

**4. RUTH NTHENYA LUA**

**5. DONALD WATHUKA LUA.....OBJECTORS/APPLICANT**

**AND**

**LILLIAN MWELU MEYER.....APPLICANT/CREDITOR**

**RULING**

1. The objectors filed a summons dated 14<sup>th</sup> November, 2014 seeking:

a) The respondents be forthwith suspended from acting as the administrators of the estate of the deceased in any manner whatsoever under the temporary grant issued on 12<sup>th</sup> April, 2002 until the court has fully heard and finally determined all the pending objections challenging the grant.

2. The application is based on grounds that the original grant of letters of administration issued on 25<sup>th</sup> February, 1994 were revoked by this court vide ruling dated 30<sup>th</sup> October, 1996 which directed that "it is further added that the beneficiaries to the estate of the late James Lua will do well in a family or a clan gathering to agree on how and who should apply for the administration of the whole estate in issue. That way many family disputes will be taken care of." That this direction was ignored and in gross violation thereof and contrary to legal provisions governing applications for grant of letters of administration intestate, one Edward Malelu Lua (now deceased) secretly and without the knowledge and consent of all family members/beneficiaries filed chamber summons dated 7<sup>th</sup> July, 2000 for him together with the respondents to be substituted as administrators in a fresh grant in place of the original administrators whose grant had been revoked. That the respondents without their knowledge and consent and without the knowledge and consent of other beneficiaries were irregularly joined as co-administrators in the new grant irregularly issued on 12<sup>th</sup> April, 2002 under the said application. That the grant so issued was irregular and contrary to the law governing issuance of grants and the directions of the court of 30<sup>th</sup> October, 1996. That the grant was without consent of all beneficiaries as well as the respondents who were co-joined without their knowledge and consent. That the respondents have created deliberate obstacles to expeditious disposal of the long pending objections through various means and unnecessary intrigues, procrastinations and confusions through duplicity and multiplicity of legal representation thus holding the court and the objectors/applicants at ransom as the matters cannot move any further. That as things stand as reflected by the court record of 12<sup>th</sup> June, 2013, 6<sup>th</sup> May, 2014 and 8<sup>th</sup> October, 2014, it is completely doubtful that the best interest of justice, the estate and its many beneficiaries can be served by the continued retention

of the respondents as the administrators under a contested grant in light of the many long pending objections having regard to the manner and process under which the grant was issued. That it is plainly obvious that the estate is under the forcible control of selfish, manipulative, unfit and unsuitable administrators without the consent of other family members/beneficiaries and unless the application is granted as prayed the court shall never hear and determine the pending objections and investigate the legal validity of the grant which the respondent seem determined to block. The respondent have deliberately convoluted the court proceedings by engaging in a deliberate circus and unnecessary games of concurrent multiplicity and changes of legal representations calculated to ensure that the pending objections cannot be heard and disposed of, a matter that has irked and annoyed court. That to unlock the free and expeditious determination of these objections, it is now imperative that the respondents, covering under the contested grant be suspended from further representing the estate until all pending objections are heard and disposed off. That the administration of the estate is clearly unsafe, unfit and irreputable in the hands of the respondents and in danger of abuse and wastage.

3. The Objectors subsequently filed a preliminary objection to the application dated 13<sup>th</sup> February, 2015 which application sought temporary stay of confirmation of grant issued by this court on 13<sup>th</sup> May, 2002 and that the respondents reimburse the total sum of KShs. 9,534,135/- being an amount of money advanced to the estate and expenses incurred by the applicant for purposes of pursuing recovery of plot number 19 Kilome Market and plot number 12 through HCCC No. 63 of 2002 on grounds that; in the absence of a confirmed grant, the applicant's activities and transaction over immovable assets of the deceased amount to unlawful intermeddling and illegal disposal in breach of section 45 and 82 of the Law of Succession Act; in the absence of an application for confirmation of grant, and in view of a disputed temporary grant vide pending objections thereto, including by two of the administrators, the applicant's transactions, the administrators had no capacity in law to enter into such transactions stated in the application which cannot in law constitute her a creditor to the estate. That the application is evidently legally premature, the legal provisions cited are irrelevant and inapplicable and the prayer for temporary stay for confirmation of grant is unknown in law and that the applicant is an intermeddler in the affairs of the estate in unlawfully dealing with administrators under an unconfirmed and disputed temporary grant and thus have no authority to dispose of immovable assets of the deceased. That she thus has no locus standi in this cause in absence of an affidavit of protest or objection to the grant which are the only avenues authorized by law.

4. The Objectors further filed a summons dated 7<sup>th</sup> December, 2015 seeking orders that:

a) The warrants of attachment dated 17<sup>th</sup> November, 2015 and the intended sale by public auction of the goods and properties of the judgment debtor in HCCC No. 63 of 2002 proclaimed and attached by Ms Kande Auctioneers on 30<sup>th</sup> November, 2015 in execution of the decree therein, issued to the petitioners/administrators/ respondents on basis of the disputed and challenged temporary grant be lifted, stayed or set aside until this court has finally and completely determined the validity of the disputed temporary grant dated 12<sup>th</sup> April, 2002 and therefore the rightful administrators of the estate rightfully entitled to levy execution of the decree or undertake any proceedings thereof on behalf of the estate.

b) Pending the full hearing and determination of all pending objections in this cause, and the conclusive determination of the validity of the temporary grant issued herein and the rightful, undisputed administrators of the deceased's estate, the petitioners/administrators/ respondents be restrained from undertaking any activities, court proceedings or executions on the basis of the contested grant dated 12<sup>th</sup> April, 2002.

5. The application was based on grounds that the original letters of administration in this cause issued to the 1<sup>st</sup> and 2<sup>nd</sup> objectors on 25<sup>th</sup> February, 1995 were revoked by this court on 30<sup>th</sup> October, 1996 with a direction that all beneficiaries of the deceased agree on who should apply for fresh letters of administration and that the petitioners ignored the direction and proceeded to unilaterally obtain the present grant issued on 12<sup>th</sup> April, 2002. That the objectors filed objections to this grant, wrongfully obtained without their consent as directed in the ruling dated 30<sup>th</sup> October, 1996 and have further filed application dated 14<sup>th</sup> November, 2014 seeking to suspend the petitioners from acting as administrators of the estate after they have deliberately frustrated determination of the pending objections and started illegally dealing with and disposing of the immovable assets of the estate before confirmation of the grant and resolutions of the dispute. That the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners also filed an objection seeking to revoke the same grant made on 12<sup>th</sup> April, 2002 claiming their names were included without their knowledge and consent. That the grant is thus contested and disputed and an application dated 14<sup>th</sup> November, 2014 to suspend the petitioners from acting as administrators until pending objections are determined is pending before this court. That the disputes as to validity of the grant pending before this court naturally affects the capacity of the respondents to prosecute or undertake any proceedings in any court and in particular in HCCC No. 63 of 2002 as such a suit can only be undertaken and prosecuted by persons who hold a clear, uncontested and untainted grant which naturally means such proceedings should await determination of all objections against the grant. That the petitioners in a calculated move to render nugatory all such pending objections and pending application dated 14<sup>th</sup> November, 2014 have moved to execute a decree dated 11<sup>th</sup> March, 2004 issued in HCCC No. 63 of 2002. That objectors contend that the said execution is illegal, not only for the blatant breach of rules governing execution of decrees older than one year but also principally because they did so when their grant is tainted as it is disputed. That the objectors as beneficiaries of the estate and persons contesting the grant and capacity of the respondents to representing the estate are grossly aggrieved by the said execution as it shall render the pending objections and application dated 14<sup>th</sup> November, 2015 nugatory and there will be no need to pursue the same if proceedings and decree in HCCC No. 63 of 2002 are fully concluded and executed. That the respondents are involved in wanton embezzlement of immovable assets of the estate by illegal disposal thereof before confirmation of the grant as disclosed in the application by a purported creditor as purchaser dealing with them and dated 13<sup>th</sup> February, 2015 to the tune of over KShs. 10 Million. That it is therefore in the best interest of justice, the estate and the beneficiaries that this application be allowed and the execution in HCCC No. 63 of 2002 be stayed until this court has finally determined the dispute.

6. In response to the summons dated 7<sup>th</sup> December, 2015 the 1<sup>st</sup> respondent swore a replying affidavit filed on 20<sup>th</sup> January, 2016 on the following grounds. That the summons is incompetent and devoid of merit. That this court sitting as it does in a succession cause is divested of jurisdiction to issue orders of stay of execution in a separate and independent civil matters pending in a court of a concurrent jurisdiction. The objectors deliberately failed to mention to the court that HCCC No. 63 of 2002 was heard and conclusively determined and the judgment has never been set aside or reviewed. That as a matter of fact, the defendant in the said suit was evicted from the premises that were subject matter of the suit. That an attempt was made in the Court of Appeal by the defendant to stay the execution in HCCC No. 63 of 2002 but the same was nipped in the bud in the ruling in Civil Application No. Nai 248 of 2004. That when the defendant in HCCC No. 63 of 2002 realized that he had no chance of subverting the course of justice in HCCC No. 63 of 2002, he started playing lottery with judicial process by

engaging numerous counsel who have filed a litany of frivolous applications. That the central issue on the present summons is *res judicata* having been litigated upon in HCCC No. 63 of 2002.

7. Grounds of opposition was filed by the creditor in opposition to the summons dated 14<sup>th</sup> November, 2014 that there exists no orders revoking the grant issued to the administrator, that as per section 80 (2) of the Law of Succession Act, the grant takes effect as from the date of grant, that under section 82 (a) the administrators have the powers to enforce by a suit or otherwise all causes of action which arise out of the death of the deceased, that under section 83(b) of the Law of Succession Act, the administrators are duty bound to recover all the assets forming part of the estate otherwise they will be accused of neglect under section 94 of Law of Succession Act, that the property recovered is for the benefit of the estate and not the administrators and that the application is otherwise frivolous, vexatious and an abuse of the process of this court.

8. In opposition to the summons dated 7<sup>th</sup> December, 2015, the Creditor filed grounds that the orders sought cannot issue for reasons that section 80 (2) of the Law of Succession Act provides that the grant takes effect as from the date of grant and that law of succession only recognizes limitation of powers of personal representative and it is under section 82 and there can never be suspension otherwise section 94 of the law of succession may be enforced against personal representatives.

9. The objectors in their submissions contended that the grant has never been confirmed and no application for its confirmation was ever filed within six months of the grant as required by law yet the administrators incur and commit the estate to illegal debts in millions beyond the value of the estate. On the preliminary objection, it was submitted that the purported creditor is not a valid creditor to the estate of the deceased and did not exist as a creditor to the deceased. It was submitted that the administrators do not hold a confirmed grant and therefore had no legal capacity to enter into transactions over immovable estate assets. It was submitted that the application dated 13<sup>th</sup> February, 2013 offends Rule 40 (6) of the Probate and Administration Rules which require the filing of an affidavit of protest against confirmation of grant and as of now no application for confirmation has been filed thus no competent application or protest is before the court. On the application dated 14<sup>th</sup> November, 2014, it was submitted that the court has discretion to make such orders as are necessary to preserve and safeguard the deceased's estate. That two thirds of the administrators have filed objections to the temporary grant and over 15 years have passed without any determinations as to its validity or otherwise. The Objector in this regard relied on Rule 73 of the Probate and Administration Rules. It was submitted that the deceased's estate is in danger of being mismanaged. That the application dated 7<sup>th</sup> December, 2015 calls into aid the inherent power of the court to make orders in the best interest of justice under Section 47 of the Law of Succession Act and Rule 49 and 73 of the Probate and Administration Rules.

10. The creditor on the other hand submitted that there is no contention that there was issuance of a temporary grant but rather that the same has not been revoked nor are there other persons other than those in the said grant appointed to replace them. That the summons for revocation have no impact on the application dated 13<sup>th</sup> February, 2015 since the application has not been heard and determined and that the application has been filed after she had signed an agreement with the Petitioner in his capacity as an administrator. The case of **Estate of Hemed Abdullah Kaniki (deceased) Nairobi High Court Succession Case No. 1831 of 1996** was cited in that regard. With regard to the preliminary objection, it was submitted that Rule 40 (6) is not applicable in the circumstances of this case because there is no proposed confirmation of grant filed in court by way of an application. That the creditor needs her money back since she is not part of the on going wrangles within the family over administration. That there is no tangible evidence by the objectors to show that the administrators have mismanaged any asset. It was argued that section 80 (2) is clear to the fact that grant of letters of administration shall take effect only from the date of grant, in this case the temporary grant which was issued by court and cannot be termed as irregular. That section 82 (a) provides that personal representatives have powers to enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased therefore there is nothing wrong that the administrators did in filing suits to recover illegally sold properties belonging to the estate. That section 83 (c) provides that personal representatives shall have a duty to pay out of the deceased's estate all expenses of obtaining their grant of representation and all other expenses of administration. That in light thereof, it is clear that the costs that the administrators incurred in recovering the illegally sold parcels is payable to the creditor. That in light of section 94, that if the administrators did not act and repossess the illegally sold land as they did, then they would be cited of negligence. Citing **Re F. Marquardt, deceased, Ex Parte Administrator General [1913-1914] EALR 162**, the creditor submitted that she was entitled to the refund. It was submitted that since an application for confirmation of grant can be made at any time, the administrators are not duty bound to inform the creditor of filing of such an application for confirmation. That this was for purposes of seeking court's intervention since some family members were opposed to the creditor being refunded.

11. I have given due consideration to the applications, the preliminary objection and the submissions tendered herein. The first issue to be considered by this court is whether or not the temporary grant is irregular or not. It is clear to me that the original grant of letters of administration issued on 25<sup>th</sup> February, 1994 were revoked by the court by a ruling dated 30<sup>th</sup> October, 1996. Edward Malelu Lua subsequently applied for fresh grant in place of administrators whose grant had been revoked. The said grant was issued on 12<sup>th</sup> April, 2002. It is that grant that the objectors want suspended on grounds that it was issued without the consent and knowledge of all beneficiaries. The respondents have not contended this allegation neither have they demonstrated that they obtained the consent of all beneficiaries as required in law. A grant ought to be issued upon all the beneficiaries' consent. Having failed to contend this fact, an inference is made that the facts as alleged by the objectors is true. In the circumstances, I find that the respondents withheld material facts from the court in their application for the grant.

12. Secondly, I have considered the preliminary objection before this court and a question arises whether it meets the essence of the preliminary objection. The court in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors (1969) EA 696**. At page 700 observed as follows:

*“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

Sir Charles Newbold P. added as follows at page 701:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

It is clear to me that the preliminary objection as raised by the objectors shall call for inquiry by way of evidence. In the circumstances, I find that it does not meet the threshold set out in the Mukisa Biscuit Case (Supra).

13. Thirdly, with regard to the application dated 7<sup>th</sup> December, 2015 seeking that the warrants of attachment dated 17<sup>th</sup> November, 2015 be lifted, stayed or set aside until this court has finally and completely determined the validity of the disputed temporary grant dated 12<sup>th</sup> April, 2002, I am in agreement with the creditor's submission that this court has no jurisdiction to issue orders of stay of execution in a separate and independent civil matter pending in a court of a concurrent jurisdiction. The proper place to seek the said order is in HCCC No. 63 of 2002. Before, I make my final orders, it is important to note that this matter is very old and the parties herein ought to see the need to settle on the administrators bearing in mind all the beneficiaries' interests. Consequently, the application dated 14<sup>th</sup> November, 2014 is allowed, the preliminary objection dated 13<sup>th</sup> February, 2015 and application dated 7<sup>th</sup> December, 2015 are hereby dismissed.

14. In the end, I make orders as follows:

- a) The grant letters of administration issued on 12<sup>th</sup> April, 2002 is hereby revoked and the respondents are forthwith stopped from acting as administrators of the deceased's estate.
- b) That the beneficiaries agree on administrators afresh and apply for letters of administration and in so doing involve all the beneficiaries in the application for letters of grant of administration particularly, their consents be obtained.
- c) The creditor's recovery of her alleged monies await the outcome of the application for grant letters of administration.
- d) The objectors do make an application for stay before the proper court.

**Dated and delivered in Machakos this 27<sup>th</sup> day of September 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Ngolya - for Administrators

Mbithi - for Objectors

N/A Ashitiva - for Creditor

Josephine - Court Assistant