



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE No. 1380 OF 2013
IN THE MATTER OF THE ESTATE OF JECKONIAH OLIVER NDINYA ACHOLA
(DECEASED)

RULING

This Ruling is for the Chamber summons Application dated 17th August 2016 brought under Certificate of Urgency by the Protestor herein the Applicant who sought for Orders *inter-alia* that:

- 1. The Honorable Court be pleased to stay execution of its' judgment issued on 17th March 2016 pending the hearing and determination of this Application**
- 2. The Honorable Court be pleased to extend time for filing the Notice of Appeal on such terms as are just and/or that the Annexed draft Notice of Appeal be deemed as duly filed and served to payment of the requisite filing fees**
- 3. That further and without prejudice to the foregoing, the Honorable Court be pleased to stay execution of its judgment issued on 17th March 2016 pending the hearing and determination of the Applicants intended Appeal against the entire judgment.**

The Application was for the Stay of Execution of the Certificate of Confirmation of Grant issued by the Court on 17th March 2016. The grant was confirmed by this Honorable Court vide its Ruling dated 17th March 2016. The said grant was confirmed in terms of the proposed mode of distribution which elucidated that the Estate of the Deceased; who died intestate, was to be distributed equally among the beneficiaries. In the same Ruling, the Protestor/Applicant together with her sister were appointed as trustees of D. A. A (Minor) who is the daughter of the Deceased late son and was thus entitled to inherit the share of her late father.

The Application was premised on the grounds *inter-alia* that the Protestor/Applicant was not informed of the judgment date which they were informed that it will be delivered on notice. Further, the Application was founded on the ground that the Protestor/Applicant tried to find out when the judgment will be delivered but no word was forthcoming.

The Applicant further submitted that on 16th June 2016, her Counsel received a copy of a letter from the Respondent's Counsel addressed to the Deputy Registrar. High Court, Family Division (which copy was furnished before this Honorable Court) inquiring some of the Deceased's properties being motor vehicle registration numbers KAS 171Y, KAA 182V and KAM 820J had not been included in the Certificate of Confirmation of Grant yet they formed part of the Estate of the Deceased and they had mutually agreed on how to distribute them. Further, she submitted that the Court file was said to be missing from the

Family Division Registry thus denying her opportunity to see the certificate of confirmation of grant.

She further stated that the Petitioners/Respondents Counsel wrote to them vide a letter dated 29th June 2016 (which copy is furnished before this Honorable Court) informing her that they had received the certificate of confirmation of grant, they had discovered the existence of two other accounts of the Deceased, that is, Bank of Africa a/c no. 0000 0000 1380 8216 0599 and Barclays Bank a/c no. 0948112116 which should be included in the certificate of confirmed grant and that there was a discrepancy in the distribution percentages with regards to the Minor's share of the money in the Bank of America, Barclays Bank and Standard Chartered Bank and that her share should read 23% instead of 25%.

She submitted that due to the fact that the judgment was delivered in her absence and the issue of disappearance of the Court file, she had lost her automatic statutory opportunity to lodge an Appeal and was poised to execute a judgment which she was totally dissatisfied with. She also stated that the Petitioners/Respondents had obtained a mention date for their Application for Summons for Rectification of Grant dated 8th July 2016; which sought *inter-alia* for Orders that the share of D. A (the Minor) of the Bank Balances in the Bank of America Account, Barclays Bank Account and Standard Bank Account be rectified to read 23% instead of 25% alongside other Orders, with an intention to expedite its hearing to the detriment of her Minor Child and that she is apprehensive that if her prayers are not granted, the Petitioner/Respondents will move to execute the judgment of the Court to the detriment of herself and her minor Child.

In the Affidavit in support of the Chamber Summons Application, the Applicant/Protestor reiterated the grounds adduced in her Chamber Summons Application.

By way of a Replying Affidavit, dated 8th September 2016, Jenipher Adero Achola, one of the Petitioners/Respondents submitted her reply to the Chamber Summons Application. In opposing the prayer for stay of execution, she submitted that the Applicant had not demonstrated that the Administrators had acted in a manner contrary to their statutory duty to the Court and/or to the beneficiaries of the Estate as alleged. She stated that the beneficiaries agreed to distribute the estate equally and that the anomaly in the distribution of the credit balances should be rectified as the various percentages add up to 102% and not 100%. She further argued that there was no basis of holding the estate back by ordering a Stay of Execution of the actual distribution of the estate for it had been distributed equally and the Protestor/Applicant and her sister were appointed trustees of the minor's share vide a Court Ruling of 17th March 2016 and they thus had every right to ensure that the minor's interests are secured by holding the administrators accountable.

The Protestor/Applicant then filed a Replying Affidavit dated 18th October 2016 in response to that of the Petitioner/Respondent. She opposed the prayer in which the Petitioner/Respondent sought to rectify the Minor's share of the Bank Balances to read 23% instead of 25% as written in the Certificate of Confirmed Grant because it was discriminatory to the minor. She also submitted that the proposal that the motor vehicle of registration no. KAS 171Y be held by the minor's trustee until she attained 18 years was mischievous because the said vehicle was stolen and the insurers would only pay compensation upon production of a Court Order and thus submitted that the Court should direct that the said insurance amount be paid to the minor's trustees and the same be deposited in an interest earning account to be held in trust for the minor until she turns 18 years.

Protestor/Applicant's Submissions

The Protestor/Applicant then filed her submissions wherein she opposed the Petitioners/Respondents Application for Rectification dated 8th July 2016 and sought for orders of Stay of Execution pending the hearing and determination of her Chamber Summons Application.

She submitted that her Application was premised on the ground that the Judgment date was not communicated to her and was thus unable to lodge a Notice of Appeal against that Judgment which she was dissatisfied with.

She relied on **Section 7** of the **Appellate Jurisdiction Act** and **Rule 73** of the **Probate and Administration Rules** which gives the Court the powers to issue such Orders as are necessary for the ends of justice. She also relied on **Rule 49** of the **Probate and Administration Rules** to advance her case with regards to her pray that the Court stays Execution of the Confirmed Grant.

The Protestor/Applicant further relied on the case of *Kungu Muthua v James Icharia Kungu [2015] eKLR* where it was held that,

“...by reason of the provisions set out in Rule 49 and 73 of the Probate and Administration Rules, the Court has jurisdiction similar to that provided by Order 42 Rule 6 of the Civil Procedure Rules, Cap 21”.

Accordingly, she submitted that she had established that the Minor was likely to suffer loss if her Application is not granted and that the said Application was made expeditiously.

In opposing the Petitioner’s Application for Summons of Rectification dated 8th July 2016, the Protestor/Applicant submitted that the orders sought in that Application save for the one seeking to correct the names of the beneficiaries were intended to deprive the minor of her equal share contrary to **Section 38** of the **Law of succession Act, Cap 160** and **Articles 22 (1) (5), 47(1) and 53 (2)** of the **Constitution of Kenya, 2010**.

Petitioners/Respondents Submissions

The Petitioners/Respondents also filed their submissions in support of their case. They submitted that the Protestors Application was a move to stall the distribution process and that it lacked substance.

They also submitted that they do not oppose the Protestor/Applicant’s prayer to file a Notice of Appeal because that it a legal right that can be invoked if she is dissatisfied with the findings of the Court. However, the Petitioners/Respondents opposed the prayed that stay be granted because the Protestor had not demonstrated the alleged apprehension and that grant of the stay will unnecessarily burden the beneficiaries.

DETERMINATION

From the foregoing, the issues for determination before this Court are:

1. Whether the Applicant has made a satisfactory case to warrant the grant of a stay of execution of the confirmed grant issued on 17th March 2016 pending Appeal and;
2. Whether the Rectification of the confirmed grant should be allowed.

This being a succession matter, the relevant provision on which this issue is founded is **Rule 73 of the Probate and Administration Rules** which provide:

Nothing in these Rules shall limit or otherwise the inherent power of the Court to make such Orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

In the same breathe, **The Civil Procedure Rules, 2010** is also applicable in determining the question of stay of execution as prayed for. The power to grant an application for stay of execution is a discretionary power which is only granted when sufficient cause has being shown by the Applicant. **Order 42 Rule 6 of the Civil Procedure Rules, 2010** provides:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

In support of the above provision, In *Kungu Muthua v James Icharia Kungu (2015) eKLR*, it was held,

“...as a general rule, an order for stay of execution is a discretionary order and can only issue when the Court seized of the matter has satisfied itself, on the basis of the evidence adduced, that the Applicant stands to suffer irreparable loss and that the Application is made without reasonable delay.”

From the foregoing, it is clear that although the Court has discretionary power; the same is informed the requirements under **Order 42 rule 6(2)** (*Supra*) which enable it to balance the interests of the Applicant with those of the Respondents by considering the circumstances at hand. *Accordingly, this Court shall be guided by the general rule as discussed above in interrogating whether or not a stay should be granted. Having considered this, the question before this Court is whether the Applicant made her Application without unreasonable delay and whether she stands to suffer irreparable injury if the stay is not granted.*

Was the Application made without unreasonable delay?

From the Affidavit evidence adduced, the Applicant submitted that the judgment was to be delivered on notice but she was not informed of the judgment date. Accordingly, these circumstances made it impossible for her to institute an Appeal within the required 14 days. Looking at all these circumstances, the Applicant cannot then be said to have intentionally delayed her Application since because the same was made when she became aware that there was a judgment in place.

Does the Applicant stand to suffer irreparable injury if stay is not granted?

According to the facts as adduced, the Applicant prays for stay of execution pending her intended appeal because she was totally dissatisfied with the contents of the confirmed grant that was issued by this Court on 17th March 2016. From the Confirmed grant, the beneficiaries of the Estate were to each received an equal share of the properties of the Deceased save for the money in the Bank of America a/c no. particulars withheld, HSBC plc Bank a/c no. particulars withheld, Barclays Bank a/c no. particulars withheld and Standard Chartered Bank a/c no. particulars withheld which was divided in the following percentages:

- Everlyn Odete Achola – 23%***
- Joy Jenipher Adero Achola – 31%***
- Antonina Onono Swanson – 23%***

- **D.A (Minor) daughter of the late James Ndinya Achola (Son of the Deceased) – 25%**

Accordingly, the Petitioners/Respondents filed an application for summons for rectification of grant seeking to rectify D.A share of the bank balances from 25% to 23% because the percentages add up to 102% and not 100%. From the above fact pattern, this Court is not convinced that the confirmed grant of 17th March 2016 is discriminatory to the Applicant and her minor child. Despite the judgment been issued in her absence, the contents of the judgment were not unfair to the Applicant and her daughter so as to warrant her stay of execution.

Further, it appears that the what the Applicant intends to in fact challenge is not the confirmed grant but the summons for rectification of the confirmed grant which seeks to reduce the minor's share from 25% to 23%. In this regard, taking into account the provision of **Section 38 of the Law of Succession Act, 1981** which advocates for equal distribution among the surviving children where the Deceased dies intestate, the percentages should be rectified in a way that does not deny the Minor her entitled portion.

This court confirms 2 issues;

At page 4 of this Court's Ruling of 17th March 2016 is states as follows;

The above section envisages equal distribution of the estate of the deceased amongst his surviving children. See **IN THE MATTER OF THE ESTATE OF GEORGE KAREGWA GITAU (DECEASED) NRB HIGH COURT SUCCESSION CAUSE 959 OF 2001**. Thus the four children of the deceased should share in the estate equally.....

This in order as per **Section 41 of Law of Succession Act** which provides that a child deserves a share of the property in the estate of his or her grandparent which would have gone to his or her predeceased parent.

The above part of the Ruling distributes the estate equally among the 4 children of the deceased with the deceased's son 25% beneficial estate bequeathed to the minor child.

The motor vehicles were left of the distribution list in the Court's Ruling because, the pleadings on record at the time showed that *particulars withheld* Toyota Prado belonged to the late James Ochola (deceased) and was stolen in 2012. Therefore one cannot be allocated what does not exist and the other 2 vehicles were distributed to each of the deceased's daughters except one who resided abroad. It is after the Ruling that it was deposited in the successive applications that there were proceeds of the stolen vehicle awaiting release and payment by the Insurance Company. These are new facts that were not within the knowledge of the Court at the time of the Ruling. Now that the issue of the motor vehicle is clarified, the new information and discovery necessitates inclusion of the motor vehicles in the Ruling.

DISPOSITION

In light of the above, it is this Court's position that the confirmed grant issued on 17th March 2016 does not in any way prejudice the rights of the minor and although it was issued without her been given notice, the same was fair in its distribution according to **Section 38 of the Law of Succession Act, 1981**. The confirmation of grant was prepared contrary to this Court's ruling that the 4 children share the deceased's estate equally and would allocate the minor 25% of the deceased's estate. By the time this Court signed it was assumed the Applicant was served with the same confirmation of grant and agreed to the terms.

Further, no evidence has been adduced to convince this Court that the confirmed grant is discriminatory to the Applicant or her Minor. The anomaly maybe cured by rectification of grant.

Moreover, no draft Notice of Appeal has been furnished to convince this court that laudable efforts have been made to institute the intended Appeal. Accordingly, this Court Orders as follows:

I. The Application for Stay of Execution is hereby not granted.

II. The Application for Summons for Rectification of Confirmed Grant is hereby granted only in so far as it seeks to rectify the names of the Administrators to read EVELYN O.O. ACHOLA NDINYA and JENIPHER ADERO ACHOLA and to include the following properties of the Deceased that were left out:

- a. **Bank of America a/c no. *particulars withheld***
- b. **Barclays Bank a/c no. *particulars withheld***
- c. **Motor Vehicle *particulars withheld* – Toyota Prado**
- d. **Motor Vehicle *particulars withheld* – Mercedes Benz**
- e. **Motor Vehicle *particulars withheld* – VW**

III. The mode of distribution is 25% for each of the 4 children of the deceased's estate and the late James Ndinya Ochola shall be to D. A to be held in trust by her mother Pamela Wanjira Achola and Patricia Wambui Njuguna

IV. Any aggrieved party may apply

V. Costs of this Application shall be in the main cause.

DELIVERED SIGNED AND DATED IN OPEN COURT ON 16TH JUNE 2017.

M.W.MUIGAI

JUDGE