REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATR MOMBASA

SUCCESSION NO. 46 of 2014

IN THE MATTER OF THE ESTATE OF CLEMENT OTIENO OKUMU (DECEASED)

CURRYIAN OKUMU ….....….OBJECTOR/APPLICANT

VERSUS

PEREZ OKUMU

BEATRICE ADHIAMBO OBIERO

HENRY OKUMU…….....……..…PETITIONERS/RESPONDENTS

RULING

1.By a Notice of Motion dated 16.5.16 and filed under Certificate of Urgency, the Applicant seeks stay of proceedings herein pending the hearing and determination of the Applicant's Appeal.

2. The background of this case is that the Respondents herein are the executors of the Will of Clement Otieno Okumu, the deceased herein. Grant of Probate was issued to the Respondents on 26.6.14. The Respondents thereafter filed a Summons for Confirmation of Grant dated 30.10.15 which however is still pending as the Applicant filed a Summons for Revocation of Grant. In the said Summons, the Applicant claimed to be the third wife of the deceased who had been left out of the Will. In a Ruling delivered 11.5.16, this Court dismissed the Summons for Revocation of Grant. The Applicant being dissatisfied with the said Ruling, filed a Notice of Appeal on 13.5.16 and thereafter filed this Application seeking stay of the proceedings for confirmation of Grant.

3. The Application is premised on the grounds on the face of it and the facts set out in the Affidavit of Curryan Okumu, the Applicant sworn on 16.5.16. The Applicant states that being dissatisfied with the Ruling she intends to appeal against the same. That she has an arguable appeal with high chances of success. She further claims that the continuance of the proceedings herein will prejudice her appeal which seeks to set aside the said Ruling and render the appeal nugatory.

4. The Applicant claims that on the day the Ruling was delivered, Miss Ndinda who held brief for her advocate Mr. Tolo erroneously failed to seek a stay of the said Ruling. She further claims that she intends to lodge an appeal against the said Ruling and that a stay of the proceedings will not prejudice the Respondents in any way.

5. In a Replying Affidavit sworn by the 2nd Respondent, the Respondents aver that the Application is defective, misconceived and bad in law, lacks merit and is made in bad faith. That the Applicant has not demonstrated that she will suffer any prejudice if stay of proceedings is not granted. But rather it is the Respondents who will be greatly prejudiced by the continual pendency of the confirmation of grant. That

the intended Appeal has no chances of success whatsoever and that the Applicant has offered no security in support of the stay she is seeking. The Respondents further claim that there is no basis for seeking stay as none of the grounds stated in the Application has been substantiated.

6. It was submitted for the Applicant that Article 164(3)(a) of the Constitution gives the Court of Appeal jurisdiction to hear appeals from the High Court that therefore the Applicant has a right to appeal. That the Applicant seeks to exercise her right to access to justice under Article 48 of the Constitution, by filing the proposed appeal. Citing the case of Sally Jeptoo Mwei v. Esther Jepkoech Mwei [2014] eKLR, it was submitted that the Application was filed without undue delay. It was further argued that given that the Applicant is 56 years old, jobless and with no one to provide for her, she is likely to suffer substantial loss if the Application is denied. The Applicant asserts that the Respondents will not suffer prejudice if the Application is allowed. For the Respondent, it was submitted that the Applicant has absolutely nothing to lose as she has not for over 26 years been supported by the deceased or the estate.

7. It was further submitted for the Respondents that the Applicant has not tendered any evidence that if the Grant herein is confirmed, that there will be nothing left for her. For the Applicant, it was argued that the Applicant would get nothing after confirmation. The bone of contention in this matter is that the Applicant was not provided for under the Will of the deceased. It therefore goes without saying that upon confirmation of the Grant, the estate will be distributed in accordance with the very Will that made no provision for the Applicant. In this regard therefore, I find that the Applicant's apprehension of suffering substantial loss is not entirely farfetched.

8. For the Respondents, it was further submitted that Order 42 of the Civil Procedure Rules under which the Application herein has been filed does not apply to succession matters. In this regard, the Respondent invited the Court to be guided by the case of James Karanja Chege & 3 Others v. Eunice Wanjiku Chege [2011] eKLR. The Applicant however argued that the applicant in that case brought the Application for stay one year after filing appeal unlike in the instant case where the Applicant filed the Application 5 days after the Ruling. In the cited Chege case, it is indeed true that the Application for stay was filed a year after the Ruling was delivered. To that extent, the authority is of no relevance as the Application herein was filed 5 days after the Ruling.

9. On the applicability of Order 42 in Succession matters, I agree that the same is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by virtue of Rule 63 of the Probate and Administration Rules. Ouko, J. (as he then was) stated in the Chege case (supra) that

> ***"In any civil proceedings, the court has inherent power ex debito justitiae to order a stay of execution pending appeal. It is a power that can be invoked under section 3A and more recently Sections 1A and 1B of the Civil Procedure Act. In succession matters, despite Rule 63 aforesaid, it is available under Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. When a court is called upon to exercise a discretion in any dispute, it must do so judicially to ensure the ends of justice are met and justice is done to both parties".***

10. This Application was erroneously expressed to be brought under the Civil Procedure Rules. The same ought to have been brought under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules under which the inherent power of the Court to grant stay is available. Section 47 provides:

> ***"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient."***

While Rule 73 provides:

> ***"Nothing in these Rules shall limit or otherwise affect 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."

The error by the Applicant however, does not in any way oust the jurisdiction of this Court to entertain this Application. The failure to cite the correct legal provisions is not fatal and in so finding, this Court is guided by the provisions of **Article 159 (2) (d)** of the **Constitution** of Kenya 2010 which behove courts to ensure that

"Justice shall be administered without undue regard to procedural technicalities."

11. For the Respondent, the case of Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR was cited. It is not however clear what the relevance of this case to the instant case is. With regard to the case of the Estate of Ronald Austine Whittigham [Deceased] 2015 eKLR, it was argued that in the present case, as in that case, no special circumstances had been demonstrated in the intended appeal and indeed no draft memorandum of appeal has been filed. The Applicant failed to demonstrate the substantial loss that would be suffered and offered no security for due performance. For the Applicant, it was contended that the Applicant in the Whittingham case was an executor whereas the Applicant herein is not. In this decision in which he dismissed an application for stay of orders made in a ruling, Musyoka J rendered himself thus:

"I am not convinced that the applicant has demonstrated that special circumstances exist nor that there are serious questions of law that arise from the matters alluded to in paragraph 11 above to warrant consideration by the Court of Appeal. In any event, a draft memorandum of appeal was not exhibited to the application to bring out the grounds upon which the applicant intends to challenge the impugned ruling. Such draft memorandum of appeal would have assisted me in determining whether I should grant leave or not."

12. There are two serious omissions in the Application herein. First, the Applicant has not filed a draft memorandum of appeal "to bring out the grounds upon which the applicant intends to challenge the impugned ruling"**.** The Applicant merely states that she has an arguable appeal with high chances of success and that continuance of the proceedings herein will prejudice her appeal and render the appeal nugatory. This omission has made it impossible for the Court to assess whether the intended appeal has any probability of success and whether stay should be granted or not.

13. The effect of the omission to file a draft memorandum of appeal is further buttressed by the cited case of Disciplinary Committee Maseno University & 2 Others v. Republic Exparte Ochong' Okello [2007]eKLR wherer the Court of Appeal said:

"The Applicant in order to succeed, must satisfy the Court that the appeal is an arguable one, that is, Secondly, that if an order of stay or injunction as the case may be, is not granted, the appeal were it to succeed, would be rendered nugatory by the refusal to grant the stay or the injunction"

Without a draft memorandum of appeal, this Court has no way of knowing whether the appeal is arguable or that it is not a frivolous appeal or indeed whether were the intended appeal to succeed, it would be rendered nugatory.

14. Secondly the Applicant has not sought leave to appeal within the statutory period or at all. An order made by the High Court under the Law of Succession Act is not appealable to the Court of Appeal as of right. Leave must be sought and obtained. Rule 39 of the Court of Appeal Rules provides:

" 39. In civil matters-

(a) where an appeal lies with the leave of the superior court application for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;

(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused within fourteen days of such refusal.

15. It was argued for the Applicant that the advocate who attended Court for the delivery of ruling erroneously failed to seek stay. No mention was made of leave to appeal and no application for such leave has to date been made. It is not clear whether this omission is as a result of disregard for or ignorance of the express provisions of law.

16. As Ouko, J. (as he then was) stated in the Chege case (supra), when a court is called upon to exercise a discretion in any dispute, it must do so judiciously to ensure the ends of justice are met and justice is done to both parties. However, given that the proposed appeal from the Ruling of this Court of 11.5.16 to the Court of Appeal is not automatic, the Applicant in addition to seeking stay ought to have sought leave to appeal. Without leave to appeal, an order for stay would be in vain. By reason of the two omissions stated above, this Application must fail. The same is dismissed but with no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of July, 2016

M. THANDE

JUDGE

In the presence of: -

…… for the Applicant

…… for the Respondents

……..…….. Court Assistant