



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 29 OF 2016

IN THE MATTER OF ESTATE OF ZAVERIO KITHINJI GITUOKI (DECEASED)

COSMAS MARETE.....APPELLANT

VERSUS

BUNDI MWITI.....RESPONDENT

(An Appeal against the Ruling of Hon. A.G. Kibiru SPM pertaining to the Preliminary Objection dated 25th February, 2016 delivered on 29th June, 2016)

In

IN THE MATTER OF CHUKA SENIOR PRINCIPAL MAGISTRATE'S SUCCESSION CAUSE NO. 46 OF 2010 (IN THE ESTATE OF ZAVERIO KITHINJI GITUOKI- (DECEASED))

BUNDI MWITI.....PETITIONER/RESPONDENT

VERSUS

COSMAS N. MARETE.....OBJECTOR/APPLICANT

R U L I N G

1. Before me is a Motion on Notice dated 10th August, 2016 expressed to be brought under section 45 of the Law of Succession Act and Order (sic) 63 of the Probate and Administration Rules Section 3 A of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules. The same seeks that the proceedings in Chuka Succession Cause No. 25 of 2015 be stayed until the appeal is heard and determined.

2. The grounds for the motion are set out in the body of the Motion and in the Supporting Affidavit. These are that; the applicant has an interest in the property of the deceased's estate and has appealed against an order by the Principal Magistrate's Court striking out his application for revocation; that the Respondent has applied to lift an inhibition that had been placed on the property with a view to distribute the property; that if the property is distributed, the appeal will be rendered nugatory. In his supporting Affidavit, the Applicant swore that the proposed distribution does not take into account his interest. Mr. Nyauchi, learned Counsel for the Applicant submitted that justice can only be served if the proceedings of the lower court are stayed and all the parties heard on their respective claims in the appeal. Counsel urged that the application be allowed.

3. The application was opposed through the Replying Affidavit of Bundi Mwiti sworn on 23rd August, 2016. He contended that he had not interfered with the estate; that the applicant's claim in the estate is that of a purchaser from one of the beneficiaries and that in the premises the appeal is a non-starter. Mr. Mutegi learned Counsel who held brief for Mr. Muriuki for the Respondent submitted that the Applicant has no locus in a succession cause as his place is in a land court against the party who sold him the alleged land. That the Applicant's intention was to delay the conclusion of the lower court matter.

4. I have considered the Affidavits on record and the submissions of learned counsel. This is an application for stay of proceedings pending appeal. In the **Case of Global Tours and Travels Ltd NRB W.U Cause No.43 of 2000** (UR) Ringera J held: -

"As I understand the law whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice..... the sole question is whether it is in the interests of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether or not to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum maximization of judicial time and whether the application has been brought expeditiously." (Emphasis added)

5. In my view, the foregoing captures the principles which a court should consider in deciding whether or not to order a stay of proceedings. The principles can be summarised as; whether the application has been made timously; whether the appeal is prima facie arguable and whether sufficient cause has been established it that is in the interests of justice that an order of stay proceedings should be made. Although learned Counsel did not address the court on these principles, I will nevertheless apply them in determining the application.

6. On the first condition, the order appealed against was issued on 29th June, 2016. The present application was lodged on 10th August, 2016, a period of one and a half month from the date of the order. To my mind, the application was filed expeditiously and it meets the first condition.

7. The second condition is whether the appeal is prima facie arguable. The order appealed against is the one which struck out the applicant's application for revocation of a grant made by the court in Chuka SPMC Succ. Cause No. 46 of 2010. The application for revocation that was struck out was not included either in the Record of Appeal in this court or in the Supporting Affidavit of the Applicant. In this regard, the basis for seeking to revoke the grant that was issued and confirmed on 10th August, 2011 was not clear from the application. The Applicant only swore that he had an interest in the estate of the deceased but did not disclose the nature of that interest. It was left to the Respondent to disclose that the Applicant's interest in the estate was that of a purchaser. It was contended that the Applicant had purchased some portion of the estate land from one of the beneficiaries. This argument is buttressed by the impugned ruling wherein the learned Magistrate stated:-

"In the present cause, the Objector claims to have purchased a parcel of land from one Jacob Mutua one of the beneficiaries in the estate of the deceased. As held in the Evan Mwiti Case, supra, the Objector has no direct claim on the estate of the deceased Zaverio Kithinji Gituoki. He is an intermeddler and a stranger in these proceedings. His claim is against Jacob Mutua or his estate if he is deceased as alleged."

8. It is on the basis of the foregoing that the court below upheld the Respondent's Preliminary Objection and struck out the Applicant's application. The Applicant did not deny the averments by the Respondent that his interest in the estate was that of a mere purchaser which rose after the deceased had passed on. A look at the Memorandum of Appeal shows that the above part of the ruling of the court is not intended to be challenged and if it is to be challenged, on what basis.

9. Section 45 of the Law of Succession Act Cap 160, Laws of Kenya (hereinafter "the Act") provides:-

"45. 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

2. Any person who contravenes the provisions of this section shall-

a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment not exceeding one year or to both such fine and imprisonment; and

On the other hand, section 82 of the Act provides:-

"82. Personal representative shall, subject only to any limitation imposed by their grant, have the following powers-

a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

1.

ii. no immovable property shall be sold before confirmation of the grant;" (Emphasis supplied

In Evans Mwiti & Anor .v. Martin Bundi Maitima & 2 Others Meru H.C Succ. Cause No. 390 of 2008 (UR) Makau J put it aptly:-

"In view of the foregoing I am in agreement with the respondents that the applicants have no claim directly against the estate of the deceased. The applicants purchased the two parcels of land from the Petitioner who is a party in the application for revocation. Their interest if any can be ventilated through the said Petitioner. In view of the foregoing the applicants if aggrieved by any decision of this court once it makes an adverse determination against their interest, is to file a separate suit against BEATRICE NAITORE MAITIMA. I agree the applicants have no business in this succession cause. They are intermeddlers or strangers to the deceased estate. They can pursue their claim if any upon determination on who is to inherit the suit lands. Their cause of action can only arise after determination of this cause if any and against BEATRICE NAITORE MAITIMA."

10. In the case of Muriuki Hassan .v. Rose Kanyua and 4 Others [2014] eKLR, when faced with a situation of sale of a property belonging to an estate before succession, Makau J held:-

"The interested parties are not direct creditors of the deceased before his death but purchases from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

11. In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held:-

"10. A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard; the jurisdiction of

the Court to protect the estate of a deceased person is set out in section 45 of the Law of Succession Act.....

15. For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82 (b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant."

12. In Re Estate of Geoffrey Kiricho Mbogori (deceased) Chuka HC. Succession Cause No. 49 of 2016 (UR) , after analysing various cases on the subject the court held:-

"the net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled taking possession of, disposition, or alienation, as well as trespassing on to the property. Such acts are subject to reversal by the court summarily. The spirit behind sections 45 and 82 of the Act, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified and ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby there may be no settlement and or peaceful co-existence of the family members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed.

The net effect of aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with or without the sanction of the court. Before the grant of letters of administration is confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale thereof. Anyone who purports to purchase property from the estate before confirmation does so at his own peril."

13. What I have been endeavouring to show is the position of the law as declared by the courts where there has been a sale of the estate land before confirmation. Both the law and the courts have frowned upon such transactions. Such transactions cannot be sanctioned and since the Applicant finds himself in the same position, I doubt if his appeal can be said to be arguable as his main interest is said to be that of a purchaser from a beneficiary. In this regard, notwithstanding the other attractive grounds set out in the Memorandum of Appeal if this court stays the proceedings it will only be postponing the day of reckoning for the Appellant. This will amount to a waste of the scarce judicial time. Accordingly, the second condition for stay of proceedings has not been met.

14. On the 3rd condition, the Applicant did not establish or disclose any sufficient cause to show that it is in public interest to stay the proceedings of the court below.

15. In the premises, I am of the view that the application is without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED and delivered at Chuka this 13th day of October, 2016

A. MABEYA

JUDGE

Ruling read and delivered in open court in the presence of the Counsel for Respondent.

A. MABEYA

JUDGE

13/10/2016