



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1194 OF 2009

IN THE MATTER OF THE ESTATE OF REUBEN KIPLAGAT CHESIRE (DECEASED)

BELINDA JERUTO CHESIRE .....APPLICANT

BETWEEN

KIPTOO CHESIRE .....1<sup>ST</sup> CLAIMANT

CONNIE JEROTICH CHESIRE ASIYO.....2<sup>ND</sup> CLAIMANT

WILLIAM KIBIWOTT CHESIRE .....3<sup>RD</sup> CLAIMANT

AND

ALICE JEPCHUMBA CHESIRE .....1<sup>ST</sup> RESPONDENT

TIMOTHY CHESIRE .....2<sup>ND</sup> RESPONDENT

**RULING**

1. What is before me for determination is a Chamber Summons dated 23<sup>rd</sup> May 2013, taken out under Order 42 rule 6 (1), (2) and(6) of the Civil Procedure Rules, 2010 seeking stay of execution of the arbitral award made on 10<sup>th</sup> August 2011 pending the hearing and determination of an intended appeal.
2. The application is predicated on grounds that are set out on the face of the application, as well as in the affidavit of the applicant, Belinda Jeruto Chesire, sworn on 23<sup>rd</sup> May 2013.
3. In the grounds on the face of the application the applicant argues that she has filed notice of intention to file appeal against the order made by this court on 2<sup>nd</sup> May 2013; which order will result in the execution of the arbitral award made on 10<sup>th</sup> August 2011. She argues that the arbitral award is illegal and contrary to the laws of Kenya, public policy and the principle of *ex dolo malo non oritur* action, that is no court will lend its aid to a man who found his cause of action upon an immoral or an illegal act, in light of the purported determination of the entire dispute in this cause. She argues that the determination of a succession cause is the exclusive reserve of the High Court by virtue of Section 47 of the Law of Succession Act, Cap 160 of the Laws of Kenya, and is therefore not arbitrable. She submits that the arbitral award, *inter alia*, purports to determine

matters and issues of a criminal nature under Section 45 of the Law of Succession Act, which are not arbitrable. She contends that the assets comprised in the estate of the deceased are in grave danger of foreclosure and attachment by creditors due to non-servicing of the loans and other liabilities owing by the estate and due to intermeddling, waste and depletion. She states that the intended appeal is meritorious and raises germane issues of law and fact. She submits that it is arguable as it has good chances of success. She states that she is ready and willing to abide by the conditions set by the court; and that it is just, fair and in the interest of justice that the court stays the ruling and the orders made consequentially, as well as the award of the arbitrator.

4. In her affidavit, the applicant avers that she stands to suffer grave and irreparable loss and damage if an order of stay of execution of the adoption of the award under challenge as judgment of the court or pending the filing and determination of the intended appeal. She avers that she is apprehensive that the substratum of the intended appeal will be rendered nugatory unless orders are granted to stay the decision and orders of this court made on 2<sup>nd</sup> May 2013 pending the filing, hearing and determination of the intended appeal. She argues further that it is just, fair and in the interest of justice that the court stays the said ruling and consequential orders in the terms sought in the application.
5. The respondents have opposed the application. The 1<sup>st</sup> respondent filed her replying affidavit on 10<sup>th</sup> June 2013. In it is averred that the provisions of Order 42 rule 6(1) (2) (6) of the Civil Procedure Rules 2010, upon which the application is based, are not applicable to matters arising under the Law of Succession Act, and that the said provisions dealing with stay of execution pending appeal have not been imported into matters falling under the Law of Succession Act by Rule 63 of the Probate and Administration Rules. It is further stated that there is nothing capable of execution in the ruling delivered on 2<sup>nd</sup> May, 2013 as the said ruling merely dismissed the applicant's application dated 9<sup>th</sup> September 2011. It is averred that no stay of execution can issue as the notice of appeal does not relate to the said award; and that a stay of execution, if at all possible in these proceedings, can only relate to the decision sought to be appealed against as comprised in the notice of appeal.
6. The respondents argue that the applicant has not demonstrated that she has an arguable appeal against the ruling of 2<sup>nd</sup> May 2013. They also state that there is absolutely no evidence of intermeddling, waste or depletion as claimed by the applicant. They assert that the estate is properly managed with the help of professional managers and accountants. They say that the applicant is always free to inspect records as ordered in clause (c) of the arbitral award and she will therefore not suffer any substantial loss should the orders sought not be granted. She submits that the estate urgently needs substantive administrators to be able to deal with, among other things, the issue of liabilities, and that the orders sought will tie down the estate in the Court of Appeal for several years and the creditors will in all probability move to foreclose to the detriment of all the beneficiaries and herself as a guarantor.
7. There were directions that the application be canvassed by way of written submissions. Both sides have filed their written submissions. The applicant's submissions were filed on 2<sup>nd</sup> September 2013, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions were filed on 6<sup>th</sup> September 2013. The said submissions were highlighted on 14<sup>th</sup> July 2014. Mr. Ochieng-Oduol appeared for the applicant, while the case for the 1<sup>st</sup> and 2<sup>nd</sup> respondents was argued by Mr. Koech.
8. In their submissions, counsel for the applicant identifies two main issues for determination namely: a) whether this court has the jurisdiction to entertain the application herein and b) whether the orders sought by the applicant should be granted. It is submitted that the applicant had an invariable and constitutional right of appeal against the decisions of this court as is provided for under Article 164(3) (a) of the Constitution. It is submitted further that the applicant had evinced her intention to appeal against the orders made herein on 2<sup>nd</sup> May 2013. That she has done through her Notice of Appeal dated 6<sup>th</sup> May 2013, and that the application herein seeks to evenly

hold the scales of justice to ensure that the substratum of her appeal was not diminished by the taking of any steps on the arbitral award.

9. It is contended that this court is enjoined under the Constitution to dispense justice to the people who approached it, and that Article 159(2) (a) (e) of the Constitution demands that justice be done to all and that the purpose and principles of the Constitution be promoted and protected by the courts. The applicant contends that having provided for the right to appeal to the Court of Appeal under Article 164(3) (a), the Constitution does not have denied this court the jurisdiction to grant stay. It is submitted that this court is clothed with inherent power to grant a stay which can and has been invoked by the applicant in her application. Counsel, relies on the decision in *Re the Estate of Madhupaper International* (2006) eKLR where Kasango J held that

“...I am of the view that the Companies Act provides the law regulating the conduct of companies and the rules of procedure. Being so, I find that the Civil Procedure Act and Rules does not apply to matters under the Companies Act. Even if the Companies Act did not provide for stay of winding up orders, the court is adequately clothed with its inherent power, which can be invoked to issue stay.”

10. Counsel has also cited the decision in *The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others*, Petition No. 11 of 2012 consolidated with JR No. 295 of 2012 & Others, where a five Judge bench held that:

“However we are satisfied that the correct procedure for this application is provided for in Order 42 rule 6 which the applicant has cited. Supported by ancillary provisions under Sections 1A, 1B and 3A application is properly and procedurally anchored before this Court, and we have the jurisdiction to proceed with it under that order.”

11. On whether the court should grant the prayers sought by the applicant, she has relied on the provision of Order 42 Rule 6 of the Civil Procedure Rules. She contends that there was grave danger that the respondents would immediately enforce or execute the arbitral award to the prejudice of the applicant's rights as a child, dependant and beneficiary of the estate of the deceased. She further argues that being a daughter, dependant and beneficiary of the estate of the deceased entitled her to participate in the administration of the estate of her father but has been locked out without being heard in the petitions filed in court and referred to arbitration resulting in the arbitral award, whose execution was imminent, and was going to further trample upon her rights. Lastly, it is submitted that the applicant is willing to abide by any terms which the court may impose on the issue of security.

12. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the court lacks jurisdiction to entertain an application brought under Order 42 of the Civil Procedure Rules, seeking a stay of execution pending appeal, arguing that those provisions have not been imported into matters arising under the Law of Succession Act, by Rule 63 of the Probate and Administration Rules. Counsel has cited the decision in the case of *Rael Chemutai Mayiek vs. Grace Chemutai Kiget* (2005) eKLR, where Kimaru J said that:

“The Petitioners have made an application for stay of execution of the judgment of this Court under Order XLI Rule 4 of the Civil Procedure Rules. I have carefully read the Law of Succession Act and the Probate and Administration Rules made thereunder. Rule 63(1) of the Probate and Administration Rules provide that only orders V, XI, XV, XVIII, XXV, XLIV and XLIX of the Civil Procedure Rules shall be applicable in proceeding under the Law of Succession Act. Order XLI of the Civil Procedure Rules is not the rules of the Civil Procedure that can be applied in proceeding filed under the Law of Succession Act. The application before me, its merit notwithstanding, is therefore incompetent.”

13. Counsel has also cited the decision in *Re Estate of Musomba* (2004) eKLR, where Wendoh J stated that:

“I do agree with counsel for the petitioner that Rule 63 of the Probate and Administration Rules is very specific on what provisions of the Civil Procedure Act and Rules are applicable to proceedings commenced under the Succession Act and Probate and Administration Rules ... the court has no jurisdiction to grant orders of injunction under order 39 in matters relating to Succession and without the jurisdiction, the court cannot invoke Section 72 of the Interpretation and General Provisions Act to cure the form when the court has no jurisdiction in the first place.”

14. It is the respondents' case that even if the court is to find that it has jurisdiction to entertain the application, the same should still fail on its merits and for the reason that there is no positive order capable of being executed as per the ruling delivered on 2<sup>nd</sup> May 2013.

15. It is further contended that prayers 4 and 5 of the application cannot be granted as there is no subsisting appeal against arbitral award dated 10<sup>th</sup> August 2011. It is submitted that the Notice of Appeal dated 6<sup>th</sup> May 2013, to which the application is predicated, is clear that the applicant wishes to appeal against the ruling delivered on 2<sup>nd</sup> May 2013 and not the arbitral award. It is submitted that it is trite law that one can only get stay of the decision sought to be appealed against.

16. On the applicant's contention that the intended appeal would be rendered nugatory if stay orders are not granted, the respondents submit that the requirements of Order 42 rule 6(2) are clear, and that the applicant has not demonstrated in any event that she has an arguable appeal with high chances of success. On the applicant's urging the court to evenly hold the scales of justice, the respondents argue that the court should consider the history of the matter, especially that the parties had all agreed to refer the matters to arbitration, which consent was adopted and sanctioned by court, and that parties engaged in a very long and laborious arbitration which culminated in the award sought to be challenged. They contend that the applicant all along knew about all these matters and she did not raise any objection to the same until the award was published. It is their submission that the challenge to the award is not made in good faith and that the court ought to hold that the application is without merit.

17. On 17<sup>th</sup> September 2013 I gave directions that the written submissions were to be highlighted. The highlighting was done on 14<sup>th</sup> July 2014. Mr. Ochieng Oduol appeared for the applicant, while Mr. Koech argued the case for the respondents. Both counsels gave vast to the arguments set out in their respective written submissions.

18. I have given considerable attention to the application, the rival affidavits, the written submissions on record, as well as the oral highlights of the said submissions by counsel.

19. As regards the jurisdiction in light of the provisions of Order 42 rule 6(1), (2) and (6) of the Civil Procedure Rules 2010 upon which the application is based, I am in agreement with the respondents' contention that the said order is not applicable in matters arising under the Law of Succession Act, and that the said provisions dealing with stay of execution pending appeal have not been imported into matters falling under the Law of Succession Act by Rule 63 of the Probate and Administration Rules. The Law of Succession Act is complete with its own rules.

20. I note however that the application herein has also been brought under all other enabling provisions of the law. Article 159(2) (d) of the Constitution enjoins this court to administer justice without undue regard to technicalities. This court being a probate court is largely a court of equity, and I am persuaded to consider the substance of the application and determine the matter on its merits, or in any event lack thereof as the case maybe, without undue regard to the technicalities of want of form of the application by the applicants.

21. On whether the court should grant the orders sought, I uphold the respondents' case that there is no positive order capable of being executed as per the ruling delivered on 2<sup>nd</sup> May 2013. The application that GBM Kariuki J. was called upon to determine sought orders that the arbitral award made on 10<sup>th</sup> August, 2011 be set aside. At paragraph 16 page 15 of the said ruling, the learned Judge indicated that the question that the court had been called upon to determine was whether referring the matter to arbitration was in harmony with the provisions of the Law of Succession Act, and whether the Constitution was violated. It was the learned judge's view that there was no conflict between the Constitution and the Law of Succession Act in relation to arbitration, and he accordingly dismissed the application dated 9<sup>th</sup> September 2011 with costs.

22. Now, in their Notice of Appeal dated 6<sup>th</sup> May, 2013, the applicant has indicated, at paragraph 1, that she is dissatisfied with the decision by GBM Kariuki J. of 2<sup>nd</sup> May 2013 and intends to appeal to the Court of Appeal against the whole of the said ruling. The draft Memorandum of Appeal attached to the application reads - "Being an Appeal from the Orders of the Honourable Court (Justice GBM Kariuki) rendered on the 2<sup>nd</sup> of May 2013 at Nairobi by Justice Luka Kimaru."

My reading of the said ruling reveals that there is no positive order capable of being executed, and therefore in my view the application ought to fail on that count.

23. In view of everything that I have stated above, I hereby dismiss the application dated 23<sup>rd</sup> May 2013, with costs to the respondents.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**