



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 399 OF 2007**

**IN THE MATTER OF THE ESTATE OF JOHN MUSAMBA KATUMANGA – DECEASED**

**RULING**

1. The applicant in this matter filed a Motion dated 31<sup>st</sup> July 2014 on 1<sup>st</sup> August 2014. He seeks several orders among them, leave for the law firm of Oloo & Oloo Advocates to come on record and stay of execution of the judgment delivered on 30<sup>th</sup> May 2014. The application is premised on Section 3A of the Appellant jurisdiction Act Cap 9 Laws of Kenya and Order 5(2)(b) of the Appellate jurisdiction Rules and on all other enabling provisions of the law.

2. When the application was served on the respondent, she filed a notice of Preliminary Objection dated 11<sup>th</sup> August 2014. She raises several points – estoppel, jurisdiction, fact that application raises new evidence, among others.

3. The respondent argued the Preliminary Objection on 12<sup>th</sup> August 2014, to which the application replied.

4. It was argued that the application is founded on the provisions of the Appellate Jurisdiction Act and Rules, yet only the Court of Appeal can exercise jurisdiction under the said law. It was further argued that once there is a signed certificate of confirmation grant the court would then have no jurisdiction to look at new evidence. It was argued that the application takes the form of a review.

5. In reply it was argued that the reference to the Appellate jurisdiction Act and Rules was a mistake and the Constitution was invoked on the grounds that the technicalities of procedure should be ignored and that the court should do substantive justice. It was submitted that the application is not a disguised review.

It was also argued that the firm of Oloo & Oloo, Advocates is properly on record as it seeks leave to come on record.

6. On the citation of the Appellate Jurisdiction Act and Rules, the position of the court is that citation is not fatal to the application. The applicant has conceded that the same was a mistake. I find that the prayers sought in the application are very clear. The mere citing of the wrong provisions of the law does not deny this court jurisdiction to consider the prayers sought if it has jurisdiction to grant them. The citation of the wrong provisions of the law amounts to a technicality in procedure. By dint of the constitutional provisions. I can and do hereby overlook the said technicality.

7. It was submitted that I have no jurisdiction to entertain the application before me so long as a certificate of confirmation of grant is on record duly signed by the judge. The respondent did not cite any statutory provisions *nor* case law to support this contention. I am not aware of any such law and I find not basis therefore for accepting that proposition.

8. It was argued that the application is a disguised review of my orders. I note that the application is for stay of execution. Grant of stay orders does not amount to a reversal of orders sought to be stayed. There cannot therefore be any merit in this argument.

9. On the issue of whether the firm of Oloo & Oloo Advocates is properly on record, I do note that the applicant seeks to have the said law firm allowed to come on record. I have carefully perused the

provisions of the Law of Succession Act and the Probate and Administration Rules and I have not come across any provisions which require that leave not be sought before there can be change of advocates in succession causes. I concede that this is a requirement under the Civil Procedure Rules, but the relevant provisions in the Civil Procedures Rules have not been imported into probate practice. At least I am not aware of any such importation nor have any been brought to my attention.

10. It was argued that the applicant is estopped from seeking the reliefs sought in the application because he participated in the confirmation proceedings. The respondent did not lay basis for this proposition, neither did she cite any statutory provisions nor case law to support the same. I am unaware of any rule of law that would support such a proposition.

11. On the whole it is my finding that the objection raised to the said application is without foundation in law. I hereby dismiss the said objection and direct that the Motion dated 31<sup>st</sup> July 2014 be heard on its merits.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> DAY OF August 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mrs. Oloo advocate for the applicant.**