



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 154 of 1998

MUSYOKA

MWANGANGI:.....:PLAINTIFF

VERSUS

REUBEN CHAMBI

MUTHYA:.....:DEFENDANT

RULING

1. That Application dated 30.6.2008 seeks an order of “*stay of execution in HCCC 154/1998 pending lodging and hearing of the appeal against this court’s ruling delivered on 29.5.2008 at the Court of Appeal*”.
2. From a perusal of the grounds in support and the Affidavit sworn on 26.6.2008 by Dorcas Mwikali Chambi the issue is very simple; on 29.5.2008 this court (*Sitati, J.*) allowed the substitution of the Defendant, Reuben Chambi Muithya (deceased) with his legal representatives, Dorcas Mwikali Chambi and Francisca Syombua Chambi. The Applicant was heard before the Ruling but now contends that the Respondent on the basis of the substitution, applied for Notices to Show Cause against the Applicants and I see that there is a judgment against the Defendant entered on 14.11.2002 in the sum of Kshs. 522,520/= and costs taxed at Kshs. 74,635/= by consent. Part-payment of Kshs. 300,000/= has been made and it is the balance that is sought to be recovered from the Applicants.
3. The Applicants have further raised the issue that although they were legal representatives of the deceased Defendant, they were in a difficult position because after the grant was confirmed in H.C.Succ. 342/2005(Machakos) all the assets of the deceased were distributed but I note that in the certificate of confirmation of grant dated 27.4.2006, it is recorded as follows:- “*all the assets quoted in the 2nd column of the schedule be registered in the names of Dorcas Mwikali Chambi and Francisca Syombua Chambi as joint owners and trustee to Nyamai Chambi and Grace Mwendu Chambi.*” The assets include six (6) parcels of land, 2500 shares at National Bank of Kenya Ltd, and two (2) motor vehicles. In any event, their other argument is that “*when the Respondent sought to join them... they were not liable to be joined as administrators of the deceased estate (sic) and were not for all purposes of intention legal representatives of deceased estate (sic) at time of lodging the application*” for substitution. That they will suffer irreparable loss and damage as they have no power to act contrary to the confirmed grant and more so when they have discharged their duties as per the provisions of law.
4. The Respondent’s response is contained in grounds of opposition dated 2.7.2008 and filed on the

same day. In her submissions, counsel for the Respondent argued that there is no evidence of substantial loss to be suffered if the orders are not granted. That no security has been offered and yet the decree was passed on 14.11.2002 and Kshs. 300,000/= has been paid and the decree itself is not being challenged at all. That since the Applicants admit that they are legal representatives of the deceased's estate, and the beneficiaries thereof they cannot escape the liability attached to that role.

5. I have carefully considered the issue before me and what I gather is that the Applicants seek that any execution proceedings in this suit should be stayed until the intended appeal is heard and determined. The execution proceedings relate to the recovery of the decretal sum but specifically also that the order of substitution of the Applicants be stayed. Sadly, I do not think on a fair consideration of the Application as framed that there is any reason to grant the orders sought. I say so, with respect, for the following reasons:-

6. Firstly, this suit was instituted on 7.7.1998 but the Defendant died on 8.6.2005 and on 16.9.2005, a grant of letters of administration was issued to the present Applicants, jointly. As at that time, the judgment-debt in this suit was unpaid and legally formed a liability to the estate of the deceased. In her ruling of 29.5.2008, *Sitati, J.* considered all these matters and concluded that *"the respondents did not annex to the Replying Affidavit a copy of the petition for Grant of Letters of Administration as proof to this court that an inventory of the deceased's liabilities was made, nor does the certificate of confirmation of Grant show what liabilities there were to the estate and how such debts were going to be paid."* The respondents in that Ruling are the present Applicants and to my mind, I see nothing to be challenged because once they admit to be the Administrators of the deceased Defendant's estate then section 83(d) of the Law of Succession Act enjoins them *"to ascertain and pay, out of the estate of the deceased, all his debts"* and in section 83 (g) *"within six months from the date of confirmation of the grant, or such longer period as the court may allow to complete the administration of the estate... and to produce to the court a full and accurate account of the completed administration."* This includes an inventory of all liabilities and their payment thereof.

7. I have seen a copy of the certificate of Confirmed Grant issued on 27.4.2006 and there is no evidence that six months after that date, the Applicants complied with the law as I have stated above. Without doing so, their present Application is a miserable attempt at avoiding their lawful duties and discretion cannot favour them in such a situation. As was stated by *Madan, J* (as he then was) in Butt vs The Rent Restriction Tribunal Civil Appl. Nai 6/1979.

"It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or there are or not particular circumstances in the case to make our order of staying execution."

8. My mind is clear that in the circumstances of this case, discretion cannot favour the Applicants.

9. Secondly, and as a corollary to the above, the Applicants have inherited all the assets of the deceased Defendant and I do not see how they can now shout that the estate has ceased to exist. It cannot because I have said that without showing to this court that the administration of it has been completed, they are bound to show precisely why the debt owing in this suit has remained unpaid although certainly they are aware of it.

10. Lastly, a party seeking a stay order must establish principally that substantial loss would be occasioned if no stay is granted. In this case, since the estate has assets in the hands of the lawfully appointed administrators I see no loss whatsoever if the stay order is not granted as the estate from the assets elsewhere outlined above, can pay the remainder of the decretal sum without any personal hardship to the Applicants.

11. On the whole, I see no merit in the Application dated 30.6.2008 and the same is dismissed with costs.

12. Orders accordingly.

Dated and delivered at Machakos this 24th day of September 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Makau Jnr for Applicant

Mrs Musila for Respondent

Isaac Lenaola

Judge