



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Case 2436 of 2005

IN THE MATTER OF THE ESTATE OF JOHN ECHUKULE KUCHAL (DECEASED)

JOSEPH KUCHAL NANGIRO.....1ST APPLICANT/OBJECTOR

EDWARD ETABO KUCHAL.....2ND APPLICANT/OBJECTOR

VERSUS

MARGARET MWONGELI MUTUNGA.....1ST RESPONDENT

FAITH MBITHE.....2ND RESPONDENT

RULING

A number of applications were filed herein. A summons dated 4th January 2006 was filed by Joseph Kuchal Nangiro and Edward Etabo Kuchal as objectors. The application was filed against Margaret Mwangeli Mutunga and Faith Mbithe the two administrators herein, as respondents. The application was filed on 5th January 2006 and was under certificate of urgency. Its main prayer was for a temporary injunction to restrain the processing of death gratuity and pension of the deceased JOHN ECHUKULE KUCHAL to the respondents, pending the hearing and determination of the application and the hearing and determination of an application for revocation or annulment of grant of letters of administration dated 4TH January 2006 which was filed on 5th January 2006.

Subsequent to the filing of the summons for restraining orders dated 4th January 2006, the applicants filed another application by way of summons dated 16th January 2006 through Kogongona & Company advocates. That application sought for two substantive orders numbered as (2) and (3). The orders sought were in short that the administrators of the estate be restrained from dealing with the estate pending the hearing and determination of the application and the hearing and determination of the application for revocation of grant of letters of administration. The other substantive order sought is that the administrator be restrained from receiving the death gratuity and pension of the deceased pending the hearing of the application and the application for revocation of grant of letters of administration.

From the court record, Mr. Mwaniki for Kagongona & Company advocates appeared before the Deputy Registrar on 9th January 2006 and fixed the Summons dated 4th January 2006 for hearing on 8th March 2006.

On a later date, Mr. Kihara appeared before Hon. Justice Rawal and an application under certificate of urgency, which is not identified, was fixed for hearing on 6th February 2006. This appears to be the application dated 16/1/2006. On that 6th February 2006 Ms. Kagongona for the applicant appeared, while there was no appearance for the respondents Ms. Kagongona stated that the application was served. I allowed the application to proceed to hearing, the absence of the respondents notwithstanding. I reserve my ruling, which I gave on 15th February 2006. In the ruling, I granted prayer(3) of the application, which restrained the respondents as administrators from receiving the death gratuity and pensions pending the hearing of the application, which had already been filed, for revocation of Grant for Letters of Administration.

Thereafter, on 8th March 2006, the application dated 04/01/2006 came up for hearing. On that date, counsel for the applicant Ms. Kagongona did not appear.

Mr. Kwengu for the respondent appeared and informed me that they had not been served with any notice to withdraw the earlier application dated 04/01/2006. He also informed me that they had not actually been served with the application dated 16/01/2006. Consequently, M/s Kwengu & Company advocates filed an application on behalf of their clients on 8th May 2006, seeking for orders that the orders granted by this court on 15th February 2006 be set aside, vacated or varied, as well as costs.

That application came for hearing on 4/12/2006. At the hearing Mr. Kwengu submitted that the orders of the court were made ex-parte without service of the application. He submitted that the earlier application which came up for hearing on 8/3/2006 was a mischief, as it sought the same orders as the application that was determined ex-parte. He argued that the purported withdrawal of the earlier application dated 04/01/2006 was improper, as it was already served. He also argued that the administrators or petitioners would not suffer any prejudice if the orders granted by the court were set aside.

Ms. Kagongona for the administrators submitted there was no mischief. It was true that her clients had filed the earlier application. However, there was no response filed to that application. She contended that the respondent was served with the application on 24/1/2006. She further submitted that the orders sought to be set aside were merely orders for maintenance of the status quo.

I have considered the application dated 2nd May 2006, the documents filed and the submissions of counsel for both sides.

Under Rule 73 of the Probate and Administration Rules, this court has powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The grounds for this application were that the ex-parte orders were given without serving the application dated 16th January 2006; that the respondent concealed material facts; and that the interests of justice required that the orders be set aside.

Considering this matter, the orders I have given merely retained the status quo with respect to the payment of gratuity and pension until the hearing and determination of the summons for revocation or annulment of grant, which has already been filed and is pending. I have not made any final decision in the matter, and, in my view, the orders I gave, though granted ex-parte, do preserve the assets of the estate. As such I am not persuaded to exercise my discretion to set aside the orders I made, as they are merely interim, and there is a pending application for revocation of grant of letters of administration. In my view, preserving the assets of the estate is in the best interests of the estate and the beneficiaries. No prejudice will be suffered by the applicants as a result of my orders. I decline to set aside the orders that I made on 15th February 2006.

I however order that the summons for revocation or annulment of grant dated 04/01/2006 be fixed by the registry for hearing as a matter of urgency.

The upshot of this is that I dismiss the summons dated 2nd May 2006, and order that the Summons for revocation or annulment of grant dated 04/01/2006 be heard as a matter of priority. I however order that the costs of this application will be in the cause.

Dated and delivered at Nairobi this 20th day of February 2007.

George Dulu

Judge

In the presence of –

Mr. Mugo holding brief for Mr. Kwengu for the applicant.

No appearance for the respondent.