REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
PROBATE AND ADMINISTRATION CAUSE NO. 159 OF 1997

IN THE MATTER OF THE ESTATE OF: CHARLES LEVITAN (DECEASED)

R U L I N G

In this Summons for stay, the Applicant, Louise Njeri Mwaura, seeks, in the first place, a stay of execution of the ruling delivered by this Court on 23rd March, 2001 pending appeal against the said ruling, and secondly the sum of Kshs.3,671,944/49 held in a fixed deposit with Standard Chartered Bank Kenya Limit Reference No. 01403/145885/00 and Kshs 655,829/05 held in the joint account of Antony Levitan and Peter J.S. Hewett Current Account No. 01011-145885-00 Muthaiga Branch be invested in the joint account of the Applicant and the Respondents pending the hearing and determination of the intended appeal.

From what has been brought to my attention during the hearing of the Application, the Applicant is aggrieved by the ruling of this Court dated 23rd March, 2001 whereby the Court held that the Applicant and her son were not dependants of the Deceased in this matter within the meaning of the Law of Succession Act and that they were not therefore entitled to any part of the Estate of the Deceased. Consequently the Court dismissed the Applicant's summons dated 5th February 1999 praying for provisions.

Before proceeding further, let me mention that there was a preliminary issue as to whether this application before me was filed within 14 days as ordered by Lady Justice Aluoch.The order was made on 21st May 2001. While the Applicant started counting the 14 days from 22nd May, 2001, the Respondent started counting them from 21st May, 2001 and is therefore saying that since the application was filed on 4th June, 2001, that filing was one day late. The Applicant does not agree, and I think she is right, because properly the counting started on the 22nd May, 2001. The application was, therefore, filed within the 14 days and is properly before me.

Moving further, therefore, the court has been told that a notice of the intended appeal has been filed in the Court of Appeal and that the Applicant has a good appeal with a probability of success to present to the Court of Appeal. While the Respondent does not deny that a notice of the intended appeal has been filed, the Respondent does not agree that the Applicant has a good appeal with a probability of success.

I would not like to make a definite decision on that issue and I do not think it necessary as the rendering of the intended appeal nugatory which the Applicant is fearing is founded on the allegation that "the spending and drawings reflected in the … estate account" is making the estate be wasted by the Respondents and it is as a result of that fear that the Applicant has included prayer 3 in this summons.

Those allegations are allegations against the Executors and are new in this matter as they were not made at the time this Court was hearing the summons dated 5th February 1999. There was nothing said against the Executors and therefore I do not think the intended appeal will say anything against the Executors and seek orders against the Executors.

That being the position, I think that the inclusion of prayer 3 in this summons, meant for a stay of execution, is improper and Rule 73 of the Probate and Administration Rules is no cure in these circumstances. If the Applicant wanted such an order, she should have properly included this prayer in the summons dated 5th February, 1999.

Here today the only question which should be properly addressed is whether a stay of execution should be granted pending appeal against the ruling made on 23rd March, 2001.

In law a stay of execution can only be granted where execution can take place and is due to take place. For example, where a defendant has been ordered by the court to transfer a registered piece of land or to pay a debt to the plaintiff so that if the defendant defaults, execution of the Court order takes place for the transfer or payment of the debt to be effected. In this matter before me, what is there to be executed from the ruling dated 23rd March 2001? What execution is intended so that it may be stayed?

With all due respect, I find none. The Applicant in her summons dated 5th February 1999 came with her son into this court asking the Court to grant them an order that they were, as dependants of the Deceased, entitled to a part of the estate of the Deceased and that therefore should have provisions from the Estate.That was because they had been left out first, by the Deceased himself and subsequently by the Executors of the Will of the Deceased and the Applicant and her son were therefore getting no provisions from the Estate on the basis that they were not dependants and were not entitled.

This Court, Visram J., on 23rd March, 2001 refused to give the Applicant and her son the order they wanted. The Applicant and her son therefore remain left out just as they were before they came to Court and before the learned judge delivered that ruling. That is all the learned judge did and it was all that was required to be done and the question of execution of that ruling does not therefore arise. The learned judge did not order any body to do anything.He did not for example, make an order distributing the estate or any part of the estate or directing the Executors to do anything with the money or any part of the Estate of the Deceased so that following his order or ruling, execution could follow.

If, therefore, for example, confirmation of the Grant of Probate is done, that will not be because there is a Court ruling dated 23rd March, 2001 saying the Grant be confirmed. There is nothing like that in that ruling. If distribution of the Estate is done because the Grant or Probate is confirmed, that will not be because the ruling of 23rd March, 2001 says that those things be done. I have read the ruling. There is completely nothing requiring execution of that ruling. It is a ruling which requires no execution and against which there can never be a proper order of stay.

Put it in another way, and if there must be execution for every ruling order or judgment, it was a ruling the execution of which is effected the very second the ruling is delivered. It is a ruling the execution of which is done simultaneously with its delivery. It is an executed ruling at its delivery so that any moment after that ruling's delivery, there remains no execution to stay. Thereafter the aggrieved party is at liberty to appeal against the ruling but will have no execution to say as it is not humanly possible to stay that which has already taken place or has already been done. The question of that appeal being rendered a nugatory because execution has not been stayed does not therefore arise and that is the position in this matter.The Applicant's intended appeal is in no way rendered a nugatory by this Court's refusal to grant a stay of execution asked for in this application.

To risk a repetition, your people refuse to give you something. You take them to court for the Court to force them, through a Court Order, to give you that thing. The Court refuses to order them to do so, meaning the Court has not ordered anybody to do anything. It has simply rejected your application and left things to be as they were before you filed your application in that Court. In those circumstances, after delivery of the ruling, what is there to be executed from that court's refusal? Completely nothing.

If follows that I am, in this summons for a stay of execution, being asked to make an improper order; a useless, hollow, pointless, if not an impossible to execute, order of a stay, perhaps, to be improperly used and have the effect of an injunction in this matter where no injunction has been applied for and may not also have been granted even if it had been applied for. In conclusion, therefore, this summons dated 4th June, 2001 before me must fail and the same is hereby dismissed in its entirety with costs to the Respondent.

Dated this 19th day of October, 2001.

J.M. KHAMONI

JUDGE