



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 294 OF 1996

IN THE MATTER OF THE ESTATE OF MOHAMED GATONGE (Deceased)

GAUKU MOHAMEDPETITIONER

VERSUS

GITONGA MOHAMEDOBJECTOR

RULING

1. This is a ruling on the following two applications by the Petitioner: -

- a) A Notice of Motion dated 30/9/2019 (“the first application”), and
- b) A Summons for stay of execution dated 5/11/2019 (“the second application”).

I propose to deal with the applications sequentially.

2. The first application is brought under Order *XXXVI Rule 1 of the Civil Procedure Rules, Article 159 of the Constitution and section 1 (a) of the Civil Procedure Act*. It seeks the Court’s leave to allow the petitioner to question the legality of the findings which various Courts have made in this matter. I will paraphrase those questions hereunder:-

- “1. Whether the sworn affidavit by the applicant advocate is admissible to prove consent was entered by the applicant and the objector.*
- 2. Whether the Court acted beyond its judicial powers in judicial administration of Justice (Justice Kasanga Mulwa J. and Justice Isaac Lenaola J (sic)) to appoint respondent joint administration to help perversion of the cause of Justice and injustice for cover up of fraud.*
- 3. Whether the parental letter of both applicant and respondent is admissible to prove paternity of the respondent not the son of the deceased father Viz Mohamed Gatonge for being born after the death of the deceased.*
- 4. Whether the respondent because was born after the death of the deceased can be an heir of the deceased estate by perversion of the cause of Justice for being appointed Co. administrator of deceased estate by the court with intend to help perversion of the cause of justice and gross misjustice.*
- 5. Whether the order for joint administrators was signed in the presence of parties as provided by law of contract Act CAP. 23 Law of Kenya.*
- 6. Whether the consent order was recorded by vivavoce before the court. By parties and signed by their advocates pursuant to mandatory law categories manifestry.*
- 7. That unless the documentary proof of evidence is admissible respondent confirmed grant be revoked and declared null and void and the consent order be varied quashed or set aside for perversion of the justice”.*

3. Those then were the questions that this Court was asked to decide on. The application was supported by the affidavit of the petitioner sworn on 30/9/2019. She deposed that the respondent was born after the demise of the deceased; that their mother had allegedly written a letter stating that the deceased was not the father of the respondent; that her advocate had denied having signed the consent to appoint the respondent a co-administrator and that there had been misinterpretation of the law of contract and paternity.

4. The application was opposed by the respondent vide his one page replying affidavit sworn on 27/11/2019. He contended that the application did not disclose any cause of action; that the issues being raised had already been decided upon; that the estate had already been distributed and that there was no law that had been cited for interpretation and the application was but an abuse of the court process.

5. I have considered the affidavits of the parties and the submissions of the petitioner. I deliberately set out *in extensor* the so called questions sought to be determined so as to show the conduct and in intention of the petitioner in these proceedings. The petitioner seeks the reopening of matters which have already been determined with finality by various courts.

6. All the issues being raised in the application are not justiciable. This is so by dint of **section 7 of the Civil Procedure Act Cap 21 Laws of Kenya**. They are *res judicata* having been determined by this and the Court of Appeal. In the ruling of this Court delivered on 19/9/2019, this Court set out the entire history of the matter and I do not intend to rehearse it here.

7. **Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya** provides: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

...

Explanation 3 The matter above referred to must have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

...”.

8. All the issues that the application has raised, purportedly for interpretation, have hitherto been raised and conclusively determined by this and the Court of Appeal in **Civil Appeal No. 64 of 2008**.

9. Accordingly, I am satisfied that the application is not only bad in law, it does not lie and it is an abuse of the court process. The same is for dismissal.

10. The second application seeks that there be a stay of execution of the order made by this Court on 19/9/2019 and an order to restrain the County Government of Meru from transferring and subdividing the estate property, to wit, **plot no. 6 Makutano, Meru Municipality**.

11. The application was supported by the affidavit of the petitioner sworn on 5/11/2019. She averred that the order appointing the respondent as a co-administrator was a conspiracy to pervert justice; that the objector was born after the demise of the deceased; that her advocate had denied having signed a consent; that her other brother had withdrawn his objection and that their mother had disputed the paternity of the respondent.

12. The application was opposed by the respondent vide his replying affidavit sworn on 27/11/2019. He deposed that the application was an utter abuse of the legal process. That the same was frivolous and vexatious and made in bad faith. That the order sought to be stayed had already been perfected as the property had been sub-divided into two as per the grant. That the matters sworn to in the supporting affidavit had already been determined.

13. I have considered the affidavits on record and the submissions of the petitioner. This is an application for stay. In her replying affidavit sworn on 11/12/2019, she stated that the application was for stay pending interpretation of the Law of Contract Act.

14. I have already found that the application for interpretation is not only incompetent, but that it does not lie. That being the case, the second application for stay has no basis and the same is therefore dismissed.

15. Accordingly, both applications dated 20/9/2019 and 5/11/2019 are dismissed with costs.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 6th day of February, 2020.

F. GIKONYO

JUDGE