



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS SUCCESSION APPLICATION NO. 15 OF 2019

PAMELA ADISA MUSIZI.....1ST APPLICANT

LEBA LUKALIZA MAHIVA.....2ND APPLICANT

ELIKA MMBOGA AMALU.....3RD APPLICANT

RUTH MUHONJA MISIGO.....4TH APPLICANT

DAVID ASIMA MAHIVA.....5TH APPLICANT

SOLOMON KHAGASI MAHIVA.....6TH APPLICANT

VERSUS

AIREN MUTEYIZI UNGUNZU.....1ST RESPONDENT

ALBERT AZENGA KANYANGA.....2ND RESPONDENT

RULING

1. The Motion dated 28th August 2019 seeks several orders. It is principally an application for leave to file appeal, against decision made in Vihiga SPMCSC No. 97 of 2005, out of time, and for consequential orders to stay execution of the impugned order or ruling, and orders to injunct the second respondent from intermeddling with a particular asset of the estate.

2. The impugned order or ruling is said to have been delivered or made on 27th June 2019. The applicants aver that they were unaware of the delivery of that ruling until 9th August 2019. They were aggrieved by it and accordingly desired to challenge it on appeal, but they were out of time, hence the application. It is not too clear to me why the applicants did not attend at the delivery of the ruling. They aver that the ruling was initially due for delivery on 10th January 2019, and was adjourned several times, but I have no evidence of that.

3. I have seen a copy of that ruling. It was on an application for revocation of grant, review of a judgement and for an injunction. The application was dismissed on its entirety, that is to say the court declined to revoke the grant, to review the judgement sought to be reviewed and refused to grant the injunction sought. None of the orders made with respect to that application are capable of execution, and, therefore, there cannot be any basis for grant of a stay order.

4. After dismissing the application, the trial court proceeded to give directions, for the filing of a confirmation application, and of protest affidavits, by whoever shall not agree with the proposals on distribution. It is not clear from the application before me whether the stay of execution is being sought with respect to these directions, so that the filing for confirmation of the grant be delayed until after the appeal is disposed of.

5. It would appear that the confirmation application has since been filed. I have seen the application dated 8th August 2018. The applicants are aware of it since it is they who have annexed a copy of the application to their affidavit. A succession cause is geared basically to distribution of the estate. Indeed, it is the *raison d'être* for the filing of the cause. Distribution is at the heart of the confirmation, and all issues relating to the estate ought to be addressed at this point. All the concerns that the applicants may have ought to be addressed at the confirmation hearing. For, by virtue of section 71 of the Law of Succession Act, at confirmation, the court considers the process through which the administrator was appointed, to assess whether or not to confirm him or her to remain in office. I believe that if the applicants have issues with the manner in which the administrator was appointed, they would have opportunity to agitate against it at the confirmation hearing.

6. I am invited to give injunctive orders to restrain intermeddling with the estate by the 2nd respondent. Looking at the affidavit in support of the application, I note that there are no allegations made against him at all. I see that in the affidavit sworn in support of the revocation application, that was before the trial court, that the same did carry elaborate allegations against the 2nd respondent, that application is attached to the affidavit sworn in support of the application. I cannot rule on whether to grant an injunction based on that affidavit since the revocation application is annexed merely to demonstrate what was before the trial court. In any event, the trial court dismissed the application, and that dismissal will be the subject-matter of the appeal, should I allow this application.

7. I would have been minded to disallow the application before me, and to require the applicants to advance their case through filing a protest, or protests, to the confirmation application that is pending before the trial court. The trial court file is not before me, and, therefore, I do not have a clear view of what has been happening in the matter. A portion of the proceedings have been attached, but they only cover the period between 2013 and 2014. This is a succession cause, there can only be closure when all the parties, who are beneficially entitled, are heard on their issues and complaints. I note that the applicants claim to be children of the deceased. They should have their day in court. They have a constitutional right to be heard on appeal. I note that the affidavit sworn in reply was by the 2nd respondent, who is not an administrator of the estate. The administrator, the first respondent, did not file any. Ideally, the appeal is principally against him, for it was his grant that was sought, at the trial court, to be revoked. He should have filed a response, to address the issues as to whether the applicants had notice of the delivery of the ruling, for that would matter in assessing whether or not I should allow them to file appeal out of time.

8. In the end, I shall make orders as follows:

(a) That I allow the application herein, dated 28th August 2019, in terms of prayer 4 of the Motion;

(b) That the extension granted in (a), above, shall be for thirty (30) days;

(c) That once the appeal is filed, there shall be stay of proceedings in Vihiga SPM CSC No. 97 of 2005, to await the outcome of the appeal; and

(d) That each party shall bear their own costs.

9. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE