



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1060 OF 1987

IN THE MATTER OF THE ESTATE OF LOONTASATI OLE LOLOWUAYA (DECEASED)

TWAARARI OLE LOONTASATI OLOLOWUAYAAPPLICANT

VERSUS

MOSES MOOKE LOONTASATI.....RESPONDENT

RULING

1. The deceased died on 20th February 1980. A grant in respect to his estate was made to Martha Nashipae, Sakai Ene Loontasati, Moses Mooke Loontasati (the respondent) and Richard Twarari Ole Loontasati Olowuaya (the applicant) on 13th July 2015. Pursuant to the judgment delivered by this court on 4th April 2016, the application for confirmation of grant filed by the applicant dated 23rd October 2015 was allowed.

2. On 14th April 2016, the respondent filed an application seeking the stay of execution of the distribution in the judgment pending the hearing and determination of the appeal which he had preferred to the Court of Appeal. In its ruling delivered on 12th July 2017, this court allowed the application for stay of execution for 6 months to allow him to prosecute his appeal.

3. The present application dated 26th April 2016 was brought by the applicant seeking for an order to compel the Registrar of Probate at Nairobi High Court to execute on behalf of the respondent all the documents pertaining to the distribution of the estate of the deceased. The application was based on the fact that the respondent has refused to sign Form RL 19 in respect of all the land known as Kajiado/Elengata Wausi/4 to enable them subdivide and distribute the said land to the rightful beneficiaries.

4. The application was opposed by the respondent through his replying affidavit dated 27th February 2018. He stated that he has never been called by the applicant or at all in connection to the transmission process nor has there been any meeting of the family members and/or beneficiaries of the estate in respect to the transmission process. He alleged that the document referred to by the applicant was contrary to the orders of 4th June 2016 and the certificate of confirmation of grant to the extent that the entire parcel of land title number Kajiado/Elengata Wausi/4 was ostensibly being transmitted to three persons as opposed to being transmitted to each of the five houses as ordered by this court, and that he could not be a party to an instrument which was contrary to the court orders and prejudicial to the interests of the other beneficiaries. He further alleged that there had been no survey and/or subdivision conducted on the suit property and no meeting of either administrators or beneficiaries.

5. On the same day the respondent filed a notice of preliminary objection on the applicant's notice of motion application dated 26th April 2016 on the grounds that:

a. the application offended the provisions of the **Law of Succession Act** and the **Probate and Administration rules** and as such is unfound and without any legal basis;

b. that equity follows the law;

c. that the application was fatally incompetent, anchored on wrong and inapplicable provisions of the law, devoid of merit, wishy-washy, untenable and fundamentally flawed in form and substance hence deserving only to be struck out in *limine*; and

d. that the jurisdiction of this honourable court had not been properly invoked and as such this honourable court cannot entertain the

said application.

6. Counsel appeared before the court on 27th February 2018 for the hearing of the applications. Mr. A. Kago for applicant appeared for the applicant while Mr. H. Kago for respondent was present for the respondent. I have considered all the pleadings and submissions by counsel.

7. On the preliminary objection, I agree that the **Law of Succession Act (Cap 160)** is self-contained, and it is only depended on the **Civil Procedure Act** and the **Rules** made thereunder to the extent that **rule 63(1)** of the **Probate and Administration Rules** has permitted. (**In Re. Estate of the late Chilali Mulinda (Deceased) [2015] eKLR**). The present application was stated to have been brought under **sections 1A, 1B and 3A** of the **Civil Procedure Act and Rules 40 and 51** of the **Civil Procedure Rules**. Technically, these provisions would not confer jurisdiction to this court to grant the orders sought because they are not among those imported under **Rule 63(1)**. However, I hope the respondent is not saying that the applicant has no remedy. I hope he is not saying that an applicant who has a judgment or order under the **Law of Succession Act** cannot execute it because the **Act** has no specific provision on execution. If that is what he is saying, he is wrong. This is because under **Rule 73** of the **Probate and Administration Rules** the court has inherent power to make –

“such order as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Further, **Article 159(2)** of the Constitution enjoins the court to administer justice without undue regard to procedure technicalities.

8. On the merits of the application, the applicant has a judgment in terms of a confirmed grant, which he is entitled to execute, and the respondent is under a duty to comply. The respondent preferred an appeal, and on 12th July 2017 he was given 6 months stay to allow him prosecute the appeal. By 27th February 2018 he had not prosecuted the appeal. The explanation was that there was delay in preparation of the Record of Appeal owing to the delay in the getting of proceedings from this court, and that there was a certificate of delay received on 1st February 2018. The Record of Appeal was filed and served on 9th February 2018. He requested, under **Rule 67**, for extension of time. He has requested the Court of Appeal to prioritize the appeal.

9. I consider that, now that the appeal has not been prioritized, the respondent had the option to seek from the Court of Appeal the stay of the execution of the decree that was issued by this court. I have said that the applicant has a decree that he is entitled to execute. I will exercise my discretion and grant a further stay of 3 months from today. After the three months, and subject to what the Court of Appeal will say, the present application will stand allowed with costs. There will be no further reference to this court on the application.

10. The respondent has been indulged. He will pay costs.

DATED and DELIVERED at NAIROBI on the 16TH day of MAY 2018

A.O. MUCHELULE

JUDGE