



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.157 OF 2015

IN THE MATTER OF THE ESTATE OF:

DAN JAPALA ODHIAMBO (DECEASED)

AND

ATIENO ODHIAMBO PETITIONER/RESPONDENT

VERSUS

PETER OTIENO ODHIAMBO

TOM OCHOLA ODHIAMBO.....OBJECTORS/APPLICANTS

RULING

[1] The application dated 26th June 2018, is by the objectors, **PETER OTIENO ODHIAMBO** and **TOM OCHOLA ODHIAMBO**, against the petitioner, **ATIENO ODHIAMBO**, all being beneficiaries of the estate of the late **DAN JABALA ODHIAMBO**, who died on the 11th February 1971, as per the Grant of Letters of Administration Intestate issued to the petitioner on the 23rd February 2016 and confirmed in her favour on the 11th April 2018, apparently after the hearing of an objection raised by the objectors to the petitioner's summons for confirmation of grant dated 26th May 2016.

[2] The objection was dismissed by this court (differently constituted) in a judgment rendered on **11th April 2018**, in the presence of the petitioner but absence of the objectors, the judgment had earlier been slated for delivery on 10th January 2018, but was re-scheduled to 7th February 2018 and then to 14th March 2018, when it was deferred to 11th April 2018, apparently due to the absence of the objectors' advocate.

The record shows that the deferent was done in the presence of the objectors. Nonetheless, the court ordered that notice of that judgment date be issued to both counsel for the objectors and the petitioner. But, on the appointed date the petitioner was the only party present in court to take the judgment.

[3] The present application arises from that delivery of the judgment on the 11th April 2018, and essentially seeks an order to temporarily stay the implementation and/or enforcement of the judgment and the decree arising therefrom and in particular, in relation to the payment of fine and/or in default committal to jail.

The applicants/objectors also seek an order to extend time to file a notice of appeal and that the notice of appeal annexed to the appropriate summons be deemed as duly filed and/or lodged.

The application is based on the grounds on the face of the summons as fortified by the facts contained in the supporting affidavit dated 26th June 2018, deponed by the objectors through the second objector, Tom Ochola Odhiambo.

[4] The petitioner did not file grounds of objection nor a replying affidavit in opposition to the application which was argued on behalf of the objectors by the learned counsel, **MR OCHWANGI**. The petitioner was represented at the hearing by the learned counsel, **M/S MIMBA**, who left the matter to the court after informing the court that service of the application was effected last week but despite calling the petitioner to her office, she (petitioner) failed to appear in the office last Friday to sign a replying affidavit.

Learned counsel made a plea hitherto reluctantly, for time to file a replying affidavit. She however indicated that execution of the judgment had not been effected.

[5] Having considered the application in the light of the supporting grounds, it is the view of this court that although the objectors were aware of the 11th April 2018, as the judgment date, the same having been communicated to them on 14th March 2018, when they appeared in court without their advocate, there is no evidence in the court file showing that all counsel and in particular, the objectors' counsel were served with the necessary notice of judgment as ordered by the court. It is for that reason alone that this application is now granted in terms of prayers three (3) and four (4) only.

As there has been no attempt or indication by the petitioner to execute the judgment and the resultant decree, a fact indicated by the petitioner's counsel, an urgent need does not arise to grant prayer six (6) of the application.

In any event, the application for stay of execution of the judgment may be renewed in the Court of Appeal.

With regard to the costs of this application, each party shall bear their own costs.

Ordered accordingly.

J.R. KARANJAH

JUDGE

10.07.2018

[Read and signed this 10th day of July, 2018]

[In the presence of Mr. Wagonda holding brief for Mr. Ochwangi and

M/s Mimba]