



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2071 OF 2011

IN THE MATTER OF THE ESTATE OF PAUL MBUGUA KIBE (DECEASED)

CATHERINE NJERI NDUATI.....APPLICANT

VERSUS

ROSE NYAWIRA KIBE.....RESPONDENT

RULING

1. The deceased Paul Mbugua Kibe died intestate on 30th November 2009. The applicant is the widow of the deceased and had two children with him namely Cynthia Mumbi Mbugua and Philip Kibe Mbugua. The respondent is a former wife of the deceased and also had two children with him namely David Allan Kibe and Brian Joel Gatungo. This court on 13th December 2012 appointed the applicant and the respondent as co-administrators of the estate of the deceased. The deceased's estate comprised only of money in the bank and the deceased's share of the estate of his late father David Kibe Waweru. Through the ruling dated 21st March 2014 this court held that the deceased had 5 beneficiaries surviving him namely: Catherine Njeri Nduati (the applicant), Cynthia Mumbi Mbugua, Philip Kibe Mbugua, David Allan Kibe and Brian Joel Gatungo, and that each was entitled to the Kshs.32, 989, 183.00 estate as follows: Catherine Njeri Nduati –Kshs.5,264,803.00, Cynthia Mumbi Mbugua- Kshs. 5,264,803.00, Philip Kibe Mbugua - Kshs.5,264,803.00, David Allan Kibe - Kshs.8,597,387.00 and Brian Joel Gatungo – Kshs.8,597,387.00. Pursuant to the ruling of 26th May 2014 the amount of accrued interest on the sum was to be distributed among the 5 beneficiaries following the ratio used in the ruling of 21st March 2014. On 29th April 2016 the applicant filed summons for confirmation of grant. The summons are pending determination.

2. Being dissatisfied with the ruling dated 21st March 2014, the applicant filed an appeal to the Court of Appeal. The Court of Appeal in its judgment dated 22nd September 2017 redistributed the sum of Kshs.32,989,183/=. Kshs. 9,332,090.50 went to the applicant and her children and Kshs.23,657,090.50 went to the children of the respondent. On 4th October 2017 the applicant filed an application before the Court of Appeal seeking the review and setting aside of its judgment dated 22nd September 2017 and all consequential orders arising therefrom. The application is pending determination.

3. On 9th October 2017 the respondent brought an application seeking orders compelling the applicant to surrender back/pay back the sum of Kshs.11,742,400.52/= inclusive of interest received by the applicant on 5th May 2014 on account of the ruling delivered by this court on 21st March 2014 which ruling was overturned by the Court of Appeal on 22nd September 2017, and orders compelling the applicant and her advocate to execute all necessary documents and in particular account closing forms, funds transfer forms on monies jointly held as between the her and the applicant in their advocates joint account. The applicant filed her response to the application denying the allegation that she had refused to cooperate with the decision of the Court of Appeal. She stated that she had sought review of the decision and was awaiting determination. On 26th July 2018 this court issued a ruling directing the parties to wait for the determination of the application for review before confirming the grant or making any orders. The court further directed that the matter be mentioned before the Presiding Judge on 24th September 2018 to find out if the Court of Appeal has heard and determined the application for stay.

4. There are two applications before this court for determination, the application dated 7th September 2018 and a preliminary objection dated 18th September 2018. In the application of 7th September 2018, the applicant sought a temporary stay of execution of warrants of sale of movable property in execution of decree for money issued to Messrs Mbusera Auctioneers on 4th September 2018. The applicant further sought to be allowed to settle the decretal amount from her share of the proceeds of sale of properties of the estate of David Kibe Waweru (deceased) due to the estate of Paul Mbugua Kibe as per the certificate of confirmation of grant in **Succession Cause No. 2521 of 2009- In the Matter of the Estate of David Kibe Waweru.**

5. The application was supported by the applicant's affidavit dated 7th September 2018. The summary of her case was that prior to the filing of the **Civil Appeal No. 128 of 2016** by the respondent against the ruling delivered on 21st March 2014 by Justice Musyoka, the said ruling had been implemented and the money shared as directed; that the appeal was heard and a judgment rendered distributing the amount of Kshs.32,989,183 between the two families as follows: Catherine Njeri and her two children were to get Kshs.9,332,037/= while Rose Nyawira's two children were to get Kshs.23,657,146/=; that the verdict of the Court of Appeal meant that she owed the respondent's two children Kshs.5,968,199.99; that being aggrieved by the judgment of the Court of Appeal, she instructed her advocates to file an application for review which application is pending hearing; that despite being aware of the application for review, the respondent applied, was issued and extracted warrants of sale of movable property in execution of the money decreed on 4th September 2018; and that there is no need to attach any of her personal assets as the estate is a beneficiary in the estate of David Waweru Kibe (deceased) and therefore if any money is found owing after the ruling of the Court of Appeal the respondent can satisfy her decree by taking her share of the proceeds of any asset of the estate.

6. The application was opposed by the respondent through her replying affidavit dated 17th September 2018. It was her case that the application was incompetent, misconceived and unmeritorious as it had been brought to stay a decision of the Court of Appeal in a lower court notwithstanding the hierarchical system of the courts; that the application is a duplication of the application dated 4th October 2017 currently pending before the Court of Appeal; that it is trite law that no stay of execution order can be granted unless the applicant provides for security for the due performance of the court's decree; and that if the court were to grant the application for stay of execution, a condition ought to be imposed requiring the applicant to deposit the sum of Kshs.12,365,158.57/= being inclusive of the interest into the already existing joint account.

7. On 18th September 2018 the respondent filed a notice of preliminary objection to the applicant's application dated 7th September 2018 on the grounds that:

a) owing to the principle of precedent and the doctrine of *Stare decisis* this court being a court of lower tier in accordance with the hierarchical system of courts has no power or status to determine and cannot stay the decision of the Court of Appeal;

b) the decision the subject of the application dated 7th September 2018 can only be stayed by the Court of Appeal or the Supreme Court; and

c) the applicant dated 7th September 2018 is a complete duplication of the application dated 4th October 2017 which application despite being made under certificate of urgency was not certified urgent by the Court of Appeal, nor any interim relief granted, and as such is still pending before the court.

8. I have read and considered the written submissions of the parties in support of their respective cases.

9. It is not disputed that this court's decision on the distribution of the estate of the deceased among the respective beneficiaries was overturned by the Court of Appeal which gave its distribution. The applicant may have filed an application to review that distribution. She did not, however, obtain a stay of that distribution pending the hearing of the review application. As far as this court is concerned, the respondent has a judgment which she is entitled to execute. This court has no power to stay the orders of the Court of Appeal. Attachment of the property of the applicant is one of the modes of execution available to the respondent under the **Civil Procedure Act and Rules**.

10. The applicant asked to be allowed to settle the decretal amount from her share of the proceeds of sale of properties of the Estate of David Kibe Waweru (deceased) due to the estate of Sam Mbugua Kibe as per the certificate of confirmation of grant in **Succession Case No 2521 of 2009**. Her case was that before the filing of the appeal the parties had already distributed the Kshs.32,989,183/= and therefore there was no money to distribute. In paragraph 12 of her supporting affidavit she stated that:

“12. That in any case, there is no need to attach any of my personal assets as the Estate is a beneficiary in the Estate of David Waweru Kibe (deceased) and therefore if any money after the Court of Appeal ruling is declared is found owing, the respondent can satisfy her decree by taking my share of the proceeds of such of any asset of the estate.”

It is clear that if the court were to allow what the applicant is requesting it means that the realisation of the respondent's decree would have to await until such time that the said assets due to her from the estate of David Waweru Kibe (deceased) are sold to realise the proceeds to be paid to the respondent. In other words, the applicant would have obtained a stay through the back door, as it were. That cannot be allowed.

11. In conclusion, the applicant's application has no merit and is dismissed with costs.

DATED and SIGNED at NAIROBI this 10TH day of DECEMBER 2018

A.O. MUCHELULE

JUDGE