



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 234 OF 2013

**DAVID KIRIMI CHARLES (legal representative of the estate of
Abraham Kailema Ikigu, deceased.....APPELLANT**

Versus

**MUNTUKIRIMANAMUNGANIA (legal representative of the estate of
Doris Kinanu Kirimana, deceased.....RESPONDENT**

(Appeal arising from the orders made by Hon Nasimiyu, RM on 15.3.2013 in MERU CMCC NO 262A OF 2010)

RULING

Execution against legal representative

[1] The question that the application dated 20th June 2014 is asking is:-

Whether a decree passed against a party as the legal representative of a deceased person may be executed by the attachment and sale of the property of the legal representative of the deceased person.

The Applicant in his affidavit and submissions in support of the application stated that he was sued in MERU CMCC NO 262A OF 2010 in his capacity of the legal representative of ABRAHAM KAILEMIA IKIGU, the deceased. But, execution of the decree arising therefrom was executed by Viewline Auctioneers by attachment of his properties which do not form part of the estate property. This the Applicant opined was contrary to the law and for that reason he sought for stay of attachment and sale of his properties listed in the schedule of movable property in the Proclamation and Attachment by Viewline Auctioneers dated 24th October 2012 pending the hearing of this appeal.

[2] The Respondent opposed the application through Replying Affidavit of **PATRICK KITHURE KIRIMANIA** and the submissions filed hereto. The Respondent made several points. One, that there is no appeal to the substantive judgment delivered in **MERU CMCC NO 262A OF 2010**. Second, the vehicles and properties in question are in the custody of the auctioneers. Third, the Applicant's objection to the attachment of the vehicles in issue was dismissed by the trial court after viva voce evidence was taken. Fourth, as per the certificate of confirmation of grant, all the property of the deceased went to Applicant. And, therefore, the Applicant should not be allowed to split hairs and he cannot avoid liability under the grant. And, fifth, the Applicant came to court after the stay he had enjoyed in the earlier application dated 6th May 2013 was set aside by consent on 5th June 2014. On the basis of these reasons

he urged the court to dismiss this application.

DETERMINATION

[4] As I have already stated, the major issue to determine is:-

Whether a decree passed against a party as the legal representative of a deceased person may be executed by the attachment and sale of the property of the legal representative of the deceased person.

I must admit that, although this application is essentially seeking stay of execution pending appeal, it is, however, based on somewhat rare and quite technical ground; execution against legal representative of the deceased. Therefore, this question requires a discussion on the process and procedure of execution of decree against the legal representative of the deceased. Accordingly, sections 37 to 39 of the Civil Procedure Act are of utmost importance. But, I will recite section 38 and 39 in extenso below:

37. Legal representative

(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.

(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

39. Enforcement of decree against legal representative

(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him legally.

Attach property of deceased held by legal representative

[5] The law, the way I understand it is that execution against a legal representative of the deceased person is permitted. Except, however, liability thereto will be to the extent of the property of the deceased which has come to the hands of the legal representative and has not been duly disposed of. Therefore, where the entire estate property has gone to the legal representative, as is the case, here, execution shall be directed at any or all of the property of the deceased that has come to him.

Execution against personal legal representative personally

[6] The law also allows execution against any person who has intermeddled with the property of the estate. But, in a case of intermeddling with the estate of the deceased or where no property has been left in the hands of the legal representative or where there is need to ascertain the link between the property of the legal representative and the estate property, the court is called upon to carry out an inquiry. I borrow

this from the clear text of the law above as well as from the words...*only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of*; which bear defined legal connotation. Thus, the law requires and empowers the court executing the decree, on its own motion or on application of the decree-holder to carry out an inquiry...*for the purpose of ascertaining such liability...to compel such legal representative to produce such accounts as it thinks fit*. This inquiry takes after the procedure provided for Notice to Show Cause and it will certainly be an important consideration to establish whether the legal representative has dishonestly transferred, concealed, charged or removed any part of the estate property, or committed any other act of bad faith in relation to the estate property. Thus, where no such property of the estate remains in the possession of the legal representative- the judgment-debtor in the suit- the inquiry is even more intense, and if he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally. See section 39(2) of the Civil Procedure Act which provides that:-

Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally

Accordingly, depending on the result of the inquiry I have alluded to above, the law allows execution of such decree against the legal representative as if it was against him personally. This means, in such circumstances, his own properties may be attached in satisfaction of the decree.

Applying the test

[7] I have set out the law. Let me now apply it to the facts of this case. Doubtless, the decree in the lower court is against the Applicant as the legal representative of the estate of Abraham Kailemia Ikigu, deceased. Under section 2 of the Civil Procedure Act:-

“legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued

The Applicant is also the administrator and beneficiary of the estate of Abraham KailemiaIkigu, the deceased and all the properties of the deceased went to him. See the Certificate of Confirmation produced by the Applicant. This is a border-line case which may be subject of intense inquiry that I have discussed above. Nevertheless, I am aware that the Applicant has right to appeal and for his appeal not to be rendered nugatory. Perhaps in asserting this right, that is why the Applicant has been keen and has really been fighting to stop attachment and sale of the attached property. But, I also observe that despite being the person to whom all the estate property went, he has not bothered to settle the decree in question. I do not know why that is the case, and I am not deciding that issue here. I also note that the Respondent is a holder of a decree which he is entitled to realize immediately. But, I do not know why the Respondent did not attach any of the specific properties of the deceased which went to the Applicant: that would have avoided this application. I am sure that even now nothing stops them from pursuing those options under the law. However, all these things notwithstanding, I am aware that I should give a remedy not as a matter of providence but of exercise of judicial discretion; I must, therefore, strike a balance of these rights. As this appeal is not on the substantive decree, but of a matter incidental to execution of a decree; and as this application is for stay of execution pending appeal; and the properties in question are in the custody of the auctioneer, the most appropriate orders to make are:-

(1) A stay of sale of the attached properties until this appeal is heard. This order also acts as security which is required under order 42(6) of the Civil Procedure Rules for the due performance of the decree which may ultimately bind the Applicant.

(2) The auctioneer shall file a full inventory of the properties he is holding for certification by the court. He shall also file his bill of cost so far incurred for taxation to be paid by both parties in equal shares.

(3) I also order that the record of appeal be filed within 14 days so that the appeal may be disposed of expeditiously. It is so ordered.

Dated, signed and delivered in open court at Meru this 24th day of January 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kaimenyi advocate for Mokia advocate for respondent

Mutegi advocate for P.K. Njoroge advocate for applicant/appellant

F. GIKONYO

JUDGE