



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NO. 140 OF 2014**

**IN THE MATTER OF THE ESTATE OF LILLI JORGENSEN – DECEASED**

**SALLY NJAMBI MAHIHU**

**RUPERT PATRIDGE .....APPLICANTS**

**VERSUS**

**MWANGUZA KAI DECHE**

**JEFWA S. ERICKSON ..... RESPONDENTS**

**RULING**

The application dated 9.11.2016 seeks stay of the execution of the grant that was confirmed on 31.10.2016. It also seeks setting aside the judgement of this court delivered on 27.10.2016. The application is supported by the affidavit of Kamami Njoroge Advocate. There is also a further affidavit of the same advocate sworn on 23.11.2016. The respondents filed a replying affidavit sworn by Jefwa S. Erickson on 17.11.2016.

Mr. Kamami, counsel for the applicant, submitted that the matter was heard ex-parte yet they were on record. He was served with a hearing notice for the 1.9.2016 but received the notice under protest as the hearing date was not convenient. He had not been invited to take up a hearing date. The suit had been stood over generally on 19.4.2016 when the petitioners' advocates were not in court. On 1.9.2016 he had another suit vide No. 344 of 2016 before the Mombasa ELC Court. Further on the date of hearing, the counsel was unwell and the hospital attendants record has been annexed. Counsel further maintains that the suit was heard in other subsequent days and no notice was served. The petitioners are jobless and cannot refund the estate.

Mr. Mtana, advocate for the petitioners, opposed the application. Counsel maintains that the application is calculated to delay the execution of the judgement. The applicants admit that they were duly served with a hearing notice. Receiving the notice under protest is not a reason to fail to attend court. There is no evidence that the case before the Mombasa Court proceeded on that date. No proceedings have been annexed. Counsel for the respondent did not even bother to call the petitioners' advocates and explain if he was unable to attend court. The applicants themselves also did not attend court. The applicants have been indolent from the time the court dismissed their objection. The applicants filed an appeal before the Court of Appeal and the same was dismissed. Since then the applicants have been reluctant to participate in this matter. The matter proceeded like a formal proof.

The dispute herein involves the estate of the deceased. The petitioners used to be the former workers of the deceased while the applicants are the deceased's former advocates and the chairman of the Residents Association for the area where the deceased lived in Kilifi. Whereas the petitioners contend that there was a written will, the respondents maintain that there was no will. This matter was fixed for hearing on 17.5.2016. The date was taken at the registry on 20.4.2016 by counsel for the petitioners. A hearing notice was duly served upon counsel for the respondent. On 17.5.2016 this court did not hear the matter and directed the petitioners' advocate to serve again the respondents. The case was listed for hearing on 9.6.2016. It appears that the court was not sitting on 9.6.2016 and Mr. Mtana took another

date at the registry for 1.9.2016. On that date Mr. Mtana informed the court that he had served counsel for the respondent and an affidavit of service was filed. The case proceeded at 11.05 am in the absence of counsel for the respondents. Three witnesses testified and the case was adjourned to 7.9.2016 when the petitioners closed their case. Judgement was fixed for 27.10.2016.

The main issue for the court ultimately is to determine the distribution of the deceased's estate. This will depend on whether the deceased left a will or not. Counsel for the respondents did not attend court on the grounds that he was indisposed and at the same time received the hearing notice under protest. There is no causelist that was attached for the Mombasa ELC Court for the 1.9.2016. This court cannot confirm whether indeed Mr. Kamami was before the Mombasa Court on that date. The advocate maintain that he went to Coast General hospital for treatment on the same date. The advocate was not admitted and it is possible that he went to hospital in the afternoon or the evening. Receiving a hearing notice under protest is not a reason at all for the court to adjourn a case. The court cannot be held on ransom by a counsel who was duly served with a hearing notice but decide not to attend court or even call his colleague and agree on an adjournment. If the court were to work at the convenience of each advocate on record in a matter, then cases will never be heard and concluded in good time. The respondents themselves have never appeared before the court at any given time. The application is not grounded on good grounds.

However, taking into account the fact that the petitioners are by all means going to benefit from the deceased's estate whether the distribution is based on the alleged will or intestate, I do find that it will not be prudent to revoke the confirmed grant in totality. I heard the pleas of the deceased's former employees who are beneficiaries of the deceased's estate. Some of them have had their children drop out of school. The deceased died in September 2014. It's now two years since then.

Given the fact that part of the deceased's estate is scattered in form of shares in various companies, I do confirm the grant to enable the administrators collect all the realisable assets of the deceased in form of shares and bank deposits. The administrators to open a bank account and deposit all the proceeds realized from the movable assets. The petitioners and all the deceased's workers to equally share a total sum of Ksh. Three (3) million from the estate so as to settle their financial obligations. The deceased's real estate shall not be included in the confirmed grant. The administrators shall file quarterly reports on the administration of the estate.

In the end, the objectors' application partly succeeds. The judgement of this court is set aside on the above terms. In order to avoid future delays, parties herein to take hearing dates for the suit to be heard within ninety (90) days hereof. The grant is partly confirmed in the above terms. Costs shall follow the outcome of the main suit:

**Dated, signed and delivered in Malindi this 21<sup>st</sup> day of February, 2017.**

**S. CHITEMBWE**

**JUDGE**