



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 39 OF 2015

In the Matter of the Estate of Kiunga M' Abira (Deceased)

STELLAH KATHAMBI HEZEKIA

SAVELA WANJA M' ABIRA

JENNIFER KANANA.....PETITIONERS

Versus

M' ABIRA M' INIU

RAEL KAJUJU M' ABIRA

ERASTUS MBURUGU M' ABIRA

GITONGA M' ABIRA.....OBJECTORS

RULING

[1] Before me is Summons dated 27th July 2015 which is expressed to be brought under Rule 73 of the Probate and Administration Rules and in which the Objectors have sought for the following orders:

1.spent
2. There be stay of proceedings in SMCC No. 20 of 2015 at Githongo pending the hearing and determination of this application.
3. There be a stay of proceedings in SMCC No. 20 of 2015 at Githongo pending the hearing and determination of the Summons for Revocation/annulment of Grant herein.
4. Any other orders as the honourable court may deem just and expedient in the circumstances.
5. Costs be provided for.

[2] The gist of the application is that the Administrators are sisters to the deceased. The Objectors are also related to the deceased, for they are father, step mother and brothers of the deceased respectively. But, that they learnt of this matter from one Elias Mutwiri and Purity Ntinyari who had been sued by the administrators in SMCC No. 20 of 2015 at Githongo. In addition, they argued that Administrators neither

consulted nor sought permission from them before filling this cause.

[3] The Objectors filed submissions reiterating the contents of the application. Except, they submitted inter alia that they seek revocation of the Limited Grant on the basis of Section 76 and paragraphs (a) (b) (c). They also stated that the Petitioners had deposed to untrue and false misrepresentations of the facts, which statement constituted untrue allegations of essential facts in point in law to justify the limited grant and that the proceedings to obtain the Grant were premised on a falsehood, thus, defective in substance.

[4] The Summons was opposed via a Replying Affidavit filed by the Petitioners on 11th December 2015 wherein they deposed inter alia that that:

(a) They filed this Cause in court on 23rd February 2015 and were granted a *Limited Grant ad Litem* to enable them file a civil suit against Mungania Mutwiri and Purity Ntinyari;

(b) In any event their father, step mother and step brothers had not filed any succession cause in respect of their late brother's estate and they had no superior interest in the estate than themselves.

[5] The Petitioners also submitted and stated that they were seeking to recover the parcel of land which was fraudulently acquired by Mungania Mutwiri and Purity Ntinyari; hence, the application for limited grant to file suit. They did so as sisters to the deceased. However, they have not filed substantive succession cause since the deceased did not have any other asset except the said parcel of land which had been fraudulently acquired by the said defendants in Githongo SRMCC NO.20 of 2015. They accused the applicants of failing to take any actions to protect the estate of the deceased from being taken away by Mungania Mutwiri and Purity Ntinyari. They said that the default on the part of the Applicants was to assist the grabbers take away the deceased's asset.

DETERMINATION

[6] First things first. I note that, during the pendency of this Cause, the 1st and 3rd Objectors died. But, parties agreed to proceed with the surviving persons. I shall so proceed. Upon careful consideration of the application before me and the rival submissions of the parties, I take the following view of the matter. Looking at prayer 2 of the application, the significant order sought is:-

(a) A stay of proceedings in SMCC No. 20 of 2015 at Githongo pending the hearing and determination of the Summons for Revocation/annulment of Grant herein

I have looked everywhere in the record but I do not find any summons for revocation of grant. That notwithstanding, the grounds argued in the affidavits filed as well as the submissions of the parties relate to revocation of grant. The mix is quite unsatisfactory. But, as a court of law I shall determine every issue raised and eventually determine whether proceedings in Githongo should be stayed or the grant should be revoked.

Revocation of limited grant

[7] The grant intended to be revoked is a *limited grant of letters of administration Ad Litem* which was limited to the purpose of filing suit until further representation was granted by this court. I am aware that a limited grant could also be revoked if any or more of factors in Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya are present. I should think also that, it is potent ground in an application for revocation of limited grant to show that the grant has been used for a purpose other than the one for which it was granted. Or that the purposes for which the limited grant was issued has ceased to exist or has been spent. Or the time for which the limited was to subsist has lapsed. But, from the arguments presented in this case, I should determine whether:-

(a) The proceedings to obtain the grant were defective in substance; or

(b) The grant was obtained fraudulently by the making of a false statement or by the concealment

from the court of something material to the case; or

(c) The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

[8] Applying the above test, under the Limited Grant of Letters of Administration Ad Litem issued herein, two things are of great significance: (1) the Petitioners have no power to distribute the estate; and, (2) the said Grant is limited to the purpose only of filling suit. Such grant is normally issued due to the exigencies arising in relation to the estate and which could not wait issuance of full grant through the normal way. It is also issued without prejudice to the right of any other person to apply for full grant of representation to the deceased. As such, limited grant may not be subjected to full and strict compliance with the requirements meant for, as if it is full grant of representation. Again, the person to whom the grant is so made undertakes to administer the estate according to the law but limited to the purpose for which the grant is issued until a further grant of representation is made by the court. I have perused the petition and all pleadings filed thereto. The urgency cited in the certificate of urgency dated 20th February 2015 was that they needed to file suit against Mungania Mutwiri Elias and Purity Ntinyari M'Abira to recover the estate property which the two had fraudulently acquired. The court was satisfied that the urgency warranted issuance of a limited grant and it so issued it. And pursuant to the limited grant suit GITHONGO SRMCC NO 20 OF 2015 was duly filed in court. Therefore, the grant was used for the very purposes for which it was issued.

[9] There is also no serious misrepresentation of fact except a statement that they were filing the petition *“in my capacity as father to the deceased”* which appears on the face of the petition. That is irritating but it is just a venial error, because the petitioners described themselves in the affidavit in support of the Petition to be the daughters of the deceased. Accordingly, there was no misrepresentation of a fact that was material to the case. Hence, the grant was not obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. As such, I am not satisfied that the Objectors have shown any sufficient cause as to impel this court to revoke the limited Grant issued herein. The grant is still necessary for purposes of proceeding with suit number GITHONGO SRMCC NO 20 OF 2015 which is pending before Githongo court. All the other arguments contained in the affidavit of the Objectors are useful as a defence in the said suit. Let it be channeled through that suit.

Stay of proceedings

[9] As far as proceedings in suit number Githongo SPMCC NO 20 OF 2015 are concerned, the law is that the discretion to stay proceedings should be exercised only in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay of proceedings, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the application, the scarcity and optimum utilization of judicial time. For further illumination on the threshold see the following passages from *Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332*, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the

pleading and the facts of the case.”

[10] Is the proceeding at Githongo one that should be stayed? As it has been written, stay of proceedings is a serious, grave and fundamental interruption of the right of a party to have his case determined by application of law in a fair and public hearing, that is to say, in a trial on the basis of the substantive merits of his case. See article 50(1) of the Constitution of Kenya, 2010 which should be the light in determination of applications for stay of proceedings. Therefore, in line with the Constitutional demand, the court's general practice should be that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The proceedings in Githongo SPMCC NO 20 OF 2015 are for recovery of estate property. The suit is based on and relate to serious allegation of fraud in that acquisition of the estate of the deceased by the defendants in that suit. In fact, the petitioner stated that the objectors are part of the fraud. I am convinced that, in the interest of justice, the said proceedings should take their full course. The merits or otherwise will be determined by the court seized of the matter and all issues will be resolved there. I do not see any reason to stay them. I reject the request for stay of proceedings in GITHONGO SPMCC NO 20 OF 2015. The upshot is that the application dated 27th July 2015 is dismissed with costs to the Respondents. In light of my decision after hearing parties herein, the orders issued by Wendoh J on 26th August 2015 are vacated forthwith. It is so ordered.

Dated, signed and delivered in open court at Meru this 15th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate for Petitioners/respondents

Mr. Gikunda advocate holding brief for Mr. Mutungu advocate

for applicants.

F. GIKONYO

JUDGE