



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.451 OF 2011

IN THE MATTER OF THE ESTATE OF:

KILAA LUKUNKEI SOIT DECEASED

BETWEEN

NALEKE KILAMATI SOIT OBJECTOR/RESPONDENT

AND

TEMAYIAN NAOROI SOITPETITIONER/APPLICANT

RULING

1. The application herein is the Notice of Motion dated 17th September 2013 brought pursuant to **Order 22 Rule 22** of the **Civil Procedure Rules, Section 1A, 1B** of the **Civil Procedure Act, Article 159** of the **Constitution** and all other enabling provisions of the law. The petitioner/applicant seeks orders:-

1. *That this application e certified as urgent and service thereof be dispensed with in the first instance.*
2. *That, pending the hearing and determination of this application, this Honourable Court be pleased to Stay the Execution proceedings before the Deputy Registrar slated for 19th September, 2013.*
3. *That there be Stay of Execution proceedings in this matter till the Confirmation of the grant.*
4. *That this honourable court be pleased to issue any other directions as it may deem just and expedient.*
5. *That costs of this application be provided for.*

2. The application is based on the following grounds:-

- a) *That the Respondent has since commenced Execution Proceedings by filing the Bill of Costs in Court before the Grant of Letters of Administration have been confirmed.*

- b) *That the trial court by the ruling dated 21st March 2013 ordered that the parties in this matter do file their Schedule of Distribution to be canvassed.*
- c) *That the Respondent who had filed the Objection Proceedings, has not filed the said Schedule of Distribution as ordered by Court, but has resorted to Interlocutory Execution Proceedings.*
- d) *That it serves better the Interests of Justice that the Confirmation of grant in this matter be made expeditiously rather than engaging the parties in Interlocutory Execution Proceedings, instead of determining the issues in contention.*
- e) *That unless the Orders sought in this application are granted, the intention of the Respondent to file the Bill of Costs as if the matter has since been determined, is meant to frustrate the efforts of the Petitioner/Applicant to have the Estate of the Deceased administered as provided for under the law.*
- f) *That the Respondent will not suffer any prejudice if the Interlocutory Execution Proceedings stayed as it amounts to application of double standards by the Respondent. (sic)*
- g) *That this application has been made so timely and without any unreasonable delay.*

3. The application is also supported by the annexed affidavit of Temayian Naoroi Soit the Petitioner/Applicant sworn on the 17th September 2013. In the affidavit she states that she knows of her own knowledge that the letters of administration in respect of the Estate of Kilaa Lukunkei Soit (Deceased) have not been confirmed, that the succession cause Kilgoris SRMCC Succession Cause No.7 of 2009 was confirmed by the trial court.

4. She further states that upon confirmation of the aforesaid grant, the

Respondent moved the High Court alleging that the trial court lacked jurisdiction to have confirmed the said grant.

5. Objection proceedings were heard and the High Court ordered that the parties do file the schedule of distribution to be canvassed before this court (it is shown a copy of the court's ruling). That from the 21st March 2013 the said schedule of distribution has not been filed before this court but the Respondent has since filed the Bill of Costs for taxation which amounts to an interlocutory execution proceeding (it is shown a copy of the Bill of Costs and Notice of Taxation was due on the 19th September 2013 before the Deputy Registrar.)

6. The deponent adds that the filing of a bill of costs at this stage amounts to frustrating the efforts to the confirmation of the Grant of Letters of Administration which ought to have been given priority. Further that the bill of costs as drafted amounts to a final decision made by this court in determining the estate of the deceased which ought to have been brought after the grant has been confirmed.

7. That it would be in the interest of justice that the interlocutory execution proceedings commenced by the Respondent in these proceedings be stayed till the Grant of Letters of Administration has been confirmed by this court.

8. The application is opposed. There is the replying affidavit by Naleke Kilamati Soit, the Objector/Respondent sworn on 27th September 2013 in which she states that no execution process has been initiated as alleged since her advocate only filed a bill of costs for assessment of the costs in line with the judge's determination. Secondly that she lodged an application for revocation of

grant and confirmation of the same vide these proceedings and that the petitioner/respondent forged her thumb print and authored a document uttered falsely as consent emanating from her which consent was a forgery and which made the magistrate's court to issue and confirm the grant.

9. That because of the petitioner's/applicant's fraudulent acts, she was tried and convicted and fined Kshs.20,000/= in default to serve a jail term which this court also confirmed. Besides this court vide its decision dated the 21st day of March 2013 revoked and nullified the grant and the confirmation fraudulently obtained on fraud and condemned the applicant to pay costs for the application for revocation of grant.

10. She adds that this court's jurisdiction was invoked pursuant to the provisions of **Section 76** of the **Succession Act** which confer limited jurisdiction upon the High Court to revoke grant upon the grounds cited therein, and that in the circumstances, the court became *functus officio* in the matter and had no jurisdiction to take over the conduct of the succession proceedings in respect of the estate of the deceased.

11. Further that besides the grant having been revoked together with the confirmation, there is nothing to be confirmed by this court as sought by the Petitioner/Applicant.

12. That the directions made by this court that parties herein do file

Schedule of Distribution in the cause herein, was made in error and without jurisdiction in so far as the court's jurisdiction was spent upon discharging its mandate of revoking the grant and the court herein is devoid of jurisdiction under the Succession Act to venture into the issuance of fresh grant and confirmation of the same in this cause or purport to be distributing the properties of the deceased in the miscellaneous cause herein.

13. She further states that the dispute in regard to the estate of the deceased can only be addressed through fresh succession cause in light of serious disputes which have been brought about by the Petitioner/Applicant in so far as the miscellaneous succession cause herein cannot form a basis of pleadings and/or relevant succession forms to be a basis of litigation so as to resolve the ingrained dispute between the applicant and respondent.

14. She adds that she cannot be faulted for lawfully seeking to assess costs of the miscellaneous succession cause as awarded by the court upon determination of the application for revocation of grant. She further states that there is nobody punishing the applicant as the costs of this succession cause flow from her own illegal and criminal conduct. Finally that there is nothing left for hearing and determination by this court in this matter as the Law of Succession Act only allows the High Court to proceed and revoke a grant upon being satisfied to do so upon grounds spelt out under **Section 76** of the **Succession Act**. She further says the court herein cannot take up or assume the hearing or confirmation of a non-existent grant which has since been revoked and any proceedings of that kind amounts to illegality and a nullity. The Respondent avers that the application therefore has no merit and should be dismissed with costs.

15. Mr. O.M. Otieno represented the Objector/Respondent whereas Mr. G.M. Nyambati represented the Petitioner/Applicant. On the 12th November 2013 parties herein agreed to canvass the application by exchanging written submissions. I have had the opportunity of carefully reading through the said submissions and the authorities as provided by counsel.

16. The issues that arise for determination are as follows:-

- a) *Whether there are execution proceedings commenced by the filing of a bill of costs.*
- b) *Whether the court had jurisdiction to order filing of schedule of distribution.*

c) *Whether there is a confirmation of grant to be made.*

17. On the first issue as to whether there are execution proceedings commenced by filing of a bill of costs, the answer is in the negative. From the court's own ruling, costs were awarded to the respondent. The applicant's advocate filed a bill of costs for assessment of the costs before the Deputy Registrar which assessment has not yet been done and therefore there should be no fear of execution. Execution proceedings only commence after a decree has been issued and/or when a bill of costs has been taxed to scale by the Deputy Registrar. I find therefore that the respondent was in order to file her bill of costs before the deputy registrar for assessment and the said assessment does not amount to execution. I find no sound basis of staying the taxation as the same will not prejudice the applicant. Having said that the prayer

for stay of execution fails in its entirety.

18. Touching on the second issue of jurisdiction, I do agree with

counsel for the respondent's arguments that under **Section 76**, the jurisdiction of this honourable court is limited to revocation of the grant or upholding the same where it deems fit to do so. This court exercised its jurisdiction when it revoked the grant and did not have jurisdiction to direct filing of schedule of distribution. I have relied on the authority of **Owners of the Motor Vessel "Lillian" -vs- Caltex Oil (Kenya) Ltd. 1989 KLR** where the court held:-

"Whether a court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

19. Lastly, the grant having been revoked, there is no other confirmation awaited unless a fresh application is made to that effect. I find therefore that the application herein lacks merit and the same is dismissed with costs to the Respondents.

Dated and delivered at Kisii this 13th day of March, 2014

R.N. SITATI

JUDGE.

In the presence of:

Miss Gogi (present) for the Objector/Respondent

Mr. Minda h/b for Mr. G.M. Nyambati for the Petitioner/Applicant

Mr. Bibu - Court Clerk