



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: OUKO (P), NAMBUYE & M'INOTI, JJA)**

**CIVIL APPEAL NO. 237 OF 2016**

**BETWEEN**

**LALITA DEVI LALCHAND GALOT.....APPELLANT**

**AND**

**MOHAN GALOT.....RESPONDENT**

*(An Appeal from the Ruling and Order of the High Court of Kenya (Ougo, J)*

*dated 28<sup>th</sup> September, 2015*

*in*

*H.C. SUCC. CAUSE NO. 1997 OF 1995)*

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the High Court (**R. E. Ougo, J**) dated 28<sup>th</sup> September, 2015 in High Court Succession Cause No. 1997 of 1995.

The background to the appeal is briefly that on 28<sup>th</sup> November, 2008 the respondent filed summons for revocation of grant dated 27<sup>th</sup> November, 2008, brought under **Section 76** of the Law of Succession Act, Rules 44 and 73 of the Probate and Administration Rules. The substantive prayers sought were as follows:

**“ (1) Spent**

**(2) That pending the hearing and determination of the application inter-parties there be a stay of any dealings within the alleged assets, listed as assets of the estate of the deceased Lalchand Pusharam Galot in the Court order hereof issued on 21<sup>st</sup> October, 1999 and dated 20<sup>th</sup> July, 2000.**

**(3) That pending the hearing and determination of this application there be a stay of any dealings with the alleged assets listed as assets of the estate of the deceased Lalchand Pusharam Galot in the Court order hereof issued on 21<sup>st</sup> October, 1999 and dated 20<sup>th</sup> July, 2000.**

**(4) That this Honourable Court be pleased to revoke the grant of letters of administration made to Lalita Devs Lalchand Galot on 12<sup>th</sup> March, 1996 as amended and confirmed by the Court order hereof issued on 21<sup>st</sup> October, 1999 and dated 20<sup>th</sup> July 2000.”**

The application was supported by grounds on its body and a supporting affidavit of **Mohan Galot**. Pending the hearing of the application, the appellant filed a Notice of Motion on 19<sup>th</sup> November 2014 dated 18<sup>th</sup> November, 2014. It was brought under section 1A, 1B & 3A of the Civil Procedure Act (CPA) and all other enabling provisions of the law, substantively seeking order that:

**“ (1) The hearing of the summons for the revocation of the grant dated 27<sup>th</sup> November, 2008, be stayed pending the hearing and**

determination of HCCC No. 55 of 2012, HCCC No. 298 of 2009 and HCCC No. 43 of 2014.

*(2) The costs of this application be provided for.”*

The application was supported by grounds on its body and a supporting affidavit of **Roger Sagana**. The application was opposed by a replying affidavit sworn by the respondent on 7<sup>th</sup> March, 2015. The application was canvassed by way of written submissions filed, fully adopted and not orally highlighted by the respective parties. The trial Court (**R. E. Ougo**, J) assessed and analyzed the rival pleadings and submissions and then expressed herself as follows:

*“From the court record there are various cases touching on the assets listed as forming part of the deceased’s estate. The applicant via the current application seeks to stay the application for revocation of grant dated 27<sup>th</sup> November, 2008 which the applicant therein claims was fraudulently confirmed. I refrain to make comments on the said Summons for Revocation as the same is yet to be heard. However, I note that the application the applicant seeks to stay does not in any way interfere in the distribution of the said assets as the court in the said application would only dwell on the issue on whether the said Grant was fraudulently or irregularly granted and confirmed as provided for under Section 76 of the Law of Succession, Cap 160. Though I do note that the finding in HCCC 55 of 2012 on directorship and shareholding will be crucial to these proceedings but at a later stage when this Court is faced with the issue of distribution of the assets of the estate, as the same will shed light to directorship the said companies and percentage held by each director. I find that the current application for stay is premature and dismiss the same. I further order the parties to take a date for the hearing of the summons for revocation to avoid further stalling this old matter. It is so ordered. Costs in the cause.*

The appellant was aggrieved. He filed this appeal raising seven (7) grounds of appeal. It is her complaint that the learned trial Judge erred in fact and in law:

- 1. In dismissing the appellant’s application for stay of proceedings on the ground that the respondent’s application for revocation of the grant “does not in any way interfere in the distribution of the said assets.”*
- 2. In being oblivious to the fact that the revocation of the grant would automatically deprive the Appellant of her share of 25% in Manchester Outfitters Limited when the shareholding in that company is an issue for determination in HCC No. 55 of 2012.*
- 3. In finding that the application for stay was premature in the face of the Court Orders made in HCC 55/2012, HCC 430/2012, HCC 2247/2007 and HCC 298/2009 which were expressly brought to her notice by the Appellant.*
- 4. And grossly so in law by undertaking to consult the presiding Judge in respect of HCC 55/2012 and HCC 430/2012 before pronouncing her decision as this exercise would have broken the rules of natural justice as against the Appellant.*
- 5. For being oblivious to the fact that the revocation of the grant would also affect the Appellant’s claim of 25% in L.R. 7022/7 which property is the subject of litigation in HCC 2247/07 where there is already an order of stay of proceedings. The situation is replicated in HCC 298/09.*
- 6. In legally dismissing the application for stay when in doing so, her order would potentially cause possible judicial conflict, confusion and havoc vis-à-vis HCC 55/12, HCC 298/09 and HCC 430/12.*
- 7. In finding that the application for the revocation of the grant does not in any way interfere in the distribution of the assets in the grant. She ignored the fact that the revocation of the grant would leave no assets for distribution. As they said in days of yore: nemo dat quod non habet!*

*(You can’t sell what you don’t have, what is not there!)*

*That decision would seriously cause harm to the appellant.*

*The finding is illogical.”*

The appeal came up for plenary hearing on 18<sup>th</sup> November, 2019. When called out only learned counsel **Mr. E. Kaka**, for the appellant was in attendance. There was no attendance for the firm of **Kinoti & Kibe**, for the respondent indicated to have been served on 22<sup>nd</sup> September, 2019, and **Mr. Ochanda** indicated to have been served on 22<sup>nd</sup> July, 2019. The Court being satisfied that the respondent had due notice of the hearing of the appeal allowed **Mr. Kaka** to prosecute the appeal. Relying on the written submissions dated 29<sup>th</sup> June, 2017 and filed on 30<sup>th</sup> June, 2017, the appellant faulted the High Court for finding that: the application for revocation of grant did not in any way interfere with the distribution of the assets of the estate of the deceased, which in the appellant’s view, was illogical because once the grant was revoked there would be no assets for distribution; the application for stay of proceedings was premature because according to the appellant the appropriate time to apply for stay of proceedings is when the proceedings intended to be forestalled have not been concluded.

The High Court was also faulted for seeking consultation with the Presiding Judge of the Commercial Division before rendering the decision. In the appellant’s view this conduct gave rise to an inference that the resulting decision was not independent but influenced by the consultation done in the absence of the appellant, who was denied her right to be heard on the content of the consultation before the decision was rendered in violation of appellant’s constitutional fundamental freedom to fair hearing and therefore in breach of the rules of natural justice. The High Court was also faulted for the failure to appreciate that granting the order sought would have been in the best interest of justice to all parties involved in the various litigations giving rise to the impugned ruling. On that account the appellant urged us to allow the

appeal with costs.

Though the respondent did not attend Court to canvass the appeal, he nonetheless filed his written submissions dated and filed on 18<sup>th</sup> September, 2017, which we cannot ignore. It is the respondent's submission that the trial Judge exercised her discretion properly as the respondent had sufficiently demonstrated that; confirmation of the grant of letters of administration on 21<sup>st</sup> October 1999 was done irregularly and frequently; determination of the application for revocation of the confirmed grant would be limited to determination of issue as to whether the confirmed grant was obtained irregularly and fraudulently; the appellant would also have an opportunity to object to the mode of distribution should the confirmed grant be revoked, in addition to a right of appeal if deemed fit; the appellant failed to demonstrate by way of an affidavit that she would suffer any prejudice if the summons for revocation of grant were heard; granting stay of proceedings in a succession matter filed in 1999 would grossly go against the principle enshrined in **Article 159** of the Kenya Constitution 2010, that justice shall not be delayed; there was no demonstration that the issues in the application for revocation of the confirmed grant are intertwined with those in HCCC Nos. 55 of 2012, 298 of 2009, 430 of 2012 and HC ELC No. 224 of 2007. On that account the respondent prayed for the appeal to be dismissed in its entirety.

The appeal arises from the exercise of judicial discretion by the High Court in arriving at the impugned ruling. Our mandate therefore is, as was set out in **United India Insurance Company Limited v East Africa Underwriters Kenya Limited [1985]** KLR 98 which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the Judge misdirected herself in law, misapprehend the facts, took account of considerations which she should not have taken into account, failed to take into account a consideration of which she should have taken into account or that her decision albeit a discretionary one, is plainly wrong.

In light of the above threshold, only one core issue falls for our determination namely, whether the trial court exercised its discretion judiciously when it arrived at the impugned ruling. We have evaluated the evidence in light of the above rival submissions. The appellant is the widow of **Lalchand Pusharam Galot** (deceased) while the respondent is the deceased's brother. It is the appellant who moved the succession court and obtained a grant of Letters of Administration of the estate of the deceased on 12<sup>th</sup> March, 1996, subsequently confirmed on 21<sup>st</sup> October, 1999. The assets forming the estate of the deceased are as indicated in the confirmed grant. It is the appellant's contention that the reasons advanced for seeking the order giving rise to the impugned ruling were well founded as in HCCC No. 298 of 2009 the appellant and Galot Industries jointly sued the respondent seeking injunctive orders to restrain him from interfering with the land and assets belonging to Galot Industries cited in the list of assets as No. (ix). The respondent sued the appellant's sons in HC ELC 2247 of 2007 as consolidated with HCCC No. 49 of 2009 over land parcel No. LR 70227/7 in which the appellant claims a share; the respondent instigated the filing of HCCC No. 55 of 2012 and HCCC No. 430/2012 over the shareholding in **Manchester Outfitters Limited** wherein the estate of **Lalchand Pusharam Galot** claims a share.

We have considered the reasoning of the High Court in the impugned ruling in light of the prayers sought in the summons for revocation as well as the background information set out above and have seen no prayer for the Court to redistribute the estate upon revoking the grant. We have likewise considered the reasons the respondent proffered in support thereto namely that; the proceedings to obtain the grant were defective in substance; the grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant; the appellant misled the Succession Court as to the true assets of the deceased **Lalchand Pusharam Galot**; some of the assets included in the list of assets allegedly belonging to the deceased belong to third parties; and also that the appellant concealed the pendency of proceedings in the succession matter by failing to serve the same on interested parties. The issue is whether in light of the above undisputed position the High Court erred in rendering the impugned decision.

In **Halisbury's laws of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332**. It is stated as follows:

*“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 proceedings 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 application 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 pleadings and the facts of the case.”*

Ringera, J as he then was in the case of **Global Tours & Travels Limited. Nairobi HC winding up Cause No. 43 of 2000** expressed himself as follows:

*“As I understand the law whether or not to grant a stay of proceedings or further proceedings of a decree or order appealed is a matter of judicial discretion to be exercised in the interest of justice ... The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expedition of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”*

The Supreme Court of Kenya in the case of **Wycliffe Oparanya Ambetsa v Director of Public Prosecution [2017]** eKLR cited with approval the case of **Republic v Massey [2001]** ALL ER 339 where it was stated:

*“At Common Law, therefore, a stay should only be imposed in exceptional circumstances and even more rarely in the absence of fault on the part of the complainant or prosecutor, and no stay should be imposed unless a defendant has established, on a balance of probability, that he would suffer severe prejudice to the extent that no fair trial could be held.”*

In light of the above threshold, we find no error in the High Court's exercise of discretion to render the impugned ruling for the reason that the scope of the High Court's determination of the summons for revocation as correctly found by the High Court and which we affirm as the correct position will be confined to the determination as to whether the grant was obtained and confirmed fraudulently, irregularly and or on concealment of material particulars and without notice to interested third parties. Secondly, as already stated above, there is no request for the Court to re-distribute the estate. The appellant will therefore suffer no prejudice as she will have an opportunity to be heard afresh on her claim as a beneficiary of identifiable assets of the deceased, especially when the respondent has not laid a claim to the deceased's estate as a beneficiary but only as a party interested in some properties forming what was listed as the assets of the deceased's estate without (as he claims) giving him an opportunity of being heard before those properties were so firstly listed; and secondly distributed.

In the result, we find no merit in this appeal. It is accordingly dismissed with costs to the respondent. It is so ordered.

**Dated and Delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

***Signed***

**DEPUTY REGISTRAR**