

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC. SUCCESSION CAUSE NO. 26 OF 2021

**IN THE MATTER OF THE ESTATE OF OWOUR ONYANGO
OMOKA – DECEASED**

ERNEST NICANOR OUMA OWOUR.....APPLICANT

VERSUS

BERNARD SHIKUKU OWORI.....RESPONDENT

AND

PETER MULAMBA & 15 OTHERS.....INTERESTED PARTIES

RULING

1. By a Notice of Motion application dated 29th July 2021 brought under Article 159(2) (d), 232(1) of the Constitution of Kenya, Section 1A, 1B, 3, 3A, 63(e), 75(1) Civil Procedure Act, Order 40, 42 and 45 of the Civil Procedure Rules, Rule 16, 17 of the High Court (Organization & Administration (General) Rules 2016, the applicant sought the following orders:

a. Spent.

b. Pending the hearing and determination of the application interoperates, the court be pleased to stay the proceedings and orders of the Busia Chief Magistrate Succession Cause no. 621 of 2021 in the Estate of OWOUR ONYANGO OMOKA.

c. Pending the hearing and determination of this application interpartes, this court be pleased to issue

an order conservatory of the status quo obtaining ante the orders made on 17th October 2019 revoking the Grant of Letters of Administration made to Ernest Nicanor Ouma Owori.

d. Leave be granted to the Applicant to file an appeal out of time against the ruling and order made on 21st February 2021 in Busia Chief Magistrates Succession Cause Number 621 of 2018, in the alternative time be expanded to enable the applicant to file an appeal out of time against the ruling and order made on 21st February 2021 in Busia Chief Magistrates Succession Cause Number 621 of 2018.

e. Costs be provided for.

2. The application was based on the grounds shown on the face of the application as follows:

i. The court below has undertaken and is set to continue proceedings on 3rd August 2021 in an estate whose gross value exceeds the statutory jurisdiction of a Chief Magistrates Court.

ii. An application was filed in the lower court on 1st December 2020 challenging the jurisdiction of the trial court and despite written submissions having filed contemporaneously with the application, and the failure by the respondent to file affidavits and submissions in opposition or response thereto, the lower court dismissed the application to challenge its jurisdiction in one paragraph without the

slightest reference to the law and the facts on a date when the matter was listed for mention before it.

- iii. The ruling sought to be appealed against, was only brought to the notice of the applicants on 27th July 2021 when service of an application for confirmation of grant was effected on his chambers and upon inquiry, it was learnt that a ruling had been rendered on 4th February 2021 dismissing the jurisdictional application.*
- iv. If stay is denied, the substratum of the remedy that would preserve the applicant's and interested parties' rights to ownership, benefit, use of and possession of the respective land sought to be pursued by way of appeal will be jeopardized and impaired beyond recovery after the survey exercise and distribution of the estate.*
- v. There is a real likelihood of violence and loss of life and property given the very emotive attachment the applicants and affected parties have to the land comprised in the estate.*
- vi. It is in the wider interest of justice that the order of stay be made preservatory of the status quo ante.*
- vii. The court below is set to hear the Confirmation of Grant of Letters of Administration on 3rd August 2021 at Busia wherein orders are sought to use Police Officers to forcefully carry out the survey and subdivision of the estate in question with a real*

likelihood of the breakout of violence, and a disruption of the lives, security and way of life of the applicant, affected members of the beneficiaries and purchasers who had acquired title entered possession and settled on the land before the grant was revoked by the Chief Magistrates Court.

viii. There are family members of the interested parties and purchasers for value without notice of any defect in the process of succession who had received title deeds, settled on the land and cultivated it, which interested parties are now threatened with forcible survey of the land they have occupied for years and there is a real likelihood of a breakdown of law and order dire to extremely emotive nature of entitlement to possess, use and own the subject matter of the land comprised in the estate herein.

ix. It is in the interest of justice that the status quo ante obtaining prior to the revocation of grant by the Chief Magistrates Court be preserved to protect the children, women and members of the families who had innocently acquired title and possession of parcels in the estate of the deceased.

3. In addition to the grounds set out above, the applicant ERNEST NICANOR OUMA OWOUR swore the supporting affidavit dated 29th July 2021 where he reiterated the grounds on the face of the application.

4. The Respondent filed his Replying Affidavit on 16th September 2021 sworn by BENARD SIKUKU OWORI who deposed that he is the son to OWOUR ONYANGO OMOKA and the administrator of his estate in Busia CMC P&A NO. 621 of 2018. He stated that a grant of letters of administration intestate and a certificate of confirmation of grant were issued in favour of the applicant vide Busia CMC P&A NO. 621 of 2018 on 18/10/2018. The said certificate of confirmation of grant was issued through concealment of material facts and the confirmed grant was made without the beneficiaries appearing in court as the law provides. He deposed that the grant of letters of administration made in favour of the applicant in the lower court was revoked on the 12/09/2019 and an order issued on the 19/10/2019. He said that there are no sufficient reasons that have been given by the applicant to explain why an appeal was not preferred against the order of revocation that was issued 2 years ago and which order the applicant was privy to.

5. He continued that the applicant intends to bring on board Peter Mulamba and Athanus Narasa Manjula in the succession cause in the lower court irrespective of the fact

that they are not children of the deceased and there was no valuation report to ascertain that indeed the deceased's estate value exceeds the jurisdiction of the lower court as alleged. The applicant did not raise the issue of value of the deceased's property when he filed the succession cause in the lower court. He termed the application a sham which had been made in bad faith and intended to frustrate the process of distribution of the deceased's estate. He concluded by stating that the order to which the Interested Party seeks to set aside was entered into by consent and between beneficiaries to the estate of the deceased and as such cannot be set aside by a stranger.

6. Directions were taken On 8th March, 2022 that the hearing of the application be dispensed with by way of written submissions.

Applicant's submissions

7. The Applicant filed their submissions on 8th February 2023 and submitted that there is no jurisdiction conferred upon a subordinate court in respect of an estate whose gross value exceeds 20 million shillings. He said that at page 62 of the applicant's record is a Register of Title, the proprietorship

section indicates that the land parcel comprised in the estate is 73 acres. If this Court were to take judicial notice that an acre of land has a value of Kshs. 500,000/=, the estate would bear a value of at least 40 million. He stated that this Court has supervisory jurisdiction over the proceedings in a subordinate court by virtue of Article 165 of the Constitution.

8. On why this court ought to issue conservatory orders, he submitted that the record will show that before a properly constituted High Court a grant of letters of administration was issued in High Court Succession no. 74 of 2004 to Ernest Nicanor Ouma Owour and he became registered as personal representative of the deceased on 31st January 2018 pursuant to proceedings in Busia HC Succession Case number 72 of 2004, this court must question and answer how a subordinate court would clothe itself with power to reverse that juridical finality of a higher court. He continued that it was therefore compelling to preserve that which a properly constituted court created as this court awaits to have a fresh look at the rival claims between the respondent and the applicant as well as the rights of the interested parties.

9. He submitted that the right to appeal against a ruling such as the one made on 4th February 2021 does not lie as of right and leave must be given so that frivolity and ill-founded grievances do not find their way into the High Court or higher court. He cited the decision in RE ESTATE OF WANGA OLE OYIE NAROK HIGH COURT SUCCESSION CAUSE NO. 31 OF 2017. He submitted that the Law of Succession Act has its special rules of procedure but which do not envisage appealing out of time and persuaded the court to apply the generic power of court to enlarge time donated to it by Article 259 (9) of the Constitution of Kenya as well as Section 9(1) of the Interpretation and General Provisions Act. The explanation why the appeal was not filed on time is that the ruling sought to be appealed against was delivered on a date when the matter was not fixed for ruling and the applicant was not notified. Instead the court set to hear an application to subdivide and survey the estate on 3rd August 2022. He persuaded this court to find that between 4/2/2021 to 2/8/2022 did not constitute an inordinate delay given the circumstances.

Respondent's submissions

10. The Respondent filed their submissions on 8th February 2023 and submitted that this court directed the applicant on the 23rd of November 2021 to file a valuation report in respect of the property subject of the succession cause. This was due to the contention that the value of the property exceeded the monetary jurisdiction of the lower court. He cited Section 107 to 109 of the Evidence Act and said that it was incumbent upon the applicant to table proof of this assertion.
11. He submitted that the he who seeks for orders of stay of proceedings and/or orders of a ruling is under a statutory duty to prove that he will suffer irreparable loss and in the present case this had not been done. He stated that the fresh grant that was issued to him was yet to be confirmed in his favour and the parties still have an opportunity to file an application for confirmation and exchange proposals on distribution. In the event of a disagreement, the Honourable Court will be given an opportunity to make a ruling regarding the same and that is yet to be done.

12. On whether leave should be granted to file an appeal out of time, the respondent submitted that these orders are discretionary and are only granted in the clearest cases where there is excusable delay. He stated that this court cannot countenance indolence or assist a party who has slept on his/her rights and the delay in respect of this case was occasioned through sheer carelessness. The ruling was delivered on 21st February 2021 and this application was filed on 2nd August 2021, a delay of five months and no reasonable grounds have been adduced for the grant of the orders sought. He prayed that this application be dismissed with costs.

Analysis and Determination

13. Having reviewed the application together with the response thereto plus the submissions thereof, I opine that the issues that come up for determination are;

- a. Whether this court should issue conservatory orders;
- b. Whether the applicant should be granted leave to appeal out of time;
- c. Who should pay costs of this application?

14. The law on conservatory orders is well settled in this jurisdiction and by case law. In ***Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR*** the Court was emphatic that: -

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

15. The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR***, where the Court held that: -

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet

others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

16. Further, in **John Nyambu Malombe v Kenya Film Classification Board [2018] eKLR**, the court held as follows;

“In as much as the applicant was a public officer within the meaning of Article 236 of the Constitution, I do not see, any, and he has not demonstrated the public interest in the Court granting the conservatory order

sought. In my view, the suit before the court is purely private law dispute and it does not fall within the realm of the public law. The best remedy in my view is to seek in the circumstances of this case should have been interlocutory injunction in which case the requirement of proving public interest would not have been expected. Instead, the applicant would have, as he has attempted to do by his written submission, to prove the three essentials elements precedent before granting that relief as it was established in Giela Vs Caseman Brown. It is clear from the applicant's supporting affidavit and the written submissions that the applicant is advancing a plea for an order for interlocutory injunction and not conservatory order which, according to the persuasive, as well as the binding precedents, cited above, is a public law remedy and public interest in the granting of the order must be demonstrate."

17. From the above quoted case law, it is clear that conservatory orders are usually granted where a matter falls within the realm of public law.

18. This instant suit is in relation to succession matters and the persons involved are private persons. The applicant is seeking '**conservatory orders of the status quo**' because the trial court apparently reversed the decision of the High Court and unless the orders are granted, the proceedings will

go in violation of this jurisdictional principle. Definitely, the applicant is raising a weighty issue, that is, whether a subordinate court can under any circumstances revoke an order made by the High Court.

19. However, I do not think the proper order to seek is a

‘conservatory order of status quo.’ Why all this confusing verbosity? The disputants are private people and the matter does not have a public law dimension. The framing of prayer (c) in the application is equivocal. It states

‘Order of conservatory of status quo obtaining ante the orders on 17th October, 2019’ why not simply pray for an order of

“status quo ante as at 17th October, 2019 to be maintained”. Inclusion of the ‘conservatory order’ to the

‘status quo ante’ clouds, equivocates and distorts what exactly the applicant wants. If he is seeking conservatory

order, this is an order specific to matters with a public interest character and this cannot be proper dispute for

issuance of a conservatory order. **‘Status quo’ means (stay)**

- the situation that currently exists while ‘Status quo

ante’ in Black’s Law Dictionary means- **“the state that**

existed before something else (being discussed)

occurred. Prayer 2 was unnecessarily overloaded by an urge to sound legalese. However, I believe the applicant is seeking for an order to maintain status quo prior to 17/10/19.

20. The applicant has sought leave to file an appeal against the ruling that was delivered on 21st February 2021. It is now well settled in law that courts do have the discretion to admit an appeal out of time or extend time to file an appeal out of time. The Court of Appeal in **THUITA MWANGI V KENYA AIRWAYS LTD [2003] eKLR** outlined the factors that guide courts in whether to exercise the said discretion as follows;

i) The period of delay;

ii) The reason for the delay;

iii) The arguability of the appeal;

iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;

v) The importance of compliance with time limits to the particular litigation or issue; and

vi) The effect if any on the administration of justice or public interest if any is involved.

21. The instant application was filed on 2nd August 2021 while the ruling the applicant is seeking to appeal against was delivered on 4th February 2021. They have stated that the

reason for delay in filing the appeal was due to the fact that the said ruling was delivered on a date when the matter was not fixed for ruling and the delivery was not made known to the applicant.

22. Further, he has deposed that the Court had in fact given directions that the matter would be disposed off by way of written submissions and his submissions were on record yet the court went ahead and dismissed the application for non-attendance. The replying affidavit by the Respondent does not controvert that fact.

23. He only found out about the ruling after he was served on 27th July 2021 with a hearing notice for 3rd August 2021. From the court proceedings in Busia Succession Cause no. 621 of 2018, the ruling delivered on 4/2/2021 stated that the hearing date was for the Notice of Motion dated 2/2/2020 and since the applicant and his counsel were absent, the same was dismissed with costs to the respondent. I cannot seem to trace an application dated 2/2/2020 in the trial court.

24.The application dated 2nd December 2020 is on the jurisdiction of the court and that is what the applicant is referring to herein.

25.There is no doubt that the applicant has brought this instant application 7-months after the said ruling was delivered. His excuse is that he was not aware the said ruling was delivered.

26.Nonetheless, the said application touches on the jurisdiction of the trial court including the issue of whether it in fact revoked or held proceedings in respect of an estate determined before the High Court. Those are important jurisdictional issues which ought to be determined with finality and on merit

27.. Even though the delay is inordinate, I cannot overlook or take lightly issue touching on jurisdiction and thus is a proper case I find no trouble in exercising my discretion to expand time for the applicant to file his appeal as it is in interest of all parties to be heard by a court of competent jurisdiction.

28.The upshot of the foregoing is that the application dated 29th July 2021 is merited and allowed as follows;

- a. The applicant is hereby granted leave to appeal out of time against the ruling and order made on 4/2/2021.
- b. The said appeal be filed within 30 days from the date of this order in default, the extension of time granted to the applicant shall lapse automatically.
- c. status quo ante prior to 17/10/19 shall be maintained for a period of 30 days from the date of this order but the court as may extend as necessary once the appeal has been filed.
- d. Costs of this application be in the cause.

**Dated, signed and delivered at BUSIA this 25th day of April,
2023.**

L.N MUGAMBI

JUDGE