



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC SUCCESSION CAUSE NO. 21 OF 2021

IN THE MATTER OF THE ESTATE OF SANDRA GATHONI KANYOTU (DECEASED)

KENNETH PETER NJAU.....APPLICANT

VERSUS

MURIU, MUNGAI & CO. ADVOCATES LLP.....1ST RESPONDENT

NYIHA MUKOMA & CO. ADVOCATES.....2ND RESPONDENT

RULING

1. The deceased herein Sandra Gathoni Kanyotu died on 15th January, 2021. She was allegedly survived by three children all minors and Kenneth Peter Njau the applicant herein who claimed to have been the deceased's husband. Vide a summons dated 14th June, 2021 and filed on 17th June, 2021, Kenneth Peter Njau moved to this court seeking a limited grant of letters of administration Ad colligenda Bona and that pending issuance of the said grant an injunction to issue against Muriu Munga & Co. advocates (1st respondent) and Nyiha Mukoma and Co. Advocate (2nd respondent) whom he accused of representing their respective law firms retained in transacting a sale agreement in respect of one of the properties belonging to the estate herein without his knowledge nor consent.
2. The application is based on grounds stated on the face of it and averments contained in the affidavit in support sworn by the applicant on 14th June, 2021. Basically, the applicant averred that the deceased herein was his wife and who prior to her death was entitled to a share from her father's estate. That after her late father James Kanyotu died, some properties were distributed to his beneficiaries among them the deceased herein. That one of the properties the deceased herein was entitled to was LR 16615 Red Hill.
3. He further stated that, the said property has since been valued and offered for sale at kshs 60,000,000 and that the respondents herein are engaged in the sale transaction as lawyers to their respective clients (seller and buyer).
4. He further averred that the sale was being conducted after the death of Sandra the deceased herein hence he and Sandra's children aged below 18 years ought to have been involved or consulted. That he is acting on the interest of their children who are beneficiaries of the late James Kanyotu's estate being grandchildren through the estate of their late mother.
5. When the matter came for directions before Judge Ongi'jo, she certified it urgent and granted prayer 2 of the application thus issuing an injunction restraining the sale of property known as L.R.16615 Red Hill Pending hearing and determination of the application.
6. In response, the first respondent filed summons dated 26th July, 2021 seeking to strike out summons dated 14th June 2021 on grounds that it was incompetent for want of locus standi on the part of the petitioner as he has no capacity to bring these proceedings on behalf of the estate of Sandra Gathoni with whom he had divorced on 31st August, 2018 vide Divorce cause no 74/2016. Secondly, that there is already a succession cause filed in Malindi high court being succession cause No E30 of 2021 where the deceased's mother petitioned for a grant of representation which was issued on 26th March, 2021 and then confirmed on 19th July, 2021.
7. A copy of the divorce judgment (marked Pm-1), a grant of letters of administration (Pm-2) and confirmed grant (Pm-3) were attached as exhibits in support of the affidavit sworn by Peter Munge advocate senior partner in the 1st respondent's law firm.
8. He averred that, having been retained as a lawyer to transact a sale agreement in respect of L.R 166/65 red hill does not make him a party in succession cause proceeding hence improperly sued. That any suit challenging the sale of the suit property ought to be filed in James Kanyotu's succession cause No 1239/2008 Nairobi.

9. In reply to the said application, Kenneth filed a replying affidavit sworn on 21st September, 2021 confirming that he came to learn of the Malindi succession case after he had filed this case. That he has locus standi by virtue of being a husband to the deceased and also a representative of the deceased's young children. He also confirmed that he has since challenged the grant in Malindi court by seeking its revocation.
10. Besides, the respondents filed grounds of objection dated 7th October, 2021 and filed 12th July, 2021 reiterating the position that the application of 14th June, 2021 was incompetent and bad in law as there cannot be two succession causes in respect of the same estate. The second respondent filed a relying affidavit on 29th October, 2021 basically associating themselves with the 1st defendant's sentiments.
11. During the hearing, parties agreed to have the two applications consolidated and canvassed together. They also agreed to file submissions to dispose of the same.
12. Consequently, the petitioner / applicant through the firm of Mbugua Njenga and Co. advocates filed their submissions on 19th October, 2021. Mr Mbugua reiterated the averments contained in the affidavit in support of the application and the response to the 1st respondent's application of 26th July, 2021.
13. Learned counsel stated that the petitioner has locus by virtue of being a husband to the deceased as well as a representative bringing up a suit on behalf of the deceased's estate. That the orders sought are geared towards preserving the estate. To support this proposition, counsel made reference to **In re estate Simon Kimendero (deceased) (2020) e KLR** where the court held that, it had a statutory duty to protect the estate property as well as the rights of beneficiaries.
14. Counsel contended that the applicant has established that he has an arguable case capable of being heard. In support of that proposition, he relied on the holding in the case of **In the estate of Simon Kimendero(Supra)** where the court held that an arguable case is one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success.
15. That the property is likely to be wasted unless protected. As to whether there was misjoinder of parties, counsel contended that, the respondents being custodians of the proceeds of sale out of the property the subject of these proceedings, they are properly joined. That the inclusion of the respondents in these proceedings is to effectuate and completely adjudicate the matter in issue hence no affective decree can issue in their absence. In support of this contention, reliance was placed in the case of **Elisheba Muthoni Mbae Vs Nicholas Karani Gichohi & 2 others (2013) e KLR**
16. The first respondent filed their submissions on 26th October, 2021 reiterating averments contained in their grounds of opposition and affidavit in support of application dated 26th July, 2021 .
17. Counsel submitted that there can never be two grants in respect of one estate. This proposition was anchored on two authorities namely; **Malindi high court succession cause no 146/2011 in the matter of the estate of Zakaria Lugonzo Amalemba (deceased) and Kajiado succession cause No 66B of 2018 in respect of the estate of Saleh Awke (deceased).**
18. As to lack of locus standi, counsel submitted that a former husband to a deceased cannot petition for a grant of letters of administration in respect of the estate of a deceased former spouse. In that regard, the court was referred to the holding in the matter of the estate of **DKB (deceased) succession cause 1152/2017** Nairobi high court.
19. As to the joinder of the respondents to the suit, counsel stated that as agents of their clients, there cannot be a cause of action against them. To buttress this proposition, the court was referred to the holding in the case of HCCC **N. 2533 OF 1997 Lalchand Fulchand Shah and another vs investments and mortgages bank limited** where the court held that there cannot be a cause of action where there is a disclosed principle.
20. The second respondent filed their submissions on 29th October, 2021 through the firm of Nyiha advocates. Counsel admitted having been retained as an advocate carrying out a conveyance in respect of the property in question. In his view, the conveyance is far from being over and that no monies have been retained in an escrow account
21. Counsel contended that the property in question has never been owned by the deceased hence the right place to be is in James Kanyotu's estate succession proceedings as the owner of the property. As to whether a grant can issue, counsel submitted that there cannot be two grants in respect of the same estate. That in any event, a full grant having been obtained in respect of the same estate another grant cannot issue. In support of this position, the court was referred to the case of in the estate of the late **Peter Muraya Chege (deceased) (2019) e KLR**
22. I have considered the two applications herein, responses thereto and submissions by parties' respective counsel. issues that emerge for determination are.

(a) Whether the applicant has met the threshold for a grant of administration Ad collegenda bona to issue.

(b) Whether the respondents are properly enjoined.

23. The applicant is seeking a temporary grant of letters of administration Ad colligenda Bona under rule 36 of the P&A rules which pursuant to Section 67 of the LSA provides that owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who by law would be entitled thereto in sufficient time to meet the necessities of the case , any person may apply for the making of a grant of administration ad colligenda bona defuncti for purposes of

preserving and collecting the estate.

24. In this case, there is no dispute that the petitioner is a former husband to the deceased having divorced sometime 2018. That fact has not been challenged. Under Section 66 of the Law of Succession Act people entitled to petition for a grant of letters of administration are;

a. Surviving spouse or spouses, with or without association of other beneficiaries

b. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V

c. Public trustee and

d. creditors

25. Obviously, a former husband is not among the listed categories to petition for a grant. See in the matter of the estate **of DKB (deceased) supra**. However, I do not want to extensively delve into the issue of lack of locus standi in a broad sense having in mind that there are pending proceedings before Malindi succession cause No E 030/2021 where the petitioner has filed another application for revocation.

26. The next question that begs for answer is, can two grants issue in respect of the same estate? It is trite law that two grants cannot issue in respect of the same estate. That is why form 30 issued by the principal Registrar is necessary to ensure that there are no multiple causes in respect of the same estate. This is meant to preserve the dignity of the court not to issue contradicting orders and also to bring litigation to an end once and for all.

27. It is not in dispute that there is already a succession cause before Malindi high court which has been heard and concluded. The petitioner has admitted as such and in fact confirmed that he has since challenged the proceedings in that case by filing a revocation application. He stated that he did not know of the existence of the Malindi case until the respondents disclosed in this case.

28. As stated above, two parallel grants cannot issue in respect of the same estate. See in the **re estate of Kanyeki Kimatu (deceased) (2020) e KLR** where the court stated that;

“the issuance of the two grants over the same suit property by two different courts which contradict each other is an embarrassment to the court process for which I fault Margaret Muthoni Kanyeki”

29. The petitioner having discovered the existence of the Malindi high court suit, he ought to have withdrawn this application so as to direct his energies towards Malindi file. In the circumstances, I do agree with the respondents that the application herein is bad in law and the orders cannot issue.

30. As regards joinder of the respondents, one would ask where the petitioner derived authority from to be able to sue. He had no capacity in law to institute any proceedings against anybody before obtaining a grant of letters of administration Ad litem for purposes of suing. See **Rajesh Prajiram Gudasama Vs Sailesh Pranjivan Chudasa (2014) e KLR** where the court stated;69

“.....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception”

31. In the instant case, the petitioner sued the respondents before obtaining a temporary grant. The suit is therefore incompetent and bad in law.

32. Considering the question of the respondent's joinder to the suit, the same was improper as no cause of action can be founded against an advocate acting on lawful instruction from a client. If advocates were to be sued for every case or incident arising out of their legal representation, then there will be no advocate in practice.

33. Unless the suit is founded on professional misconduct, an advocate cannot be held liable only on account of acting for a certain client. In this regard I am guided by the holding in the case of **Victor Mabachi & another Vs Nurtin Bates Limited in Civil Appeal No 247/2005 (2013) e KLR** where the court of appeal held that it was improper to implead an agent in a suit where the principal is disclosed.

34. From the above finding, I am satisfied that the application dated 14th June, 2021 is incompetent and bad in law. The same is struck out and the application dated 26th July, 2021 allowed as prayed. I will however hesitate to order for costs as this is a family related issue. Each party shall bear own costs.

Dated, signed and delivered virtually this 28th day of February, 2022

J .N.ONYIEGO

JUDGE