



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1360 OF 2019

IN THE MATTER OF THE ESTATE OF JOHN MUTIO MUTUA (DECEASED)

SAPHINA MULEE MUTUA.....1ST CREDITOR/APPLICANT

KILOMO MUTUA AKA CHARLES.....2ND CREDITOR/APPLICANT

YVONNE MBITHE MATHEKA.....3RD CREDITOR/APPLICANT

VERSUS

ANNE WANGUI MUTUA.....CITOR/PETITIONER-1ST RESPONDENT

GABRIEL NZIOKI MUTINDA.....EXECUTOR/2ND RESPONDENT

RULING

1. By a Notice of Motion application dated 14th April, 2021, the Applicants seek for orders of:

a. *Spent*.

b. Release of the money owed to the Creditors/Applicants respectively above and held in the deceased's John Mutio Mutua's Bank Accounts in trust upfront for them as below:

i. Kshs. 915,397.3 only in favour of SAPHINA MULEE MUTUA, 1st Creditor/Applicant.

ii. Kshs. 3,814,748/= only in favour of KILOMO MUTUA aka CHARLES, 2nd Creditor/Applicant.

c. Payment of money owed to Yvonne Mbithe Matheka the 3rd Creditor/Applicant herein on account of Hotel wares/goods worth Kshs. 291,500/= sold to the deceased John Mutio Mutua but were not paid for, before his death.

2. The application is premised on the grounds that the Applicants are *bona fide* creditors of the Estate of the late John Mutio Mutua, who passed on before paying for hotel wares and goods bought from the 3rd Applicant's Drip, Sip and Bite Restaurant, Nairobi, now closed, and transported to the deceased's home in Muthetheni. That the **Law of Succession Act** allows for protection of the rights of a Creditor and for settlement of debts by a deceased's estate to *bonafide* Creditors. Further that the life, health and progression of the Creditors/Applicants have been at a stand still pending the resolution of this dispute.

3. The application is supported by an affidavit sworn by the 1st Creditor/Applicant Saphina Mulee Mutua on 14th April, 2021 on her own behalf and on behalf of her co-applicants, who have duly consented to her acting on their behalf. The 1st Creditor is a sister to the deceased. The 2nd Creditor/Applicant is her younger brother while the 3rd Creditor/Applicant is her daughter.

4. She deposed that the deceased was their family trustee who held a sum of Kshs. 11,444,245/= worth of proceeds from the sale of their late mother's Plot on LR 209/2489/38, which was jointly owned with one Diana Muteshi in equal shares. That the sum was deposited in the deceased's Barclays Account No. 036xxxxxxx. She urged that their family comprised of three (3) siblings, the deceased included, each of whom was therefore entitled to a total of Kshs. 3,814,748/= being an equal share of the sale proceeds. A copy of an Agreement for Sale dated 23rd April, 2014 is on record to this effect.

5. The 1st Applicant/Creditor asserted that the deceased had paid her a sum of Kshs. 2,889,351/= before his demise and the estate was therefore still holding on to Kshs. 915,397.3/= to date which sum she was in urgent need of since she is living with disability and has no other source of income. Her younger brother, the 2nd Applicant was at the time of the deceased's death yet to receive any sum, and the deceased therefore died holding the total sum of Kshs. 3,814,743.3 due to him. That he too is in urgent need of the money since he has severe disability and is in need of medical attention and basic needs.
6. The 3rd Creditor's claim on the other hand is in respect of hotel wares worth Kshs. 291,500/= which she is said to have sold to the deceased but that the deceased fell ill soon thereafter and died before he could settle the payment. That the 3rd Creditor is a single mother of a young boy whose education and other basic needs are greatly affected due to his mother's financial incapability.
7. The Creditors/Applicants were dependents of the deceased and are beneficiaries in the deceased's will dated 17th August, 2019. The will is yet to be propounded, a fact the 1st Applicant attributes to a dispute between the Executor and the Citor/Petitioner herein.
8. In response to the application, the Petitioner/1st Respondent Anne Wangu Mutua filed a replying affidavit sworn by herself on 11th June, 2021. She conceded that the Applicants are related to the deceased herein in the manner described. She stated that while she was appraised of the difficulties faced by the 2nd Applicant, no proof had been presented in respect of his disability claims. That while persons living with disabilities are issued with a certificate of disability by the National Council of Persons with Disability, no such certificate had been attached. She urged that whereas the Applicants had issued demand letters and which her Advocates had received, she had no authority to act on the claims raised therein against the estate since no letters of administration had been issued to her.
9. The Petitioner/1st Respondent denied the averment that the deceased was a Trustee, urging that the Applicants ought to have provided a deed or instrument creating a Trust in order to give credence to their averments in this respect. She deposed that a Trust cannot be legitimately imported into a contract such as the subject Sale Agreement dated 23rd April, 2014, nor can it be assumed when parties have not expressed such intentions. She urged that the onus was on the party relying on the existence of the trust to prove it through evidence.
10. She took issue with a "Request for RTGS Transfer" dated 6th October, 2014 from Barclays Bank of Kenya Ltd which is annexed to the 1st Applicant's supporting affidavit. She averred that whereas it indicates that the purpose of the transfer of the funds into the account of the deceased was for "part payment of purchase price", there were no further details, specifically in respect of the property in question. She stated that it was curious that the Applicants provided the R.T.G.S form of a single transaction from their Advocate but did not provide details or proof pertaining to the receipt of the sum of Kshs. 27,000,000/= from the Purchaser Lucy Nyambura Muhia. Therefore, that it was not clear what the funds were for and where they had originated from.
11. It was further averred that the Applicants had also not explained why, if at all, the monies had been transferred to the deceased's account and not to each of the siblings in equal shares as they had agreed since the money was being held by their joint Advocate. Additionally, that there was no proof of payment of the entire purchase price, being Kshs. 27,000,000/= into the Advocates account in line with clause 2 as read with clause 4 of the Sale Agreement. That the Applicants had also failed to demonstrate payment of the half share of the purchase price in favour of Diana Muteshi, the joint owner of the property thereby leaving the court to speculation.
12. The 1st Respondent asserted that it was curious that the said transfer of funds into the deceased's account was done one (1) year after the completion of the sale. That it was also curious that there was no explanation given as to why the deceased would have retained the sum of Kshs. 915,397.30/= for five years having transferred the larger amount.
13. According to the 1st Respondent, the allegations by the Applicants are without basis. To her knowledge, the deceased was a person who took pride in not owing anyone money.
14. In respect of the 3rd Applicant/Creditor, it was averred that there had not been presented a formal agreement between the deceased and the 3rd Applicant in respect of the alleged goods. That even if the agreement could be inferred, no receipts or valuation reports had been attached to ascertain the value of the goods and to specifically identify them. That all the 3rd Applicant had done was to simply attach a list with no corroborative evidence. It was further urged that the 3rd Applicant had also failed to provide evidence to show that she indeed was the owner of the named business. It was noted that the business license that had been provided was questionable since it was issued on 30th December, 2010 and expired on 31st December, 2011.
15. In the 1st Respondent's view, if indeed it were that the deceased had debts as claimed he would have either settled them or specifically provides for them under his will. She asserted that it was strange that the Applicants had stated that they were dependants of the deceased yet on the other hand claim that the deceased had at the time of his death held a substantial amount of money which was lawfully due to them. She urged that the Applicants had failed to substantiate their claims reasons for which the application ought to be dismissed.
16. Counsel M/s Chepseba filed written submissions dated 13th July, 2021 on behalf of the Creditors/Applicants. She proposed three (3) issues for determination: whether there is a fiduciary trust proved by the 1st and 2nd Creditor/Applicant against the deceased; whether the 3rd Creditor/Applicant was owed by the deceased; whether the Applicants proved dependency on the deceased and whether the orders sought are available to the Applicants.
17. Counsel reiterated the averments in the Supporting Affidavit sworn by the 1st Creditor/Applicant and asked the court to find that a fiduciary trust existed herein and in the alternative presume the existence of a trust as of absolute necessity. Reliance was placed on the decisions in **Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** and **Lawrence Gachau Kihu & 4 others vs. Mary Wangui Maina (sued on behalf of Maina Kihu (deceased)) [2018] eKLR**.

18. In respect of the 3rd Applicants claims, it was submitted that although she did not produce any documentary evidence to prove her claims, she had explained that theirs was a gentleman's agreement. Counsel made reference to the Collins English Dictionary noting that it defines a gentleman's agreement to mean an informal agreement in which people trust one another to do what they have promised. That the explanation of the 3rd Applicant should therefore be deemed satisfactory. Counsel urged that in view of the relationship between the 3rd Applicant and the deceased who was her uncle, and in view of her current state of life, the court ought to exercise a humanitarian approach and find in her favour.

19. Counsel Mr. Mugambi filed written submissions dated 11th June, 2021 on behalf of the 1st Petitioner/ Respondent. He proposed three issues for determination: whether there was a Trust created in favor of the alleged 1st and 2nd Creditors/Applicants to which the Deceased was a Trustee; whether the alleged Creditors/Applicants are bona fide creditors of the Estate herein and whether the alleged Creditors/Applicants were dependants of the deceased.

20. On the first issue, it was submitted that for a Trust to be created, it must be construed from a set of circumstances or can result from certain circumstances. That in the instant case there was no evidence of a Trust Deed and as such there was no express trust. Further that since the monies purportedly received by the deceased had been received through a valid transaction, no constructive Trust could arise. Additionally, that the subject Sale Agreement had no provision to the effect that the parties intended to have the money transferred to the deceased to hold in trust for his siblings. Therefore, that a resulting trust could not be inferred. To buttress his point, Counsel cited the decision in **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR**.

21. On the second issue, Counsel submitted that it was upon the Applicants to prove the allegation that they were creditors of the Estate of the deceased. To this end, Counsel cited the decision in **Yunes Muniafu Mukolwe vs. Moses Makokha & 3 others [2016] eKLR**, while reiterating the averments in the 1st Respondent's Replying Affidavit. It was urged that the evidence presented only raises questions and concerns rather than prove the existence of any debt as alleged. Further that the Applicants had not given an explanation as to why M/s Kamau Kinga & Co. Advocates, the Advocates who represented the Vendors in the sale, would have transferred the entire amount to the deceased and not transferred the shares to the respective vendors. That in any event, there was no paper trail filed to show the source of the funds and demonstrate how they got to the Advocates and finally the deceased. Therefore, that it could not be ascertained that the funds were received by the deceased for the purpose claimed.

22. On the third issue, it was submitted that for one to be a dependant for purposes of succession, they must fit either of the descriptions under **sections 26 and 29 of the Law of Succession Act**. Counsel asserted that whereas the 1st and 2nd Applicant were among those listed under **section 29** by dint of being siblings of the deceased, there was no evidence that there were being maintained by the deceased immediately prior to his demise. Therefore, that they could not be dependants of the deceased's estate. In respect of the 3rd Applicant, Counsel submitted that by virtue of being a niece to the deceased, she automatically did qualify as a dependant of the deceased under **section 29**.

23. Counsel relied on the decisions in **Re Estate of the Late M'thigai Muchangi (deceased) [2020] eKLR**; **Monica Peter Mutuku & Another vs. Wilson Muendo Mutuku [2009] eKLR** and **R N M vs. R N M [2017] eKLR** in support thereof.

24. There is on record a Supplementary Affidavit dated 1st July, 2021 sworn by Michael Kamau Kinga, an Advocate of the High Court of Kenya practicing under the name and style of Kamau Kinga & Company Advocates. The affidavit is sworn in support of the instant application. In it, he states that he is the family lawyer of the Mutua's and was involved in the transaction referenced in the subject Sale Agreement.

25. Mr. Kinga asserted that the property in issue, was registered in the names of the late Alice Mumbua and Dina Muteshi respectively as Tenants in Common in equal shares. A copy of a Title issued under the Registration of Titles Act in relation to L.R No. 209/2489/38, with effect from 1st October, 2012, is on record to this effect. He stated that the Trust of the estate of Alice Mumbua (deceased) was executed by the Administrators of her estate, John Mutio Mutua (the deceased herein) and Saphina Mulee Mutua on behalf of themselves and the 2nd Applicant. He annexed a Certificate of Confirmation of Grant dated 5th November, 2013 as evidence of this.

26. It was Mr. Kinga's statement that he was representing the Vendors in the transaction for sale of the subject property. He confirmed that a purchase price of Kshs. 27,000,000/= was deposited into his law firms account al beit in installments. There is on record applications for funds transfers dated 5th September, 2014, 15th September, 2014, 24th April, 2014, 15th September, 2014 respectively and a Telegraphic Transfer/RTGS/EFT application dated 15th September, 2014. The applications were for transfer of funds into an account held by Kamau Kinga & Co. Advocates and were for sums of Kshs, 17,000,000/=; Kshs. 3,400,000/=; Kshs. 2,700,000/=; Kshs. 1,100,00/= and Kshs. 2,900,000/= respectively for a total sum of Kshs. 27,100,000/=.

27. According to Mr. Kinga, the deceased and his siblings, that the share due to them be deposited in the account held by John Mutio Mutua, the deceased herein, to hold on their behalf in fiduciary trust. That it was on this premise that he deposited in the Barclays (ABSA) bank account of the deceased a sum of Kshs. 11,444,245/=. A depository RTGS slip is on record. He asserted that he also deposited a total of Kshs. 10,176,975/= to the co-owner Dina Esiavuka Joseph aka Dina Muteshi aka the wife of Muteshi Egingwa and her family members. Copies of RTGS Transfers of these transactions are on record.

28. Thereafter, the 1st Petitioner/Respondent swore a further affidavit dated 13th July, 2021 in response to Mr. Kinga's supplementary affidavit. She faulted the affidavit stating that it merely reiterated the averments made by the Applicants in relation to ownership of the subject property. She averred that the allegation of a Trust remained a mere allegation without proof.

29. The 1st Respondent conceded that the receipt of funds had now been established, but maintained that the manner in which the funds were to be dispatched or how they would be handled had not been provided in the Sale Agreement. She averred that the supplementary affidavit was clear that on the part of the co-owner of the subject property, monies were paid directly to beneficiaries. That the Applicants ought

therefore to have given a reason or explanation as to why this did not apply to the deceased and his siblings, in the absence of which the court could not ascertain the validity of their claims. Therefore, that the application should be dismissed.

30. Upon considering the pleadings, affidavits and written submissions filed by the parties respectively, two issues emerge for determination: first, whether the Applicants qualify as Creditors of the deceased's estate and whether the amounts claimed ought to be released to the Applicants.

31. On the first issue, I am inclined to rely on the account given by Mr. Michael Kamau Kinga, Advocate. On this, I am guided by **section 112** of the **Evidence Act, CAP 80**, which is categorical that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. From the averments made in his affidavit, coupled with the annexures thereto, it is clear that Mr. Kinga received sums of money as the purchase price of the subject property on behalf of the Vendors, a fact that the 1st Respondent has since conceded to. What is disputed is whether the sum of money consequently transferred to the deceased was for his sole benefit or whether it was to be held in trust for his siblings.

32. In his affidavit, Mr. Kinga further demonstrated how he paid out to the Vendors the total sums of money he received as the purchase price of the subject property. He annexed the bank transfers to corroborate his averments. It is evident that whereas in respect of the co-owner of the property Dinah Muteshi, monies were paid directly to the beneficiaries, while in respect of Alice Mumbua (deceased) the total sum due to the beneficiaries of her estate was paid to John Mutio Mutua, the deceased herein. This is evident from the total sum of money paid into his Barclays Bank account, being Kshs. 11,444,245, which accounted for half of the purchase price of the subject property.

33. Mr. Kinga's statement finds support in the Certificate of Confirmation of Grant of the Estate of Alice Mumbua Mutua (deceased) dated 5th November, 2013. The Certificate of Confirmation has a schedule which provides the description of properties as "*Half Share in L.R. Np. 209/2489/38 measuring 0.0407 acres*" and the share of heirs to be "*in equal shares*". The import of this is that the share of the sale proceeds due to Alice Mumbua (deceased) were to be shared equally between John Mutio Mutua (deceased) and the 1st and 2nd Applicants being the beneficiaries named in the Certificate of Grant. It cannot then be stated that John Mutio Mutua (deceased) held the proceeds for his sole benefit as this would be contrary to the Certificate of Confirmation. I am also convinced by the explanation given by Mr. Kinga Advocate, that the half share of the sale proceeds was transferred to the deceased to hold in trust for himself and his siblings in fiduciary trust as a trustworthy sibling.

34. In view of the Certificate of Grant through which the court distributed the estate of Alice Mumbua (deceased), I find that it was not necessary to have a clause in the agreement on how the share due to her should be dealt with since her upon her death, her estate became subject to the provisions of the **Law of Succession Act** and could only be distributed subject to issuance and confirmation of a Grant of Administration. The subject Sale Agreement is clear that Saphina Mulee Mutua and John Mutio Mutua were named as vendors by dint of being administrators of the estate of Alice Mumbua Mutua (deceased). The claim by the 1st Respondent that the 1st and 2nd Applicants need to lay a further basis for their claim to the sale proceeds is therefore unfounded.

35. Notably, the 1st Applicant had disclosed that the deceased had prior to his death transferred to her part of her share of the sale proceeds as evidenced by her statement of accounts from SBM Bank. This further lends credence to the 1st and 2nd Applicant's case that the deceased held the sale proceeds on behalf of himself and his siblings.

36. In respect of the 3rd Applicant/Creditor, no evidence was tendered to support her claims. She did not lead evidence to show that she was the owner of the Drip, Sip & Bite Restaurant or that she had sold the deceased the items she purports to have sold him. All that she provided was a License issued on 30th December, 2010 with an expiry date of 31st December, 2011 issued to the Drip, Sip & Bite Restaurant by the Public Health Department. She also provided a Public Notice dated 28th July, 2018 in respect of removal of illegal structures on the road reserve along Lang'ata Sub-County Headquarters, Wilson Airport and Lang'ata Wilson South C Link Road. Nothing in the Notice speaks to the restaurant. There is also a letter dated 23rd September, 2020 which lists items which the 3rd Applicant had purportedly sold the deceased.

37. I find the documentary evidence provided by the 3rd Applicant insufficient for her case in this instance. Without more, this court cannot verify the claims. This is especially since the deceased whom the 3rd Applicant is said to have sold the items to is not here to give his side of the story. I will decline the invitation for this court to enter into the realm of speculation and instead dismiss the 3rd Creditor's claim.

38. The Applicants also raised issues of dependency. In my considered view, the issues of dependency ought to be canvassed at the hearing of the main suit. As such, I will not belabor the arguments in this respect.

39. In the end, I find that the application dated 14th April, 2021 is meritorious and is hereby allowed only in the following orders:

a. John Mutio Mutua (deceased) held the half share of the proceeds from the sale of the property known as L.R. No. 209/2489/38 for himself and as a fiduciary on behalf of his siblings, Saphina Mulee Mutua and Kilomo Mutua aka Charles, the 1st and 2nd Creditor/Applicant respectively.

b. The estate of the deceased shall pay to the 1st and 2nd Creditor/Applicant the amounts due and owing to them as their share of the sale proceeds as follows:

i. Kshs. 915,397.30/= only in favour of Saphina Mulee Mutua, the 1st Creditor/Applicant.

ii. Kshs. 3,814,748/= only in favour of Kilomo Mutua aka Charles, the 2nd Creditor/Applicant.

c. There shall be no orders as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 21ST DAY OF FEBRUARY, 2022.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Creditors/Applicants.

In the presence of.....Advocate for the Petitioner/1st Respondent.