



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2532 OF 2008

IN THE MATTER OF THE ESTATE OF ABASI WACHEKE NJERI (DECEASED)

PETER NJOROGI SAMUEL.....ADMINISTRATOR/APPLICANT

VERSUS

CAROLINE WANJIKU WAMBUI.....RESPONDENT

RULING

Summons

Peter Njoroge Samuel, the Applicant, has brought this application dated 9th July 2019 by way of Summons under Sections 45, 47 and 76 (e) of the Law of Succession Act; Rules 44, 49, 59, 63 and 73 of the Probate and Administration Rules; Order 40 Rule 1 of the Civil Procedure Rules, 2020 and all other enabling provisions of the law and powers of the court. He seeks the following prayers:

1. That this application be certified urgent and be heard *ex parte* in the first instance.
2. That the Respondent, whether acting by herself or through her agents, servants and/or any other person whatsoever be and is hereby restrained from collecting rent, transacting in, wasting, damaging, alienating, transferring, disposing of or in any other manner howsoever dealing with the properties known as PLOT NO. B2837, Dandora Phase 2, Nairobi and rental property under shares in Bondeni Properties Company Limited pending the hearing and final determination of this application.
3. That the Respondent, whether acting by herself or through her agents, servants and/or any other person whatsoever be and is hereby restrained from collecting rent, transacting in, wasting, damaging, alienating, transferring, disposing of or in any other manner howsoever dealing with the properties known as PLOT NO. B2837, Dandora Phase 2, Nairobi and rental property under shares in Bondeni Properties Company Limited pending the hearing and final determination of this case.
4. That the County Government of Nairobi, through its officer in charge of the Housing Development Department, Dandora Office be and hereby ordered to produce before the court, records of ownership/allocation of the property known as PLOT NO. B2837, Dandora Phase 2, Nairobi as at 15th November, 1977 and details of transfer of the same from Wacheke Chege (also known as Abasi Wacheke Njeri) to Lucy Wacheke.
5. That the Directors of Bondeni Properties Company limited be and are hereby ordered to produce before the court, records of ownership/allocation of 160 shares issues to Abasi Wacheke Njeri before the 15th November, 1977 and details of transfer of the same to Lucy Wacheke.
6. That the Honourable Court be pleased to restrain the Respondent whether acting by herself of through her agents, servants and/or any other person whatsoever from interfering and intermeddling with the rest of the estate of the deceased.
7. That the Grant of Letters of Administration issued to Peter Njoroge Samuel alias Peter Njoroge on the 19th of June, 2019 be rectified in the following aspects: By specifying the Assets of the Estate to include:
 - (a) 160 Shares in Bondeni Properties Company Limited.
 - (b) Plot No. B2837, Dandora Phase 2.
 - (c) House B21, Pumwani Phase II, under mortgage from National Housing Corporation.

8. That costs of this Application be in the cause.

In support of the Summons, the Applicant has sworn an Affidavit on 9th July 2019. In the Affidavit, the Applicant deposes that he is the grandson of the deceased and the administrator of her estate following the death of Lucy Wacheke the Executrix named in the will of the deceased; that the will of the deceased did not specify the assets belonging to the deceased or the shares for each beneficiary; that he is aware that the deceased owned 160 shares in Bondeni Properties Company Limited and was allocated a plot in Mathare where she put up rental houses currently generating rental income, Plot No. B2837, Dandora Phase 2 allocated to the deceased by the then City Council of Nairobi in 1976 and House No. B21, Pumwani Phase II, under mortgage from National Housing Corporation and that the estate of the deceased has liabilities being mortgage still being serviced under account number 112102100001 at National Housing Corporation.

The Applicant deposes further that the Executrix Lucy Wacheke transferred to herself the shares belonging to the deceased under unclear circumstances; that the Executrix also transferred the Dandora Plot to herself and started collecting rent; that upon the death of the Executrix, Caroline Wanjiku Wambui, the Respondent, took out letters of administration to the estate of Lucy Wacheke Ngari in Kajiado Chief Magistrate's Court Succession Cause No. 96 of 2018 where she indicated the above assets as belonging to the estate of Lucy Wacheke Ngari; that the Respondent has now seized the Dandora property from which she is collecting rent; that none of the beneficiaries gave consent nor were they party to the transfer of the assets to the Executrix; that without intervention of the court, the estate herein stands to lose its assets to persons who are not the rightful beneficiaries and that due to these issues the Applicant has not managed to complete the administration of the estate of the deceased.

The Respondent filed a Replying Affidavit sworn on 6th July 2020 in opposition to the Application. The Respondent denies being in possession or control of any assets belonging to the estate of the deceased. She states that all the assets listed in Kajiado Succession Cause No. 96 of 2018 In the Matter of the Estate of Lucy Wacheke Ngari are properties that form part of the properties of which Lucy Wacheke Ngari was legally competent to freely dispose of during her lifetime; that there has not been any objection by the beneficiaries in the Estate of Abasi Wacheke Njeri as regards the list of assets and/or obligations of Lucy Wacheke Ngari as the then administrator; that it is only after her death that this application has been filed; that the estate of Abasi Wacheke Njeri had been previously administered and finalized by the Public Trustee on 2nd August 1988 under Administration Cause No. 898 of 1979; that the matter was referred to the Family Division at Nairobi Milimani and was filed afresh for the application for letters of administration in which the late Lucy Wacheke Ngari was appointed administrator on 9th April 2009 and continued to administer the same till her demise on 20th January 2018 and that the Estate of Abasi Wacheke Njeri comprised of one asset, House B21 at Pumwani Phase II, and liability, Mortgage from National Housing Corporation.

Paragraphs 9 (a) –(v) to 15 of the Respondents Replying Affidavit relate to the Estate of Lucy Wacheke Ngari. The Respondent has deposed in those paragraphs that the property comprising 160 Shares in Bondeni Properties Company Limited and Plot No. B2837, Dandora Phase 2 belong to Lucy Wacheke Ngari. She has attached documents in support. She deposes that the late Lucy Wacheke Njeri has made developments on her property and has been collecting rent from both properties. She states that the Applicant has not provided evidence that Abasi Wacheke Njeri is the owner of the two properties and therefore she asks this court to dismiss this Application.

In response to the Replying Affidavit by the Respondent dated 6th July 2020, the Applicant has filed a Further Affidavit dated 6th October 2020 in which he reiterates his assertion that the two properties in question belong to the estate of Abasi Wacheke Njeri and that the beneficiaries of Abasi Wacheke Njeri trusted that the late Lucy Wacheke Ngari would collect rent and pay expenses relating to that estate and never doubted she was acting in the best interests of the beneficiaries. The Respondent proceeded to show in Paragraphs 12 onwards that the properties in question belong to the estate of Abasi Wacheke Njeri. He also doubts the genuineness of the documents attached in the Replying Affidavit of the Respondent in respect of the two properties in issue.

Submissions

This court directed that this matter be disposed of by way of written submissions. The Applicant filed his submissions dated 26th November 2020. He identifies the following as the issues for determination:

- (i) Whether Abasi Wacheke Njeri (alias Wacheke Chege, Deceased) was the bona fide allottee of the property known as Plot No B2837, Dandora Phase 2 and whether ownership legally changed to Lucy Wacheke Ngari (Deceased).
- (ii) Whether it is necessary to summon the officer in charge of the Housing Development Department, County Government of Nairobi to shed light on the ownership of Plot No. B2837, Dandora Phase 2 as at the date of demise of Abasi Wacheke Njeri alias Wacheke Chege, the 15th November 1977.
- (iii) Whether Abasi Wacheke Njeri, alias Wacheke Chege, prior to her death owned shares in Bondeni Properties Company Limited and by extension rental units in Mathare and if so, the current fate of the said shares.
- (iv) Whether it is necessary to summon the Directors of Bondeni Properties Company Limited to produce records of the said shares as at 15th November 1977 and details of transfer/current ownership of the same.
- (v) Whether the Respondent should be permanently restrained from interfering and intermeddling with the estate of the deceased herein in whatever manner, including restraint from collecting rent from any of the said assets.
- (vi) Whether the Grant of Letters of Administration issued to the Applicant may be rectified to specify the assets of the estate of Abasi Wacheke Njeri alias Wacheke Chege as (a) 160 shares in Bondeni Properties Company Limited; (b) Plot No. B2837, Dandora Phase 2 and (c) House No. B21, Pumwani Phase II.

The Applicant submits that the late Lucy Wacheke Ngari died before the Grant issued to her in respect of the estate of the deceased herein had

been confirmed and therefore any appropriation of the estate can only be deemed as intermeddling. He refers to various documents annexed to the Replying Affidavit of the Respondent and to his further affidavit to show that the properties in question belonged to the deceased herein and concludes that he has demonstrated that the Respondent and by extension the late Lucy Waceke Ngari have acted fraudulently and illegally by intermeddling with Plot No. B2837 Dandora Phase 2 which has been proved to belong to the estate of the deceased herein. He further submits that it is necessary to summon the Director of the Housing Development Department County Government of Nairobi to shed light on the ownership of this property.

In respect to issue number 3 the Applicant submits that the deceased herein is a founder member of Bondeni Properties Company Limited and owned shares in the said company for which she had rental units in Mathare; that the beneficiaries collected rent in the said units during the lifetime of the deceased and that the evidence provided herein is sufficient to persuade this court to summon the directors of Bondeni Properties Company Limited. He submits that with prove that the properties in question belong to the estate of the deceased herein, it becomes apparent that anyone dealing with the estate other than sanctioned by the law of succession is intermeddling with the estate and ought to be sanctioned and punished. On this point the Applicant has cited **James Masanya Ontiri Igendia v. Marungo & Another [2014] eKLR** and **In re Estate of Gulamhussein Karim Meghji (Deceased) [2019] eKLR**.

In her submissions dated 27th November 2020, the Respondent opposed the Application. She contends that the Public Trustee did not include the two properties: 160 shares in Bondeni Properties Company Limited and Plot No. B2837 Dandora Phase 2 in the schedule of properties belonging to the estate of the deceased herein; she relies on her sworn Replying Affidavit and its numerous annexures to rebut the allegations that the two properties belong to the estate of the deceased herein.

The Respondent has identified three issues for determination:

- (a) Whether or not the 2 properties : 160 shares at Bondeni Properties Company Limited and Plot No. B2837 Dandora Phase 2 belong to the estate of Abasi Wacheke Njeri in Nairobi High Court Succession Cause No. 2532 of 2008 as opposed to belonging to the estate of the late Lucy Waceke Ngari in Kajiado Chief Magistrate's Succession Cause No. 96 of 2008?
- (b) Whether or not rental income in respect of the two properties should be deposited in a joint account to be opened by the Applicant and the Respondent?
- (c) Whether or not the Applicant's application is an abuse of the court's process and bad in law and should be dismissed with costs?

On the first issue, the Respondent submits that the two properties in question do not belong to the estate of the deceased herein and relies on Paragraphs 3 to 13 all-inclusive of her Replying Affidavit dated 6th July 2020. She also relies on her numerous annexures to that affidavit. On the second and third issues the Respondent answers it in the negative. She relies on the averments in paragraphs 11, 12, 13 and 14 of her Replying Affidavit to point out that the late Lucy Waceke Ngari personally acquired the two properties. The Respondent submits that the Applicant has failed to establish a prima facie case and it is only fair and just that his application be dismissed with costs to the Respondent.

Determination

I took time to read and understand all the pleadings in this matter. I have read the rival submissions. It is my understanding that in issue are two properties namely:

- (i) Plot No. B2837, Dandora Phase 2; and,
- (ii) 160 Shares with Bondeni Properties Company Limited.

The Applicant claims that these two properties belonged to the late Abasi Wacheke Njeri (also known as Wacheke Chege) the deceased in these proceedings. It is clear from the pleadings that the estate was initially administered by the Public Trustee under Administration Cause No. 898 of 1979 and that the above named properties were not listed as forming the estate. It is also clear from the court records that the late Lucy Waceke applied for a Grant of Probate of Written Will in the estate of the deceased herein and the same was issued to her on 9th April 2009 in this Cause. These facts are not disputed. The late Lucy Waceke listed Pumwani Phase II House No. 21 as the only asset of the deceased and a Mortgage A/C 112102100001 National Housing Corporation as the only liability. This is admitted by both parties herein. It is my understanding that subsequent to the demise of Lucy Waceke on 19th June 2018 the Applicant made an application for a Grant of Letters of Administration with Will – *de bonis non* in respect of the estate of the deceased herein and the same was issued on 19th June 2019. This is a fact that is not disputed. It is in his capacity as the administrator of the estate of the deceased herein that the Applicant comes to this court seeking to have this court make an order restraining the Respondent, who is the Administrator of the Estate of Lucy Waceke, from dealing in any manner with Plot No. B2837 Dandora Phase 2 and 160 Shares in Bondeni Properties Company Limited. He claims that these two properties belong to the deceased herein and form her estate. This is contested by the Respondent who asserts that the two properties belong to the late Lucy Waceke and are listed as forming her estate in Kajiado Succession Cause No. 96 of 2018. The Applicant claims that the late Lucy Waceke fraudulently and illegally transferred ownership of the two properties to her thereby denying the beneficiaries of the deceased herein their rightful shares.

I have read and understood the issues identified by each party as the issues for determination in this Cause. To my understanding, this court is being asked to determine who owns Plot No. B2837 Dandora Phase 2 and 160 Shares Bondeni Properties Company Limited. Do the two properties belong to the deceased whose estate these proceedings relate as claimed by the Applicant or do they belong to the late Lucy Waceke Ngari as claimed by the Respondent. The Applicant claims that the two properties are part of the estate of the deceased herein while the Respondent is or a different view that the two properties are part of the estate of Lucy Waceke and should be administered under Kajiado Succession Cause No. 96 of 2018. To my mind, the answer to this question cannot be given without touching on the issue of the jurisdiction of this court to determine the ownership dispute. This fact was lost to the two parties in their pleadings and submissions to this court. I pose the question, does this court, while sitting as a Probate Court, determine a claim of ownership of property?

It is trite that jurisdiction is everything (see **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR**). Without jurisdiction a court cannot proceed to determine a matter before it. In **Alexander Mbaka v. Royford Muriuki Rauni and 7 Others [2016] eKLR**, the court had this to say on the issue of jurisdiction of the Probate Court:

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”

This court (Musyoka, J) in **High Court Succession Cause No. 864 of 1996, In the Estate of Mbai Wainaina (Deceased) [2015] eKLR**, while dealing with a claim of trust had this to say:

“Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

There are numerous attachments to the Replying Affidavit and Submissions of the Respondent to which the Applicant has also mentioned. Given that this court has been told that the two properties in issue here have also form part of the estate of the late Lucy Waceke who was the Executrix of the estate of the deceased herein, and given that the Applicant claims that the same properties belong to the deceased’s estate and were fraudulently transferred by the late Lucy Waceke to herself, it is upon the Applicant to present evidence in proof of that claim before the right forum. To my understanding that forum is not this court. The Applicant must as a matter of law prove his claim before the right court with jurisdiction to determine ownership rights before coming to this court. It would be an affront to the law for this court to make an order declaring the two properties as belonging to the estate of the deceased herein or specifying the assets of the Estate of the deceased to include the two properties as prayed by the Applicant. I do not have jurisdiction to do so as the Law of Succession Act does not donate such power to this court.

There is no dispute that Pumwani Phase 11 House 21 under mortgage from National Housing Corporation is an Asset and Liability of the Estate of the deceased herein. The Applicant is at liberty to proceed with the administration of that part of the Estate or keep the administration of this estate in abeyance as he pursues the claim in the right court for Plot No. B2837 Dandora Phase 2 and 160 Shares Bondeni Properties Company Limited. This application must fail because this court lacks jurisdiction to entertain it.

In conclusion therefore, the Application dated 9th July 2019 is hereby dismissed with costs to the Respondent. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF JANUARY 2021.

S. N. MUTUKU

JUDGE