



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCC NO. E420 OF 2020

STEPHEN NG'ANG'A NDUNGU.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT/RESPONDENT

ABC BANK LIMITED.....2ND DEFENDANT/RESPONDENT

BANK OF INDIA LIMITED3RD DEFENDANT/RESPONDENT

RULING

1. The applicant herein, **Stephen Ng'ang'a Ndung'u**, seeks the following orders through the application dated 19th October 2020: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit the plaintiff applicant, **Stephen Ng'ang'a Ndung'u**, be allowed to run, operate, manage and continue the running, operation and management of the day to day affairs of **M/S Wachira Ndung'u & Company Advocates** and specifically have the sole mandate to run, operate and manage the client's account of the said firm namely: -
 - a. Family Bank Limited, Family Bank Towers Branch, Account Number (xxxx).
 - b. ABC Bank Limited, Koinange Street Branch Street Branch, Account Number (xxxx).
 - c. Bank of India, City Centre Branch, Account Number (xxxx).
 - d. Such other or further orders as may be expedient in the interest of justice.
2. The application is supported by the applicant's affidavit and is premised on the grounds that: -
 - a. The plaintiff/applicant, **Stephen Ng'ang'a Ndung'u**, is an advocate having been admitted to the bar in the year 1997.
 - b. The Plaintiff/applicant has been practicing law in partnership with **Kennedy Wachira Mari** who unfortunately passed on 20th September 2020.
 - c. The plaintiff/applicant and the late **Kennedy Wachira Mari** practiced law in partnership under the firm name **Wachira Ndung'u & Company Advocates** but the partners had not executed a partnership deed.
 - d. As required under the Advocates Act, the said firm operated three clients' accounts, namely: -

i. Family Bank Limited, Family Bank Towers Branch, Account Number (xxxx).

ii. ABC Bank Limited, Koinange Street Branch Street Branch, Account Number (xxxx).

iii. Bank of India, City Centre Branch, Account Number (xxxx).

iv. An office account at ABC Bank Limited, Koinange Street Branch Street Branch, Account Number (xxxx).

e. The plaintiff has filed an Originating Summons seeking declaration inter alia, that Kennedy Wachira Mari (deceased) ceased being a partner by virtue of death.

f. The said bank accounts hold funds held in trust for and on behalf of clients and the funds are required for court filing fees, payment of expenses on behalf of clients, expenditure on obtaining completion documents for ongoing conveyance matter and expenses for payment of stamp duty for various land transactions.

g. The said bank accounts also hold funds held in stake in conveyancing processes that are now concluded and others in advanced stages thus there is need to release funds to clients and honour professional undertakings.

h. The orders sought are absolutely necessary and urgent since any delay in operating the said clients' accounts will expose clients to risk of failure to file time bound pleadings and meet their obligations on time.

i. Any delay will expose the surviving partner to risk of being visited with the said clients' liabilities and professional embarrassment for failure to obey client's instructions on their trust funds and failure to honour Professional Undertakings.

j. The plaintiff/applicant will continue being bound by the Advocates Act and all regulations relating to accounting to clients as envisaged under the Act and Rules thereunder.

3. The 1st respondent filed the Replying Affidavit of its Legal Officer **Ms Joyce Kabaria** in response to the application. She confirms existence of Account No. (xxxx) in the name of Wachira Ndungu & Company Advocates. She states that according to the 1st respondent's mandate, the signatories in the said account requires both partners to sign for any of the transactions and that their records indicate that the partners are the applicant and **Kennedy Wachira Mari** (deceased). She states that following the demise of the deceased partner, the 1st respondent advised the applicant that in the absence of a partnership deed, it would be prudent to engage the beneficiaries/successors of the deceased's estate to enable the applicant operate the bank account.

4. She further states that the 1st respondent has no objection to the granting of the orders sought but on condition that: -

i. **Regulation 14 of the Law Society of Kenya (General) Regulations, 2018 requires a practitioner to nominate a member in Form LSK-06 in the First Schedule to be administrator of the member's legal practice in the event that the sole practitioner dies. The nominee then acts as an administrator to run the affairs in the firm. Given the fact that the firm was registered under the Registration of Business Names Act, Cap 499, it would be prudent for the Law Society of Kenya to confirm from its records that Regulation 14 does not apply in the Applicant's case (in the absence of a Partnership Deed) and that the applicant automatically becomes an administrator to run the affairs of the firm.**

ii. **The 1st respondent bank is absolved and/or indemnified of any liabilities or claims from any liabilities or claims from the successors and/or beneficiaries of the deceased account if it so considered that the funds involved in the deceased account from part of the estate under the provisions of the law of Succession Act, Cap 160.**

iii. **Given the fact that the account is stated as client account, the 1st respondent bank is absolved and/or indemnified of any liabilities or claims from the Firm's clients and/or any third parties on account of any payments made out of the account.**

5. The third defendant filed the replying affidavit of **Santosh Kumar Gupta** in response to the application.

6. Parties canvassed the application by way of written submissions which I have considered.

7. The main issue for determination is whether the applicant should be allowed to continue running, operating and/or managing the day to day affairs of the law firm of Wachira Ndung'u & Company Advocates and specifically have the mandate to operate the law firm's bank accounts.

8. I must however be cautious not to make any definite findings on the contested issues of law and fact at this interlocutory stage so as not to jeopardize the decision that may ultimately be made by the trial court that will eventually hear and determine the main suit. Suffice is to say that following issues were not contested:

a. That the applicant's deceased partner **Kennedy Wachira Mari** died intestate on 20th September 2020.

b. That the deceased was at the time of his death practicing law as a partner in the firm of **Wachira Ndung'u & Company Advocates** which was registered as a business name.

c. That there was no Partnership Deed or agreement between the deceased and the applicant in respect of the law firm.

d. That at the time of his death, the deceased and the applicant were joint signatories to the bank accounts of the law firm.

9. It is worthy to note that this is not the first time that a court is confronted with a scenario involving the intestate death of an advocate practicing as a partner in a law firm.

10. A similar issue arose in the case of *Maxwell Ombogo V Standard Chartered Bank of Kenya Ltd* [2000] EA 475. In the said case, the Court of Appeal observed and held, inter alia, as follows regarding monies held in clients account by a deceased advocate: -

“Coming back to the definition of “free property”: in view of what we have stated above, it is quite clear that the phrase connotes not only the personal property of a deceased person, but also, all the property which was in his possession or control or under his power, and the disposal which, would legally have required his authority, but for his death. Money held in a deceased advocate’s ‘client account’ falls into that category. It then follows that the late Ombogo’s two bank accounts were part of his free property and, therefore, subject to the provisions of the Law of Succession Act. Law Society of Kenya not being among the people who, under Section 4b aforesaid, have the power to take all the necessary steps to protect the deceased’s estate, it had no right to direct the deceased’s bankers to freeze the two bank accounts. Even if it had such right it would not have priority over the administrators of the deceased estate under the Law of Succession Act (see section 6). We recognize the real danger of a lay administrator appointed under the net, dissipating money in a “clients account” in the mistaken belief that it is the deceased’s money. However, as the law now stands, only the public Trustee and in case he does not act, an assistant chief, chief or administrative officer, are empowered to take and such steps as are necessary to protect the estate of a deceased person, including deceased advocates from dissipation.”

11. The plaintiff argued that the circumstances in the *Maxwell Ombogo* case (supra) were different and distinguishable from those of the instant case as the cited case involved the management of the clients account in a legal practice managed by a sole practitioner while the present case relates to a partnership in which the Partnership Act is applicable.

12. With all due respect to the counsel for the applicant, I am not persuaded that the mere fact that the applicant and the deceased had a partnership does not deprive the deceased partner’s estate of interest in the law firm’s bank accounts.

13. My finding is that monies held in the bank accounts, be they office accounts or client’s accounts were in the control and power of both deceased and the applicant. For this reason, the accounts form part of the assets of the deceased and ought not be subjected to the provisions of the Law of Succession Act. I am guided by the decision in the case of *Virginia Wangui Mathenge v Agnes Wanjiru Njoroge & Another* [2013] eKLR wherein it was held: -

“Whether the deceased at the time of his death was a sole practitioner or in partnership with the 1st defendant in the firm of Mathenge & Muchemi Advocates is not momentous. In either event (and the issue will be properly canvassed and decided at the trial court of the action) his interest in the firm at the time of his death forms part of his estate. That interest would extend to any valuables then held by the firm, including money in the bank, accrued but not yet recovered fees and other debts owed to it, furniture, equipment, etc. If a sole proprietorship his estate would be entitled to all of it. If a partnership (dissolved by the death) his estate would be entitled to its proper share.”

14. Section 32 and 37(1) of the Partnership Act Cap. 29 stipulates as follows:

“32. Duty of partners to render accounts, etc.

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

“37. Dissolution by bankruptcy, death or charge.

(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.”

15. Section 45(1) of the Law of Succession Act on the other hand stipulates as follows: -

“...except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of.... or otherwise intermeddle with, any free property of a deceased person.”

16. Having found that the subject bank accounts form part of the estate of the deceased and considering that Section 45(1) of the Law of Succession Act prohibits intermeddling with the estate of a deceased person, I find that the proper approach to be taken by the applicant in order to gain access to the firms bank accounts ought to be through liaising with the representatives of the deceased in order to initiate succession proceedings even if the same will entail the securing of, Limited Grant of Letters of Administration.

17. My take is that the mere fact that the 1st defendants do not object to the granting of the orders sought in the application subject to being indemnified from any third party client’s claims does not entitle this court to ignore the legal procedural requirements under the Law of

Succession Act.

18. For the above reasons, I find that the application dated 19th October 2020 is premature and not merited at this stage. I therefore strike it out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF APRIL 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. S.N. Nganga for Macharia for Applicant.

Mr. Macharia for 3rd Defendant.

Mr. Orende for 1st Defendant/Respondent

Court

Assistant:

Sylvia.