



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. E003 OF 2020

IN THE MATTER OF THE ESTATE OF SLBT (DECEASED)

ELIZABETH CHABANI M'IKIRIMA.....PETITIONER/APPLICANT

VERSUS

JKT.....1ST RESPONDENT

LIT.....2ND RESPONDENT

OCS KANGETA POLICE STATION.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....4TH RESPONDENT

HON ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The Petitioner/Applicant claims to be the proposed personal representative of the deceased estate. She claims to be a widow of the deceased. She claims that the 1st and 2nd Respondents have been intermeddling with the estate of the deceased and she has come to seek intervention to prevent wastage of the estate. By her application by summons dated 20th November 2020 the Applicant seeks the following orders: -

i) Spent

ii) That the Honourable Court be pleased to grant the Petitioner/Applicant a Limited Grant Ad Colligenda Bona in respect of the deceased estate to enable her collect and preserve the deceased's estate pending determination of the cause.

iii) That the Honourable Court be pleased to stay proceedings in Maua Criminal Case No. 1456 of 2020 (Republic vs James Mutwiri and Kelvin Mutethia) and Maua Criminal Case No. 1446 of 2020 (Republic vs Kelvin Mutethia & Eric Mutwiri) and/or any further intended charges against the Petitioner and her children until full investigations with regard to the ownership of the property and shares of the beneficiaries is fully determined in succession case pending hearing and determination of this application inter partes.

iv) That the Honourable Court be pleased to stay proceedings in Maua Criminal Case No. 1456 of 2020 (Republic vs James Mutwiri and Kelvin Mutethia) and Maua Criminal Case No. 1446 of 2020 (Republic vs Kelvin Mutethia & Eric Mutwiri) and/or any further intended charges against the Petitioner and her children until full investigations with regard to the ownership of the property and shares of the beneficiaries is fully determined in succession case pending hearing and determination of this cause.

v) The Honourable Court do find and declare the 1st and 2nd Respondents as intermeddlers in the estate of the deceased.

vi) The 1st and 2nd Respondents be restrained by the Honourable Court, from trespassing into any of the estate's properties, either at Kangeta or any other place in the Republic of Kenya, pending hearing and determination of this succession cause.

vii) The 1st and 2nd Respondents be fined and imprisoned by this Honourable Court, for deliberately intermeddling with the estate's property, without any authority of personal representative or this Honourable Court in accordance with Section 45 (2) (a) of the Law of Succession Act Cap 160.

viii) ***The 1st and 2nd Respondents be restrained from harassing the proposed administratrix, and/or creating circumstances that might occasion a breach of the peace that might endanger the lives and welfare of the administratrix, and their immediate family members.***

ix) ***That the cost of this application be borne by the Respondents.***

The Petitioner's/Applicant's Case

2. The application is premised on the facts on the face of it as well as by the Petitioner's/Applicant's supporting affidavit sworn on 25th November 2020. The Petitioner/Applicant also filed submissions dated 15th February 2021. Her case is that she is the proposed personal representative of the deceased estate and she is a widow to the deceased. She claims that the 1st and 2nd Respondents are former wives of the deceased and that they were divorced through Meru Divorce Cause No. 24 of 2006.

3. She claims that the 1st and 2nd Respondents on 14th April 2020 moved the Court in Maua Civil Suit No. 50 of 2020 seeking to stop interment of the deceased herein purporting to be wives of the deceased and that she, the Petitioner/Applicant had refused to involve them in the burial arrangements of the deceased. That by consent of parties, it was agreed that there would be no dispossession or wastage of the deceased properties until succession is filed. That during the pendency of this matter, the 2nd Respondent filed another suit, Maua Succession Cause No. 91 of 2020 seeking similar orders and that when the same came for hearing, the entire suit was dismissed following the Petitioner's/Applicant's preliminary objection.

4. She claims that the 1st and 2nd Respondents, with the help of the 3rd Respondent conspired to file criminal cases against her children in ***Maua Criminal Case No. 1456 of 2020 (Republic vs James Mutwiri and Kelvin Mutethia) and Maua Criminal Case No. 1446 of 2020 (Republic vs Kelvin Mutethia & Eric Mutwiri)***. in a scheme to further intermeddle with the deceased estate by invading the deceased's miraa proceeding, murrum and rent from the deceased business premises, which is worth over 120 million. That the 1st and 2nd Respondents, without her consent and/or court directions, moved with speed and broke the padlocks to the shops and took charge of the assets, and burnt his house and that the matter was reported vide OB 17/30/03/2020 but no arrest was made. That the 1st and 2nd Respondents have threatened to take possession of the deceased properties without the court's authority.

5. She claims that the 1st and 2nd Respondents have conducted themselves in a manner that could potentially lead to breach of peace, case in point is on 22nd May 2019 where the 1st and 2nd Respondents organized goons and criminals who threatened to lynch the intended representative of the administrator, who had been mandated to politely request the 1st and 2nd Respondents to vacate the estate. She claims that these actions undermine her right to a fair trial and that the 5th Respondent should conclude investigations and charge them after the shares of the beneficiaries are fully determined. She claims that she is apprehensive that the 4th Respondent's intention is to have her and her children be remanded in custody as they will not be in a position to raise bail every time they are charged.

6. In her submissions, the Petitioner urges that the Court has jurisdiction to grant the reliefs sought under Section 47 of the Law of Succession Act. She urges that the estate of the deceased ought to be protected. She urges that the 1st and 2nd Respondents were divorced by the Deceased and they got remarried. She urges that the 1st and 2nd Respondents are not beneficiaries of the Deceased and they lack locus standi to oppose the Petitioner's application. She relies on the case of Meru Succession Cause No. 45 of 2003. She urges that her children were charged with the offence of malicious damage to property, which property belongs to the deceased and as such, it is imperative to stay the criminal proceedings in that they relate to these proceedings which can only be determined in the full succession cause. She urges that even though the law gives the 4th Respondent the discretion to decide whether or not to discontinue criminal proceedings, that discretion is not absolute and can be checked by this Honourable Court where there is abuse. She urges that the Respondent have violated her constitutional rights under Articles 2, 10 (2), 27, 28, 40, 43, 47, 157 (11), 238, 239, 244, 245 & 249 and that their actions are illegal, irrational, unreasonable, arbitrary, oppressive, procedurally unfair, done with an ulterior motive so as to prejudice his interests in the deceased estate and in a manner disconnected with the principles of the criminal justice system or the objectives of the administration of justice. She urges that the Respondents are using the said criminal processes to settle scores and to secure their civil claims. She relies on the case of *Lee Mwathi Kiman vs Director of Public Prosecution & Others Petition No. 161 of 2014 and Republic vs Chief Magistrate's Court Ex parte Garnishee & Another (2002) eKLR*.

1st and 2nd Respondents' Case

7. The application was opposed by the 1st and 2nd Respondents. There are 2 different grounds of objection by the Respondent's. One is dated 9th December 2020 and the other dated 8th February 2021. Although the former relates to the main Petition by the Applicant, the Respondents later on urged that this Court should consider both objections in determining the matter. In the former, they raise the following points: -

i) The Petitioner stealthily and without notice to the other beneficiaries of the estate, filed the Petition herein.

ii) The Petitioner is not a fit and proper person to administer the estate of the deceased since she has intermeddled with the same.

iii) The Petitioner is unable to administer the estate and this can be seen by the failure to include all the beneficiaries of the estate of the Deceased herein.

8. They also filed an affidavit in support of the objection sworn by RT, a daughter to the deceased from LIT, the 2nd Respondent. Herself together with 3 others namely HKT, PKT and GKT are said to have been left out by the Petitioner/Applicant. She claims that the deceased was survived by three wives and 6 children, contrary to what the Petitioner/Applicant had averred that the deceased was survived by 1 wife

and 4 children. That the Petitioner has also included 2 strangers namely Richard Ntonja and Daniel Ntongai as beneficiaries of the deceased. That the Petitioner mischievously filed the Petition without informing the Objectors.

9. She states that the Petitioner omitted various assets and properties of the dfrom the list of assets for distribution and that there are 9 properties which are currently occupied and/or generating income, 6 of them leased to KERRA on which quarrying activities are being undertaken and 3 which are rentals. That one of the properties namely NJIA/CIA-MWENDWA/xxxx was charged to Faulu Microfinance Bank to secure a loan of Ksh 1,025,000/= which was advanced to the deceased during his lifetime. That there is an outstanding suit namely Maua CMCC Case No. 20 of 2018 with respect to NJIA/CIA-MWENDWA/xxxx and xxxx for which there is an inhibition order.

10. That the Petitioner has intermeddled with the deceased estate by disposing some of the assets and collecting and embezzling income from the estate whereas she was not an administrator. That the Chief's letter dated 22nd April 2020 annexed to the Petition leaves out the Objectors from the list of beneficiaries which shows collusion and fraud on the part of the Petitioner and Chief. That the Petitioner has failed in the duty for a proposed administrator to render a full, just and true account of the estate including the true beneficiaries of the deceased and the true account of assets and liabilities of the deceased. She urges that the Court should deny the Petitioner's application as proposed administrator and issue the grant to 3 administrators each from the 3 houses.

11. In the latter grounds, they urge that the Petitioner's/Applicant's application is bad in law as it does not meet the threshold set out in Rule 36 of the Probate and Administration Rules; That the Court lacks jurisdiction to entertain, hear, determine or grant the orders sought in prayers 3 and 4 of the application as the same can only be determined in a separate suit or petition and not in this succession cause; That the Court lacks jurisdiction to stay proceedings in criminal cases being a probate court; That the Application offends the provisions of Section 193A of the Criminal Procedure Code; That the Applicant failed to prove the grounds upon which the Respondents may be declared intermeddlers; That the Applicant has not met the threshold for grant of an injunction; That the 1st and 2nd Respondents are neither the Administrator of the estate of the Deceased nor personal representatives of the estate of the Deceased hence cannot account for proceeds of the estate; That the Applicant has not provided the Court with material upon which the Court can exercise its discretion in either requiring them to account for proceeds out of the estate of the deceased or deserving orders restraining them; That the 1st and 2nd Respondents are beneficiaries and residents on the estate of the deceased even during his lifetime hence any injunctive orders would be tantamount to eviction of heirs and children of the Deceased; That the Objection dated 9th December 2020 ought to be heard and decided in priority before any orders are granted; That the issue of appointment of an administrator ought to be heard in priority to allow such administrators collect and audit the estate of the deceased from his death until such a time the estate is distributed.

Issues for Determination

12. From the pleadings and the submissions filed, the following issues arise for determination: -

i) Whether the Application is incompetent and/or fatally defective.

ii) Whether the Petitioner/Applicant has met the threshold for issuance of grant ad colligenda bona.

iii) Whether the 1st and 2nd Respondents have been intermeddling and whether this warrants the orders restraining them from trespassing onto the deceased properties.

iv) Whether the Court should stay the proceedings in Maua Criminal Case No. 1456 of 2020 (Republic vs James Mutwiri and Kelvin Mutethia) and Maua Criminal Case No. 1446 of 2020 (Republic vs Kelvin Mutethia & Eric Mutwiri)

v) Whether this Court can and should grant orders for fining and imprisoning the 1st and 2nd Respondents.

Determination

Whether the Application is incompetent and/or fatally defective.

13. Before going into the merits of the matter, the Court will deal with the preliminaries. The Respondents have argued that the application before the Court has not met the threshold of Rule 36 of the Probate and Administration Rules. This could mean in form and it could also mean in substance. For substance, this will be analyzed in the subsequent issues.

14. The substantive provisions for limited grants are found in Section 67 of the Law of Succession Act. The procedural provisions with respect to the limited grant *ad colligenda bona* are found in the aforesaid Rule 36 of the Probate and Administration Rules. It is provided for as follows: -

36. Grant Ad Colligenda Bona Under Section 67 of the Act

(1) Where, 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 would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

(3) Application for such grant shall be by Petition in Form 85 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing the material facts together with the reasons for the application and showing the urgency of the matter and shall be made at the principal registry or at the Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries.

(4) The provisions of rule 7 (4) shall not apply to applications under this rule.

(5) Copies of the proceedings and of the grant when issued shall be served upon such persons (if any) and in such manner as the court shall direct.

15. It is clear that such an application for grant *ad colligenda bona* should be made by way of Petition. The instant application was brought by way of Summons application. Having had the benefit of going through the Respondent's responses and submissions before making this Ruling, this Court observes that indeed, as suspected, this is a highly disputed matter with divergent issues arising. Any excesses that would have resulted by hearing the matter *ex parte* were however cured by the Court when it ordered that parties be served and respond to the application. Although the application before the Court ought to have come by way of Petition and not summons application, this being a succession matter and in view of the provisions of Article 159 of the Constitution of Kenya, this Court will proceed to look at the merits of the Application as hereunder.

Whether the Petitioner/Applicant has met the threshold for issuance of grant *ad colligenda bona*.

16. Grant *ad colligenda bona* will be granted when the circumstances and urgency of the case demand that a limited grant be issued for purposes of preservation of the estate. This is ideally in a case where there is activity going on in the estate and for purposes of management of the same, the Applicant makes an application to be allowed to administer the estate for a limited period of time as parties await the final confirmed grant.

17. However, it appears that this is not quite the case herein. What is in issue herein is more of competing interests between one set of beneficiaries from the other set. In fact, the Respondents complain of the Applicant having made the instant application behind their back. The Applicant is herself adamant that the 1st and 2nd Respondents have no interests in the property because they were allegedly long divorced by the deceased. This Court has also perused the letter from the Chief by which the Applicant uses to support the Petition and observes that it indicates the names thereunder as those of '*PART OF THE FAMILY MEMBERS*.' This is indeed an admission that the list is not exhaustive.

18. Furthermore, the Court has perused the search documents annexed to her Petition and observes that a number of the properties said to belong to the deceased have cautions and caveats and that a number of the Respondents claim certain beneficial interests in the properties. This calls for a proper determination of each of the purported beneficiaries' interests in the suit property. Although the Applicant claims that the 1st and 2nd Respondents are former wives, this Court is mindful that the question of matrimonial properties may still be alive as it is possible for this to go on even after the demise of one of the spouses, and even after divorce proceedings have been concluded. This Court finds that there are fundamental issues arising in this matter which will require the Court to hear both sides conclusively before any such grant may be issued.

19. Furthermore, this Court observes that the Applicant has not clearly disclosed the particulars of what is to be preserved and in what manner. Despite mentioning business premises and rental, it is not clear what amount of rent the deceased collected and the bank account to which any such monies are deposited to. There is difficulty discerning, with precision the nature of wastage that is likely to take place thereby demanding grant *ad colligenda bona*. This Court relies on disclosure by parties in order to make appropriate orders and in the present case, no such proper case has been laid.

Whether the 1st and 2nd Respondents have been intermeddling and whether this warrants the orders restraining them from trespassing onto the deceased properties.

20. The Petitioner/Applicant has accused the 1st and 2nd Respondents of intermeddling. Intermeddling is a serious accusation which attracts criminal sanction and penalty. Section 45 of the Law of Succession Act provides as follows: -

45. No intermeddling with property of deceased person

(1) 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.

(2) Any person who contravenes the provisions of this section shall-

(a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

21. The Respondents have also accused the Petitioner of intermeddling. This Court finds that as opposed to intermeddling, the real bone of contention is on the respective parties' beneficial interests in the estate. As such, the Court will not issue any restraining order at this point.

Whether the Court should stay the proceedings in Maua Criminal Case No. 1456 of 2020 (Republic vs James Mutwiri and Kelvin Mutethia) and Maua Criminal Case No. 1446 of 2020 (Republic vs Kelvin Mutethia & Eric Mutwiri)

22. Concerning the prayer for stay of the criminal matters i.e **Maua Criminal Case No. 1456 of 2020 (Republic vs James Mutwiri and Kelvin Mutethia) and Maua Criminal Case No. 1446 of 2020 (Republic vs Kelvin Mutethia & Eric Mutwiri)** this Court is of the view that the Applicant has not demonstrated clearly why stay should be granted. Normally, stay is granted in the interests of expedient justice when there are two proceedings for which the subject matter is similar. Stay will be granted to avoid the potential of having conflicting decisions touching on the same property. See **In Re Global Tours and Travels Ltd: Winding Up Cause No.43 of 2000** and **Abdiaziz Sheikh Maad & 3 others v Governor, Mandera County & 2 others Petition 21 of 2020 [2021] eKLR**.

23. In such stay considerations, ideally, the suit that was instituted earlier should be given priority and this means that it is the most recent suit that should be stayed. Further, this would most likely be the case when both matters are civil in nature. In the present case, not only were the matters sought to be stayed instituted much earlier than the present succession case, but also, the said matters are criminal in nature and this Court is alive to the fact that the jurisdiction of the criminal courts handling those two cases is separate and distinct from the jurisdiction of the instant succession (Civil) Court. Section 193A of the Criminal Procedure Code provides as follows: -

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

24. See this Court's decision in **Miscellaneous Civil Application No. E18 of 2021 Samson Kimathi & 3 Others v Arthur Mathew Raphael Muthuri & Another**.

25. The other instance when such criminal cases are stayed is through a constitutional reference where the Petitioner would be claiming that the prosecution is an abuse of process, done to achieve some nefarious ends other than pursuing justice. A probate and administration court would not be the proper forum to raise such constitutional issues. This Court will not therefore stay the criminal proceedings.

Whether this Court can and should grant orders for fining and imprisoning the 1st and 2nd Respondents.

26. This Court finds that not only is the prayer for fining and imprisonment untenable for reasons of jurisdiction, it also demonstrates a clear intention to abuse Court process by the Petitioner/Applicant. Orders imposing fines and sentencing law breaks to imprisonment can only be made by a Court sitting in its criminal law jurisdiction. The present matter is a civil claim and the nature of remedies that this Court can grant are limited to civil remedies. Counsel for the Petitioner ought to be aware of these basic rules of procedure.

27. The joinder of the Director of Public Prosecution and the Attorney General in these proceedings is not only improper but an abuse of the process intended to embarrass or intimidate the 1st and 2nd Respondents. The Petitioner/Applicant ought to have utilized the normal complaints and reporting mechanisms provided in law for activating such agencies, should she be convinced that the actions of the 1st and 2nd Respondents attract criminal sanctions. The foregoing notwithstanding, even if the Court had jurisdiction to issue the orders sought for fining and imprisonment, the Court is yet to find any fault on the part of the 1st and 2nd Respondents and this prayer is therefore declined.

Conclusion

28. The essence of a grant *ad colligenda bona* is to preserve the estate of the deceased. Besides the fact that the application was brought using the wrong document, the same does not demonstrate any quest to preserve the estate, but it rather exhibits the heated contest and ownership dispute between the two sets of parties claiming interest in the deceased estate. The procedures in place for grant *ad colligenda bona* ought not to be used to propagate parties' individual interests and claims as against those of other beneficiaries. The deceased died leaving behind 3 houses. Whilst the 1st and 2nd Respondents are said to have been long divorced, their interests in the suit properties have to be established, including by way of determining which of those properties are matrimonial properties, if any. The said two former wives also have children, some of whom were not mentioned in the Petition. The conduct of the Petitioner in concealing crucial information before this Court, let alone convoluting a civil matter with other criminal processes is indeed wanting. It is a cardinal rule of principle that *whomsoever comes to equity must come with clean hands*. Full disclosure of all material facts is a requirement that must be met if a party seeks to benefit from the Court.

29. In addition, the disputations that have been brought up in this application demand that the matter be heard, preferably by way of oral evidence in a proper Petition. This Court does not see any urgency to warrant issuance of the grant *ad colligenda bona*.

ORDERS

30. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) The Petitioner's/Applicant's application dated 20th November 2020 is hereby dismissed.

ii) Each party shall bear its own costs of the application.

iii) The parties to fix a date for directions on hearing of the main Petition on priority basis.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiogora Mugambi & Co. Advocates for the Petitioner/Applicant

M/S Gikonyo & Ngugi Advocates for the Respondents.