



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER E46 OF 2021

IN THE MATTER OF THE LATE JOSEPH KAMAU KIMANZI (DECEASED)

RULING

1. Pursuant to a Chamber Summons dated 25th May 2021 under Certificate of Urgency by Sheila Sabaya Advocate, the applicant Caroline Mutwa Mwendu Mwinzi sought orders, ex parte, whose sole effect was to preserve the estate of the deceased Joseph Kamau Kimanzi. I allowed the application vide orders issued on 2nd June 2021.

2. On 30th June 2021, one George Ngui Mwinzi filed an Affidavit in reply having instructed the firm of Karanja Mbugua & Co. Advocates. He deponed that he was the Director and a shareholder of Kasyethau Noble Trading Limited, the company in whose name some of the properties said to be assets of the estate of the deceased were registered, further that Kiberiti Merchants Limited in whose name other properties were registered was a limited liability company with only two (2) shareholders, himself and another, Annah Mwale Kimanzi. He also deponed that some of the other properties were registered in the names of other individuals and limited liability companies. He took issue with the court's order and cited the case of **Eldoret High Court Ad Colligenda Cause 1 "A" of 2011 Re: Estate of Grace Wairimu Kamau (Deceased)** reported as **Mary Waithera vs Ann Ndegwa & another [2014] eKLR** in support of his position where the court said

Taking into account the observations, it is vivid that issues thrashed out by both sides are quite weighty and cannot be decided in an application for Grant of Letters Ad Colligenda Bona Defuncti. It must be noted that a large chunk of the estate was distributed before the deceased's death and another chunk is also yet to be distributed. I note further that out of the properties the Petitioner cites as undistributed, a number of them are contested by the Interested Parties as not being the deceased's property. And so, it is a contest whether such property can, on interim, be given to the Petitioner to administer. The law is precise that an administrator appointed under the Law of Succession Act administers the estate belonging to a deceased and not to other living persons claiming the same property. Where the latter case may apply, such persons claiming ownership would be at liberty to object to its administration or distribution. That is why, I think, it is only in a full succession cause that the court shall decide what property should be distributed to which party taking into account what each beneficiary has so far benefited from in the entire estate or as the case may be. For this reason, I am of the strong view that this is not a matter which can be determined in a Petition of this nature.

3. It is the argument by K. Mbugua that this court's orders have the effect of restricting the rights of person who are not parties to this cause as the properties do not belong to the deceased, that the deceased only had shares in the company, and the orders were prejudicial to other shareholders.

4. Further that there were pending cases before **Ng'etich J High Court Civil 11 and 12 of 2021** dealing with issue of irregularly allotted shares in some of the companies.

5. This matter came for directions on Goerge N Mwinzi's affidavit on 30th June 2021. It was my last day before proceeding on leave. I had a long cause list and it was going to 5 pm. However both counsel after some discussion agreed to proceed to argue the application. I heard both counsel, and the full record is available on the zoom recording of 30th June 2021.

6. I was to give the ruling on 9th July 2021 during my leave, but for reasons completely beyond my control, including suffering from migraines, tinnitus, and floaters in the eye making it difficult to concentrate, and which are still on treatment, I could not. I do apologise. Here we are;

7. Section 67 of the LOSA provides:-

Notice of application for grant

(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified

period of not less than thirty days from the date of publication, and the period so specified has expired.

(2) A notice under subsection (1) shall be exhibited conspicuously in the courthouse, and also published in such other manner as the court directs.

8. Joseph Kamau Kimanzi is deceased. The applicant was his wife, they had three children, all minors as at the time of his death. George Ngui Mwinzi is his brother.

9. It is on record that when the application before me was filed, there was annexed to the application documentary evidence that; The deceased and his wife, the applicant herein, were the only directors and shareholders of several companies including Kiberiti Merchants Limited and Kasyethau Noble Trading Limited in whose names the properties named herein are registered. The applicant has annexed documents from the Registrar of Companies showing that as at 5th and 6th January 2021 this was still the position.

10. George Ngui Kimanzi in his Replying Affidavit has alluded to CR6 marked GKN II that demonstrates a different position but no such document was annexed. In any event what is annexed are copies of minutes of a meeting showing the disputed position he holds but which minutes I understand are the subject of a dispute before the *Hon. Ng'etich J.* In addition GKNII is a document confirming that Kiberiti Apartments is a business name registered by the deceased and the applicant herein. It is given by the Assistant Registrar on 26th January 2017 and certifies that Joseph Kamau Kimanzi, Caroline Mutwa Mwendu Mwinzi are the ones carrying on the business under the name of Kiberiti Apartments. There is no evidence that this business had been wound up at the time of the demise of the deceased.

11. GKN III was issued Nakuru Municipality Block 20/285/U8 was issued to Kasyethau Noble Trading Limited on 9th September 2014, similarly GNKIV M/V registration no KCC O48 Z, GKN V M/V registration no. KCE 658R, are in the name of the same company. KCQ 168V is in the name of Kiberiti Apartments.

12. With regard to M/V registration no KBU 955X in the name of Joseph Kamau Kahungu and KCZ 417P in the name of Darson Trading Limited, neither of these parties has raised any issue with the orders that I made. My view of the matter was that taking into consideration that was the wife of the deceased and the only other director of their companies, she would know the the status of his assets as at the time of his death and would therefor seek to protect the same from wasting before the distribution of the estate. These parties mentioned in the petition, and the assets related to them, none has raised any issue with the orders of this court, and George Ngui Kimanzi cannot be heard to speak for them.

13. Section 2 of the Law of Succession Act defines estate as the free property of a deceased person. **Free property** is defined as, in relation to a deceased person, ***the property which that person was legally competent freely to dispose during his life time, and in respect of which his interest has not terminated consequent to his death.***

14. In this case, the applicant, the widow of the deceased simply seeks to have what she knows to be the property of her deceased husband preserved pending the granting of letters of administration.

15. The fact that there is litigation in a civil court does not stop the probate and administration court from preserving what is shown to be deceased property.

16. The case cited by the applicant though relevant as dealing with a similar issue, the facts therein were completely different

In her Supporting Affidavit sworn on 16th December, 2011 the applicant in that case specified the various reasons for which she urges the court to make the grant of representation.

(a) Since the deceased passed away the estate has had no administrator.

b) The deceased since the year 2005 was diagnosed to be suffering from SENILE DEMENTIA (serious brain degeneration disorder) (annexed herewith and marked "MW.2" is a copy of the Medical Treatment Summary from Moi Teaching & Referral Hospital Eldoret).

(c) The condition persisted until her untimely death on 11th day of June, 2011.

(d) During the period of her illness some of my siblings managed to have some of her properties transferred to their names under questionable circumstances namely: ELDORET MUNICIPALITY/BLOCK21(KINGONGO)3304;KAPSARET/KAPSARET/BLOCK 1 (YAMUMBI)289; ELDORET MUNICIPALITY/BLOCK 12/36; UASIN GISHU/KIMUMU/162; UASIN NGISHU/KIMUMU/163 (annexed and marked "MW.3", "MW.4", "MW.5", "MW.6" and "MW.7" are copies of the green cards respectively).

(e) The remainder of the estate is at risk of being fraudulently alienated in the absence of an administrator.

(f) The Lands Registrar Uasin Gishu County has very kindly imposed restrictions in the absence of an administrator is not enough.

(g) It is therefore clear that the Estate is in great danger of being wasted before it is properly administered and distributed to the rightful beneficiaries.....

The gist of the Replying Affidavits is that the late Grace Wairimu Kamau distributed her estate before her demise. That further, even if some of her property may still be in her name, the entire family sat, deliberated and decided on who shall inherit which property. According

to Francis Thiong'o Ndegwa, all the deceased properties initially belonged to her late husband Samuel Ndegwa Kamau. That after the death of the latter, the deceased took out Grant of Letters of Administration and had all the properties registered in her name save for **ELDORET MUNICIPALITY/BLOCK 21 (KING'O'NG'O) 3304** which she bought and later transferred to Anne Ndegwa.

Ann Ndegwa further adds that her late mother never suffered from a mental disease. That she was only ailing from hypertension and diabetes and was seen by a psychiatrist once on 7th January, 2009 due to complications of diabetes. She stated that **L.R. ELDORET MUNICIPALITY/BLOCK 21 (KING'O'NG'O) 3304** was bought by her late mother who later gave it to her as a gift. That in the instance, the same should not be listed among the assets of the deceased...

In rejoinder, the Petitioner has sworn a Supplementary Affidavit on 20th January, 2012. She depones that most of her late mother's properties were transferred to her siblings through fraudulent means as at the time of their transfer her mother was not mentally stable to make a sound decision... She has cited **ELDORET MUNICIPALITY/BLOCK (KING'O'NG'O) 3304** which she claims the deceased bought in the late 1990s and built on it two houses for Anne Ndegwa and the late Naomi Wambui. That the children of Naomi Wambui continued to occupy the house of their late mother until the 2007 - 2008 post election violence when people fled their homes. That although the said plot is currently registered in the name of Anne Ndegwa, it was meant for both herself and the late Naomi Wambui and that the transfer into Anne Ndegwa's name is ultimately fraudulent.

The Petitioner denies that any family meeting was called with a view to distributing her late mother's property. That the only property that was distributed before the deceased became sick was **ELDORET MUNICIPALITY BLOCK 14/1395** which was transferred to her by the deceased on 19th August, 1999.

Another Supplementary Affidavit is sworn by one Joseph Kiongo on 2nd March, 2012 in his capacity as a village elder who witnessed the deceased distributing her properties on 2nd September, 2007. ..he took the minutes of this meeting and all the persons present consented to the distribution. That the only persons who were not given any property were Mary Waitera (Petitioner) and Anne Ndegwa. That the petitioner was not given any property because she was married. That... the deceased gave each one of them Kshs. 100,000/= . . on 3rd September, 2007, he accompanied the deceased to Barclays Bank, Eldoret Branch... whereby both the Petitioner and Anne Ndegwa were each given Kshs. 100,000/= . He depones that during all those transactions, he did not notice anything abnormal with the deceased.

On 30th January, 2012 the Interested Parties filed a Preliminary Objection to the Petition based on the following grounds:-

1. That no special circumstances have been shown to necessitate the grant of Administration ad Colligenda bona defuncti.

2. That the petition introduces issues of argumentative, substantive and contentious nature by involving property which does not belong to the deceased's estate as indicated in the Replying Affidavits.

3. That the Petition seeks to involve assets which do not belong to the deceased's Estate and whose title documents are in the names of other persons.

4. That the grant of administration ad Colligenda Bona defuncti is limited for the purposes of collecting, getting in, receiving and preservation of the estate and not what the Petitioner seeks as disclosed in her Supporting Affidavit.

17. From the above comprehensive quote it is evident that that matter the applicant in that matter brought more issues than could be dealt with in an application of this nature. The estate of the deceased had already been distributed, issues of fraudulent transactions, the estate of the deceased and that of her deceased husband, gifts inter vivos- all these and more were raised in that application. That is not the same as this. Here there is prima facie evidence that the properties listed belonged to the companies where the only directors and share -holders or business partners were the applicant and the deceased.

18. The importance of protecting and preserving the estate of a deceased person pending its determination and distribution to the rightful heirs cannot be gainsaid. The LOSA has specific provisions for this purpose in addition to s. 67. These include s. 46 which requires certain officers, upon receiving reports of the death of a person ... **take all necessary steps for the protection of his free property found there, for ascertainment of his other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties:** s. 47 which prohibits the intermeddling with the property of a deceased person.

19. I am certain that these laws exist to ensure that those who are beneficially entitled do not lose out on the estate of the deceased before the actual distribution takes place. This court is bound in the interests of justice to make appropriate orders.

20. Hence even upon hearing the respondent(objector) through his counsel, I am of the considered view that the annexures to the application provided the necessary *prima facie* evidence to warrant the orders issued. It is in the best interests of the estate, and the minors, children of the deceased and the applicant herein and any other person beneficially entitled to this estate, that the estate be preserved, pending the grant of letters of administration.

21. I find no reason to interfere with orders.

22. I direct that the petition for the grant of letters of administration intestate be made within 30 days hereof. In default, the orders herein will lapse.

23. Orders accordingly.

DATED at NAKURU this 24th July 2021

DELIVERED via EMAIL this 26TH day of JULY, 2021.

MUMBUA T. MATHEKA

JUDGE

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