



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. E1564 OF 2020**

**IN THE MATTER OF THE ESTATE OF ROBERT JOHN SUMBI (DECEASED)**

SUSSY KHAADI SUMBI.....1<sup>ST</sup> APPLICANT/PETITIONER

NATALY NARANO SUMBI.....2<sup>ND</sup> APPLICANT/2<sup>ND</sup> PETITIONER

VERSUS

AUGUSTINE SUMBI.....1<sup>ST</sup> RESPONDENT

YVONNE TUNAI.....2<sup>ND</sup> RESPONDENT

PATRICK LUMUMBA.....3<sup>RD</sup> RESPONDENT

ABEL INGUTIA.....4<sup>TH</sup> RESPONDEDNT

**RULING**

The 1<sup>st</sup> Respondent raised a Preliminary Objection (PO) to the Applicants' Summons dated 19<sup>th</sup> March 2021 raising the following grounds:

- 1. That this matter is improperly before this court and offends Rules 3 and 7 of the Probate and Administration Rules.**
- 2. That a Probate and Administration Court cannot issue the orders sought.**

The impugned Summons seeks injunctive orders against the Respondents from intermeddling with Butso/18999 and 19000 and other properties of the deceased pending hearing and determination of the proceedings herein, among other prayers stated in that application.

The 1<sup>st</sup> Respondent sought to have the PO heard first. This court directed parties to file submissions in respect of the PO hence this Ruling. The 1<sup>st</sup> Respondent filed his submissions dated 26<sup>th</sup> May 2021. He asked this court to determine whether the Summons dated 19<sup>th</sup> March 2021 are improperly before this court and whether this court can grant the orders sought therein.

On the first ground, it is submitted that the PO meets the threshold of a PO as stated in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Co. Ltd (1969) EA 696** in that the 1<sup>st</sup> Respondent is objecting on the territorial jurisdiction of the court and secondly that this court cannot grant the prayers sought in the Summons. It is argued that if these two grounds are allowed, then the PO may dispose of the suit. The 1<sup>st</sup> Respondent relied on the case of **Owners of the Motor Vessel "LILLIAN S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1** to point out that without jurisdiction, a court cannot proceed with a matter before it.

It is further submitted that pursuant to Probate and Administration Rules, the proper forum for filing this matter is Kakamega Registry, within the area where the deceased had his last known place of residence and secondly, the 1<sup>st</sup> Respondent is a resident of Kakamega County and will incur extra costs defending the suit in Nairobi. He relied on Section 49 of the Law of Succession Act. Rules 3 and 7 of the Probate and Administration Rules and **In re Estate of Ashby Masila Muia (Deceased) [2018] eKLR**.

On the second ground, it is submitted that this court cannot grant the orders sought because Order 40 of the Civil Procedure Rules which provides for injunctions is not one of the Orders donated to the Law of Succession Act by dint of Rule 63 of the Probate and Administration Rules. It is argued that for the above reasons, this application is therefore defective and should be dismissed with costs to the 1<sup>st</sup> Respondent.

In opposing the PO, the applicants have submitted that the PO is misconceived and bad in law; that the deceased was a married man, having celebrated his marriage in Nairobi; that he raised his children in Nairobi and Kiambu counties and had his matrimonial home in Nairobi. They have submitted that the deceased's property is evenly distributed across different jurisdictions and the High Court in Nairobi is the most convenient place to file this matter because the deceased resided in Donholm Estate in Nairobi. It is submitted that the value of the estate exceeds the pecuniary jurisdiction of a magistrate. It is submitted that the 1<sup>st</sup> Applicant will suffer if this matter is not heard expeditiously within the jurisdiction within their limits and that the other beneficiaries live within Nairobi and shall not in any way be prejudiced if the matter is heard in Nairobi. It is submitted that the purpose of filing this suit in a central jurisdiction is to meet ends of justice; that the deceased was buried in Kakamega in line with Luhya customary laws and traditions and this had nothing to do with his place of domicile. It is submitted that the place of the deceased's death as indicated in his death certificate is in Bungoma County and not Kakamega as argued by the 1<sup>st</sup> Respondent. The Applicants urge that this PO be dismissed.

On the outset, I wish to state that I agree with the Respondent that without jurisdiction, a court cannot proceed further with a matter before it. It is therefore upon the 1<sup>st</sup> Respondent to persuade this court that what he asserts is true. The jurisdiction he challenges is two pronged: territorial jurisdiction and jurisdiction to grant the orders sought.

I have considered this matter. I have read the provisions of the law cited by the 1<sup>st</sup> Respondent. My understanding of Rule 7 (3) is that a petition may be filed in the Principal Registry or a High Court Registry or a resident magistrate's registry. The latter registry will be subject to the pecuniary jurisdiction of the magistrate and the last known place of residence of the deceased. In this matter, the value of the estate has not been disclosed by the 1<sup>st</sup> Respondent. On the issue of last known place of deceased's residence, this is still disputed. The 1<sup>st</sup> Respondent claims the deceased's last known place of residence was Kakamega, but the Applicant claim that the deceased resided with his family in Nairobi and that Kakamega was his work station and his original place. My considered view on this issue is that this suit could have been filed in Kakamega High Court, being a district registry, High Court Nairobi being the Principal Registry of Kakamega Resident Magistrate's Court subject to pecuniary jurisdiction of that court. The Applicants/Petitioners chose the Principal Registry Nairobi. She had filed Miscellaneous Application No. e37 of 2020 in Kakamega but applied for transfer of that matter to Nairobi for reasons given in her Summons. This court has already pronounced itself on that matter and has allowed that application and transferred the matter to Nairobi for purposes of consolidating that matter with this Cause. For good order and for ends of justice to be met, it is my view that it would not be in the best interest of justice to have this matter transferred to Kakamega. As indicated in my Ruling delivered on 16<sup>th</sup> June 2021, there will be no prejudiced suffered by any party in having the matter heard in Nairobi.

On the second ground of the PO, I agree with the 1<sup>st</sup> Respondent that Order 40 of the Civil Procedure Rules is not one of the Rules imported into the Law of Succession Act by dint of Rule 63. But this does not mean that a Probate Court is left without powers to stop acts of intermeddling or wastage or any other acts that may be contrary to the interest of the estate of a deceased person. To deny a Probate Court such powers would be akin to denying litigants justice in a succession matter. Section 47 of the Law of Succession Act comes into place to address this issue. It provides as follows:

***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.***

***Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”***

In addition to Section 47, this court has inherent powers under Rule 73 of the Probate and Administration Rules. This Rule provides that **“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

On that same point, courts have also pronounced themselves on the issue of the powers of the court to grant injunctive orders in a probate matter. In **Floris Piezzo & Another –vs- Giancarlo Falasconi (2014) eKLR**, while considering whether an injunction can issue in a Succession Cause the Court of Appeal expressed itself as follows;

***“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court's inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”***

In view of the above provisions and the view expressed by the Court of Appeal in the above case, it is clear to me that the 1<sup>st</sup> Respondent misapprehended the law in arguing that this court has no jurisdiction to grant the orders sought in the Application dated 19<sup>th</sup> March 2021. That is the wrong argument as demonstrated above.

With the above reasoning, the PO must fail. It is hereby dismissed. Each party to bear own costs of this PO. Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 27TH SEPTEMBER 2021.**

**S. N. MUTUKU**

**JUDGE**