



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

P&A CITATION NO. 1187 OF 2012

IN THE MATTER OF THE ESTATE OF MAKENZI WATUKA (DECEASED)

JACK MACKENZIE.....1ST APPLICANT

BRUCE MAKENZIE.....2ND APPLICANT

HENRY MAKENZI.....3RD APPLICANT

ZACHARIAH MAKENZI4TH APPLICANT

RULING

1. The Applicants filed summons dated the 7th July, 2021 and brought pursuant to section 47 of the Law of Succession Act and Rule 73 and 47 of the Probate and Administration Rules seeking inter alia, the following orders;

i. Spent;

ii. An order restraining the administrators and any other person who benefits or is likely to benefit from the illegal use of the property of the estate or from wasting and/or interfering and trespassing on the property of the estate or in any way from meddling with the estate including tilling, selling, developing or at all-without the authority of the court and pending the determination of this petition/application.

iii. An order compelling the administrators to produce to the applicants herein all the original title documents to the property of the estate of the deceased including all title deeds.

2. The application is supported by the affidavit of **Jack Mbithi Mackenzie** sworn on the 7th July, 2021 wherein he depones that he is a beneficiary to the estate of the deceased and that he is an Advocate of the High Court of Kenya and represents the interests of all the beneficiaries including his. He depones that the beneficiaries are yet to take out a grant 37 years since the demise of the deceased. He further depones that the assets of the estate of the deceased have been interfered with in which some beneficiaries are benefitting at the expense of others.

3. The Applicants are apprehensive that the administrators have been using the income realized from estate on their own and to their exclusive benefit, and have refused to disclose or account to the rest of the beneficiaries.

4. The Applicants are apprehensive that the administrators may proceed to plant crops, alienate, lease, sell or otherwise intermeddle with the said properties to their detriment should the court not issue the restraining orders.

5. The **1st and 2nd Administrators through Joshua Musyoki Makenzi** filed a replying affidavit wherein he contends that the Applicants are improperly on record as they have neither included a respondent nor a defendant and therefore the whole application in itself is incompetent. It was also contended that the applicants are not direct beneficiaries to the estate as they are the grandchildren of the deceased and hence lack capacity because their parents who are direct beneficiaries are still alive and listed as beneficiaries. It was contended that the conservatory orders will affect beneficiaries who have been in possession of their portions and who will be denied livelihood. It was also contended that the delay to file summons for confirmation of grant was due to family wrangles which have since been ironed and that the requisite summons has already been filed awaiting hearing. Finally, it was contended that the clamour for title documents is misplaced since the ones in possession of the administrators are intact as shown by copies annexed to the affidavit and that the administrators should be

allowed to proceed with the confirmation of grant.

6. The application was canvassed by way of written submissions.

7. The Applicants submitted that all they seek is the original documents relating to the estate for scrutiny, acknowledgement of existence and to assist the applicants in deciding if there's any reason to file a protest. They further asked for protection and reservation of the estate since some are benefiting from it at the expense of others and which makes the administrators reluctant in sub dividing the estate.

8. The 1st and 2nd Administrators submitted that the 1st and 3rd Applicants lack *locus standi* in this matter for the reason that they are grandsons to the deceased and not direct beneficiaries to the estate considering that their parents are still alive. They further submitted that an order restraining the beneficiaries and administrators from the estate will be prejudicial as the beneficiaries will not be able to till the land as they depend on it as a source of livelihood and for that reason this court was urged to dismiss the summons.

9. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law on the subject. I take the following view of the matter. The issues for determination herein are:

i. Whether or not the Applicant lacks locus standi to institute these proceedings.

ii. Whether or not the Applicant is entitled to the relief sought.

10. The first point for determination is whether or not the 1st and 3rd Applicants herein lack locus standi to bring this application as alleged by the Counsel for the 1st and 2nd Administrators in his submissions.

11. Their argument is that the 1st and 3rd Applicants are the grandsons of the deceased and therefore they are not a beneficiary to the suit property as their parents are still alive. My understanding of the matter at hand is that the Applicants herein brought this suit before court as beneficiaries of the estate of their late grandfather, Mackenzie Watuka.

12. Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that a certain party cannot be heard, despite whether or not he has a case worth listening to. The issue herein is whether the 1st and 3rd Applicants lack the requisite locus standi to seek relief from the court to issue the preservative orders. In my view, issues as regards locus standi are critical preliminary issues in nature which must be dealt with and settled before dwelling into other substantive issues.

13. The position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In **Otieno V Ougo [1986-1989] EALR 468**, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

14. Looking at both parties' submissions, I take note of the matter at hand that the 1st and 3rd Applicants herein brought this summons before court as a beneficiaries of the estate of his father who is still alive. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in the case of **RE Estate of Wahome Njoki Wakagoto (2013) eKLR** where it was held: -

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

15. The evidence on record suggest that the 1st and 3rd Applicants herein brought these proceedings on behalf of their fathers (who are still alive) and who are the beneficiaries to their father's estate. The 1st and 3rd Applicants interest emanates from the fact that their fathers are beneficiaries to the suit property, but they are not dependents within the provisions of section 29 of the Law of succession Act as they do not acquire an interest in their grandfather's estate in the suit property by virtue of their fathers share. It is instructive that the applicants herein did not file a further affidavit so as to rebut the respondents' assertion that the applicants are grandchildren of the deceased and whose fathers are still alive. In the absence of such a rebuttal, the irresistible conclusion one gets is that indeed the applicants are not direct beneficiaries of the estate as their fathers are still alive and hence they do not have locus standi to bring the application herein. It would seem to me that the applicants' fathers opted not to take the bull by the horns and decided to use their children to pursue the administrators herein when the true position is that they themselves as direct beneficiaries ought to have taken the driver's seat. If the applicants' fathers felt that they should allow their children to file the application, then they ought to have given them a power of attorney. As no power of attorney was given to the applicants by their father, the respondents' averments that the applicants do not have locus standi must be accepted. It is my view that the applicants have become impatient over the delay in the finalization of the matter and have thus decided to join the arena in haste. As the respondents have indicated that they already have filed summons for confirmation, then the applicants together with their families should be patient and exercise their rights during the hearing of the said summons for confirmation of grant by filing affidavits of protests if need be. The respondents have already annexed copies of the titles to some of the properties and have indicated that they are now set to proceed with

the confirmation of grant. Even though the matter has delayed, the administrators who have given their undertaking to conclude the matter ought to be given the latitude to bring the cause to conclusion. It is therefore apparent that the present application is improper before the court and is meant to throw a spanner in the works and likely to further delay the finalization of the matter. I find the application is an abuse of the court process.

16. In view of my finding aforesaid, a determination on the second issue becomes moot.

17. In the result, it is my finding that the Applicants' application dated 7/7/2021 lacks merit. The same is ordered dismissed with no order as to costs. The administrators are directed to set down the summons for confirmation of grant for hearing on priority basis.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE