



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO. 699 OF 2019

IN THE MATTER OF THE ESTATE OF SAMUEL MWATHA KANG'ETHE (DECEASED)

RULING

This Ruling relates to Summons for Confirmation of grant dated 1st July 2020 in respect of the Grant of Probate with written Will brought by Mary Wangui Mwatha, the Executrix in respect of the Estate of Samuel Mwatha Kang'ethe, deceased. The Grant was issued on 4th September 2019. She proposes that the distribution of the estate be done in accordance with the Will of the Deceased dated 22nd February 2017. In her Supporting Affidavit, Mary has named the following as the beneficiaries:

1. Mary Wangui Mwatha (Widow).
2. Henry Kang'ethe Mwatha (Adult Son)
3. Penina Wanja Mwatha (Adult daughter).
4. Elijah Kamau Mwatha (Adult Son).
5. Emma Wanjiku Mwatha (Adult daughter).

She has stated that there is no application for provision for dependants pending and that there is no estate duty payable in respect of the Estate.

A Protest against the Summons for Confirmation of the Grant has been raised by Peter Kimani Kungu. Peter swore an Affidavit on 21st September, 2020 claiming that the deceased was his step grandfather. He states that he is the director of Kimkap International Plumbers which deals with construction works; that the deceased had engaged him to do some construction work in 2013, which involved building houses within the deceased's property known as L.R. No. 13330/567; that construction work began in August 2013 and was approved City Council of Nairobi on 6th January, 2014; that in June, 2014 the deceased had a stroke and he took care of him; that the deceased did not have money to pay him for his services and he therefore did the work on credit and was to be paid later which terms he agreed; that in February, 2016 the deceased got ill again and he took him to the hospital where he was diagnosed with kidney failure; that on all these circumstances he could not ask the deceased for payment but kept receipts of the money he spent.

He further states that he claims against the Estate of the deceased as a creditor; that he has neither been included as such nor as a beneficiary to the estate; that should this court confirm the grant he stands to lose what is owed to him as the personal representative to the estate have refused to acknowledge that he was owed money by the deceased and that the personal representatives to the deceased estate are aware of his contractual relationship with the deceased as evidenced in the annexed letters dated 28th March and 10th June, 2019.

The Applicant, on 15th October, 2020, swore a further Affidavit in response to the Affidavit of Protest. She deposed that the said affidavit contained misrepresentations and half – truths in that the deceased died on 4th March, 2019 and not 4th May, 2016 as indicated; that the Protestor is not a step grandson of the deceased as is alleged neither is there blood relation between him and the deceased and therefore the Protestor is not a dependent of the deceased. She further deposed that the deceased spent 18 million and took out loans to fund the project which was 30% done; that the averments that the deceased lacked money to honour the financial obligations of the construction project are not true; that the invoices produced by the Protestor do not seem genuine as none of them show the services which were being paid for, are undated and vague, and the attached receipts are for deliveries in Kitisuru and Kiambu yet the project was in Garden Estate.

The Applicant further deposed that the Protestor ought to give ETR receipts as proof that the said goods were purchased and not the handwritten ones which could easily be fabricated and that there are invoices showing salaries paid out to unknown people yet the same could have been proven through attaching pay slips. She claims that in addition to failing to deliver on the project as required, the Protestor misled tenants in two of the deceased's houses into believing he was authorized to collect rent which he deposited in his personal account without authorization from her or the deceased. Further that the Protestor occupied two plots of land owned by the deceased and started farming without being allocated to him.

She denied as untrue the allegations that the Protestor covered medical costs for the deceased as the same was covered by NHIF and the deceased family. She stated that they had held meetings to try and resolve the conflict between the family and the Protestor, where he was to provide documentation in support of his claim that he was owed money but he did not do the same. She states that this is the first time she is seeing any documentation to that effect as the same was presented to her lawyers and that the same could have been manufactured. That the objector was informed that the family had secured services of another construction company to step in and refurbish the buildings that had been left unfinished by the Protestor. She stated that the debt is non-existent as even the documentation provided are not satisfactory.

Directions were given to dispose of this matter by way of written submissions. The Applicant filed her submissions dated 12th February, 2021. She identified the following three issues:

- i. Whether the Court has jurisdiction to handle the Respondent's claims.
- ii. Whether the Protestor has proven his claim as a creditor to the estate.
- iii. Whether the Protestor is a beneficiary to the estate of the deceased.

On the first issue she argues that it is not in dispute that there was a contract between the Protestor and the deceased for construction of houses and that it is not in dispute that the Protestor performed part of the contract before the deceased died. She raises the issue whether the Protestor is truly a creditor to the deceased's Estate and if his claim has been ascertained which she thinks not. She argues that this is a civil claim and ought to have been filed in that court to determine this allegation. She relied on the case of **Re Estate of Solomon Mwangi Waweru(deceased) [2018] eKLR** to emphasize the point that this Court, sitting as Probate Court, cannot entertain the claim by the Protestor. In that case the court stated that:

“The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 Others).”

She also relied on the case of In **Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others [2016] eKLR** where the Court held that;

“It is only where one has an established claim against the estate that has already crystalized that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalized. The right must be shown to have crystalized before the family court can entertain it.”

Therefore, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court.

On the second issue, the Applicant has relied on **Section 109 of the Evidence Act Chapter 80** which states that ***“the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.”***

She has argued that the Protestor has failed to prove his case to the required standard that the deceased owed him any money. She reiterated the reasons stated in her further affidavit dated 15th October 2020 and stated that the deceased and the family had sufficient financial resources and would not have needed to seek assistance from the Protestor as seen in the list of properties available for distribution in the Will. She stated that the contract is said to have been entered into in 2013 and yet the Protestor had never raised the issue of his monies with the deceased until his demise in 2019. That on these accounts the Protestor has not proven his claim.

She relied on In **Re Estate of S K G(deceased) [2018] eKLR** where the court stated as follows:

“However, the said [particulars withheld] did not even testify or lodge any claim to justify the amount? With all these unanswered questions, it is my finding that based on the materials placed before me, there is no prima facie evidence to conclusively find a valid debt being owed by the estate. The allegation that there is a creditor owed Kshs.17,008,000 by the estate and demand letter thereof is a trick crafted by the 1st petitioner in a concerted effort with the purported contractor to obtain a prime property to the disadvantage of other beneficiaries through the backdoor thus disenfranchising them. The burden to prove that the estate owes some creditor a debt lies on he who alleges. Section 107 (1) of the Evident Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove that those facts exists.”

On the third issue, the Applicant stated that the Protestor did not quite pursue the possibility that he was a dependant of the Estate by virtue of being a step grandchild of the deceased. She relied on sections 26 and 29 of the Law of Succession Act and submitted that the Respondent did not produce any proof that he has any blood relation to the deceased and did not even mention the line of relation with the deceased. It was also her argument that the deceased had only one wife and there is no record of another wife who would be the blood relative of the Respondent. She argued that a grandson cannot inherit directly from his grandfather unless he can prove dependency and cited the case of In the **Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR** where the court stated that

“..... 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.”

She submitted that the Respondent has not shown who his parents are and if they are dead proof of the same, as the parents should inherit first before him.

Analysis and Determination

Having carefully read all the Pleadings, Affidavits and Submissions made by the parties herein, I agree with the Applicant that the issues for determination revolve around the jurisdiction of this court to entertain the claim by the Protestor as to whether he is a creditor to the Estate of the Deceased and further whether he is a beneficiary.

I agree with the reasoning of the court in In **Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** that:

“..... The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.”

The claim by the Protestor that he was contracted by the deceased to do construction on his property L.R NO. 13330/567 in Garden Estate and that he was not paid for the work done and is therefore a creditor to the estate, is in my considered view a claim that does not fall within the ambit of the Law of Succession Act. As stated in In **Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others [2016] eKLR**, **“It is only where one has an established claim against the estate that has already crystalized that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalized. The right must be shown to have crystalized before the family court can entertain it.”**

The claim by the Protestor has not crystalized. He ought to have litigated his claim in a different forum. Once that claim has crystalized, the Protestor would then in the correct forum in seeking to have this court entertain his claim. From the authorities on this issue, some of which have been cited above, it is clear to me that this court does not have jurisdiction to determine the Protestor’s claim. He has a right to pursue his claim in the right forum. It is trite that jurisdiction is everything and without it this court is not able to entertain that claim.

On the Protestors claim that he is the step grandson to the deceased which is denied by the Applicant, I agree with the position of the law as cited by the Applicant. He who alleges must prove. Other than the allegation by the Protestor that he is related to the deceased, he has not produced evidence to prove his claim. The Law of Succession Act under **Section 29** provides for who the dependents to the deceased estate are it states:

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Alleging that he is a step grandson to the deceased, is not enough. The Protestor must prove the same, which proof is lacking. The Protestor has failed to comply with the dictates of Section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya) that **“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”**

It is clear to me that without proof to the allegations by the Protestor that he is step grandson of the deceased, this court cannot entertain his claim. Further, without his claim as the creditor of the deceased’s estate having crystalized, this court must do what the law requires of it. I therefore make a finding that the claim by the Protestor against the estate of the deceased herein must fail. The Affidavit of Protest filed herein by Peter Kimani Kungu is hereby dismissed. Consequently, the Summons for Confirmation of Grant dated 1st July 2020 is hereby allowed. The Grant of Probate with Written Will issued on the 4th September 2019 is hereby confirmed. The distribution of the estate of the deceased shall be done in accordance with the Will of the deceased dated 22nd February 2017. Each party shall bear own costs. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD NOVEMBER 2021.

S. N. MUTUKU

JUDGE

