



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO 1 OF 2017

IN THE MATTER OF THE ESTATE OF STEPHEN MUSEMBI NZUVE (DECEASED)

ROSE NZIOKI MUSEMBI..... APPLICANT

VERSUS

SAMMY IBRAHIM MWAURA

T/A S.I MWAURA AND COMPANY ADVOCATES.....RESPONDENT

ROSEMARY MUMBUA NZUVE..... 1ST INTERESTED PARTY

FRANSISCA MUTINDA NZUVE..... 2ND INTERESTED PARTY

CECILIA KITHEI NZUVE..... 3RD INTERESTED PARTY

GABRIEL MUTIE NZUVE.....4TH INTERESTED PARTY

JOAN LOUIS MUSEMBI.....5TH INTERESTED PARTY

CHRIS NZIOKI MUSEMBI..... 6TH INTERESTED PARTY

RULING

1. By Summons expressed to be brought under Section 73 of the Law of Succession Act and Section 3A of the *Civil Procedure Act*, the Applicant herein seeks the following orders:

1. That this application be certified urgent and the same be heard exparte in the first instance.

2. That prayer number two of the chamber summons application dated 22nd October 2021 is hereby granted that is to say pending the hearing and determination inter parties of the application dated 22nd October 2021, a temporary conservatory order be issued restraining the respondent Sammy Ibrahim Mwaura and his auctioneers from executing the judgement and decree passed in Nairobi Milimani CMCC number 8383 of 2019 – Sammy Ibrahim Mwaura T/A S.I MWAURA AND COMPANY, ADVOCATES VERSUS ROSE NZIOKI MUSEMBI.

3. Cost of this application be awarded to the Applicant.

2. According to the Applicant, she is one of the administrators of the deceased's estate herein. On the 22nd day of October 2021 the applicant brought under a certificate of urgency the chamber summons application of even date (hereinafter referred to as the pending chamber summons application) seeking among others an order of stay of execution of the judgement delivered on 30th day of July 2021 (hereinafter referred to as the said judgement) and the decree thereof issued on 16th day of September 2021 (hereinafter referred to as the said decree) in Milimani Chief Magistrate court civil suit number 8383 of 2019 (hereinafter referred to as the Milimani civil suit).

3. In the first instance the pending chamber summons application was heard exparte in chambers by **Muigai, J** who set the said application for inter partes hearing on 22nd day of November 2021 before this Court. However, before that date, the respondent commenced execution of

the said decree as his appointed auctioneers have since proclaimed the matrimonial household goods in the house standing on that land known as Matungulu/ Sengani/1132 and Matungulu / Sengani/1133 parcels of land that are listed herein among the assets of the deceased herein.

4. According to the Applicant, in the said Milimani suit the decree holder is the respondent herein who was the applicant's original advocates in this cause and who represented the applicant and her two children who are the 5th and the 6th interested parties in this application before the current advocates took over. However, the client advocate relationship between the applicant and the respondent broke down and the applicant sought the services of M/S J.K Mwalimu and Company who have since been on record for her and her two children. In the meantime, the respondent demanded that the applicant settles in full his legal fees as the applicant had paid him Kenya shillings nine hundred thousand leaving according to the respondent a balance of Kenya shillings 1,699,500 per an agreement the respondent claims the applicant signed and the applicant denies she did sign.

5. It is further contended the respondent also refused to release forty title deeds for some of the properties comprising the estate of the deceased herein that he had taken possession of for the purpose of making copies for use in this cause. He also refused to release some important documents like a passport for the deceased that was for use in this cause. Before the complaints commission the respondent admitted he had in his custody the said documents that he said he held as a lien for his fees.

6. Accordingly, the commission directed that the respondent files a bill of cost for taxation in court but instead the respondent chose to enforce the disputed agreement by filing a breach of agreement suit in the civil court in Milimani where a judgement in his favour was delivered and it is that decree that the auctioneers are now enforcing. However, the applicant is aggrieved by the said decree and execution thereof for the following reasons;

A. the said decree is about payment of a debt incurred by an administrator in execution of her duties as an administrator and therefore the same ought to be paid from the estate

B. in the event of inability by an administrator to settle an estates' debt this court can make provision for settlement of the said debt.

C. It is only a succession court that can make orders regarding disposal of properties movable or immovable comprising the estate and not a civil case court.

D. The respondent should have sought payment of his fees through this court and taxation of the said bill should have been done by the deputy registrar of this family court in Machakos High court who would have had the benefit of perusing the proceedings and pleadings in this cause for a fair decision.

E. The applicant was appointed an administrator by this court and she needs this court's protection from harassment by the estates creditors. Her two children are doing online university learning from the matrimonial home (from which the household goods are being attached for sale by public auction) after leaving china due to the Covid 19 situation. Documentary evidence to that effect marked R9 and R10 for the two children of the applicant are annexed to the affidavit in support of the application herein. Infact this court has in the past made an order for payment of their school fees in China. A copy of the said order marked R11 is annexed to the affidavit in support of this application.

F. This court can make an order for sale of one of the properties to pay advocates including those of the interested parties

7. In this application, the applicant prays for grant of prayer one of the pending chamber summons application dated 22nd October 2021 to protect her and her children form suffering in the event of attachment of the goods.

8. Upon being served with the application, the Respondent filed both a replying affidavit and a Notice of Preliminary Objection. The objection was argued by **Mr Ruto**, learned counsel for the Respondent. According to him, the said application is defective in so far as it purports to join a person who is not a party to this cause. Secondly, it was argued that the decree sought to be stayed was passed by the Chief Magistrate's Court, Milimani and it is only the Court that issued the decree that can, pursuant to section 34 of the **Civil Procedure Act** and Order 22 rule 22 of the **Civil Procedure Rules**, stay its execution.

9. According to the Respondent, the present application purports to clothe the Court with powers to stay execution of a decree made by another Court yet this is not an appeal. Secondly, there is no decree that has been sent to this Court for execution that this Court may stay.

10. It was further argued that the application is sub judice since there is another application dated 22nd October, 2021 seeking similar orders which is slated for 25th November, 2021. The Applicant contended that this is a delaying tactic meant to deny the Respondent the fruits of his judgement.

11. **Mr Mbugua**, learned counsel for the interested parties did not oppose the execution against the Applicant by only as against the estate. He however associated himself with the submissions of **Mr Ruto** that this is not an appellate court and ought not to be invoked to stay the execution and it was urged that the preliminary objection be upheld.

12. Opposing the objection, **Mr Mwalimu** and **Mrs Kingoo**, learned counsel for the Applicant submitted that it was sought to join the Respondent only for the purposes of having the decree of the Milimani Court stayed and for an order that the fees due therein be paid by the Estate herein since the same arose from the Estate as it was as a result of the Respondent's representation in these proceedings. Reference was made to Rule 83 of the Probate and Administration Rules and it was submitted that expenses incurred by the Estate re payable by the Estate and that under Rule 73 the Court can grant the orders sought herein. According to counsel, this matter is not sub judice since the application dated 30th October, 2021 has introduced a matter that was not in the application dated 22nd October, 2021. It was urged that this

Court is properly seized of the matter in order to determine the dependants of the estate.

13. It was further urged that since the estate debts can only be settled in the Succession Cause, section 83(c) of the said Act is clear on the duty of the personal representatives to defray the costs incurred in the administration of the estate. According to learned counsel, the Respondent was guilty of non-disclosure to Milimani Court and that the matter ought to have been filed before the Deputy Registrar of this Court who would have had the benefit of looking at this cause in arriving at the determination. To the learned counsel, an administrator cannot be compelled to settle the debts of the Estate.

14. This Court was urged to find that it has wide powers under Rule 83 aforesaid including supervisory powers over the decisions of the Milimani Court. According to learned counsel the orders granted by the Milimani Court would amount to intermeddling with the Estate of the deceased.

15. I have considered the submissions of counsel. A look at the Summons dated 22nd October, 2021, reveals that prayer 2 in this application which is the only substantive relief sought herein is the same as prayer 2 in the Summons dated 30th October, 2021. In other words, the grant of prayer 2 in the Summons dated 30th October, 2021 would render the instant Summons superfluous.

16. It would seem that the present application was provoked by the decision by **Muigai, J** not to certify the application urgent and issue ex parte conservatory orders. In my respectful view, where the Court declines to certify a matter urgent and fixes a date and pending that date, events take place that alter the circumstances hence necessitating that the Court reconsiders its earlier direction, the prudent thing to do is not to file another application, but to file a certificate of urgency explaining the change in the circumstances and urging the Court to deal with the matter expeditiously. To file another application seeking relief(s) similar to those in the pending application, in my view amounts to an abuse of the Court process.

17. In this case, it is agreed that the Applicant is aggrieved by the decision of the taxing officer in the Milimani Case on the ground that the said decision was arrived at by concealment of the fact that the fees being sought therein arose from legal representation undertaken in these proceedings hence ought to be expenses incurred in the administration of the estate. Assuming that that position is correct, that is an issue that ought to have been taken up before the Taxing Officer either as a preliminary issue or in opposition to the taxation proceedings. A decision arising therefrom would then be challengeable by way of a reference. In other words, succession proceedings are not the appropriate proceedings to challenge decisions made on taxation of costs between advocates and clients in the other proceedings. While I appreciate this Court's inherent powers, it has been held that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process in a matter in which it has jurisdiction. As was held in **Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529**, section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.

18. In this case there is a clear procedure provided under the ***Advocates Act*** for challenging decisions of the Taxing Officers and it is by reference. As was held by the Court of Appeal in **Speaker of the National Assembly vs. Karume Civil Application No. Nai. 92 of 1992**, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

19. The supervisory jurisdiction of the High Court, in my view, ought to be invoked only to correct patent errors and irregularities on the record and ought not to be a substitute to circumstances where an appeal or a review ought to have been resorted to. That jurisdiction is a special jurisdiction that ought to be invoked where there exist no alternative avenues for the redress of what is being complained of.

20. Having considered the preliminary objections raised by the Respondent herein, I find them merited. Accordingly, the Summons dated 30th October, 2021 as well as prayers 2, 3 and 5 of the Summons dated 22nd October, 2021 are incompetent and are struck out but with no order as to costs.

21. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2021.

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwalimu for the Applicant/Administrator

Miss Kemunto for the Respondent

Mr Mbugua for the Interested Parties

