



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

SUCCESSION CAUSE NO. 3 OF 2019

IN THE MATTER OF THE ESTATE OF PETER alias PETRO OKUMBE OUKO (DECEASED)

AND

IN THE MATTER OF DR. JOSHUA ABONG'O OKUMBE.....APPLICANT

VERSUS

DR. JAMES OUKO OKUMBE.....RESPONDENT/PETITIONER

RULING

1. By Summons dated 28th January 2020 supported by the affidavit of Dr Joshua Abong'o Okumbe, the applicant seeks for orders that the petition for grant of letters of administration intestate to the estate of Petro Okumbe Ouko (Deceased) lodged herein by the Respondent Dr. James Ouko Okumbe as petitioner and dated 30th October, 2019 be struck out; and that costs of the application be provided for.
2. The Summons which are brought under the provisions of sections 68, 69 &70 of the Law of Succession Act, Rules 17(1), 49, 59 and 73 of the Probate and Administration Rules is supported by grounds on the face of the Summons and the affidavit sworn by the applicant on 28th January 2020.
3. In the grounds in support of the Summons, the applicant claims that the petitioner herein actively concealed the existence of a pending succession cause No. 430 of 2018 in Bondo Principal Magistrate's Court wherein both the petitioner herein and the Applicant are co-petitioners and that a grant of letters of administration has already been issued on 20th January 2019 and is pending confirmation; that the succession cause herein is mischievously filed implying that the estate of the deceased is worth over Kshs 120,000,000 and that Land parcel No, Bondo/Nyangoma/5053 which is registered in the name of the applicant herein is available for distribution; and that the petition herein is an abuse of the court process.
4. The applicant therefore prayed that the petition for grant herein be struck out with costs.
5. In the supporting affidavit, the applicant deposes reiterating the grounds adding that the parcel of land which is subject of this succession cause is registered in the name of the applicant and therefore it cannot be subject of succession proceedings. He annexed copy of official search. Further, that the petitioner filed this petition to avoid orders issued in the Bondo Succession matter.
6. The petitioner/Respondent opposed the Summons by the applicant and filed a replying affidavit sworn on 10th February 2020 together with written submissions and annexures which include valuation reports.
7. He contended in deposition that the applicant illegally subdivided Land Parcel Bondo/ Nyangoma /5053 from Bondo/Nyangoma 1381 in the absence of formal succession cause and had it registered in his name.
8. Further, that the applicant deliberately left out two prime properties to wit commercial plot No. 14 Wagusu and agricultural land in Wagusu Beach Migwena Sub location which are of high value and that the former is registered in the name of the applicant and is subject of a court case even as beneficiaries insist that the said parcels must form part of the estate of the deceased.
9. That the applicant fraudulently caused part of the estate of the deceased being land of high value to be registered in his name which land is valued at over 40 million and that the pecuniary jurisdiction of the lower court is Kshs 10,000,000. That Parcel No.1381 consisting of his home is conservatively estimated at Kshs 17 million as per the valuation report annexed and that the property left out of the succession cause in Bondo and fraudulently registered in the applicant's name is over 60 million Kenya shillings.

10. That the issue of pecuniary jurisdiction of Bondo Court was raised by the petitioner in an application filed therein on 6/2/2020 but that as he had not filed a valuation report the trial court ordered that a formal application for transfer of those proceedings from Bondo to this court be made and that the matter is pending mention to confirm filing of the said application in the lower court on 28/3/2020.

11. That parcel No Bondo/ Nyangoma/1381 has since been valued at ksh 17million thereby removing it from the jurisdiction of the Bondo Principal Magistrate's Court. According to the petitioner, the applicant is the one who initiated the succession cause in Bondo Court and that he caused disagreement among beneficiaries as he did not disclose all the property of the deceased.

12. The applicant filed a "replying affidavit" sworn on 17/2/2020 but never sought leave of court to have it admitted on record and therefore I shall not refer to it.

13. The application was argued orally on 18/2/2020 with Mr. Onyatta advocate representing the applicant whereas Mr. Ooro Advocate held brief for Mr. Amondi Advocate for the petitioner/ Respondent opposing the application and adopting wholly the replying affidavit sworn by the petitioner and written submissions filed accompanying the replying affidavit.

14. In his oral submissions, counsel for the applicant highlighted that the Bondo Succession cause was still pending and that therefore this petition is an abuse of the court process as neither of the beneficiaries were asked to sign the petition nor were they ever cited. Further, that the estimated value of the estate of the deceased is 2.5 million but that the petitioner had been found to have intermeddled with the estate and that his valuation is based on a house that he constructed on the land which is not part of the estate. Counsel maintained that no two succession causes can co-exist in two different courts over the same estate.

15. In his written submissions adopted as opposing the application, it was submitted by the Petitioner respondent reiterating the depositions in the replying affidavit. Reliance was placed on sections of the Magistrates' Courts Act on pecuniary jurisdiction and Succession Cause No. 275 of 2014, **In the Matter of the Estate of Erastus Muriungi Ngaruthi [2015]e KLR.**

DETERMINATION

16. I have carefully considered the application herein, the replying affidavit, the written and oral submissions and authorities cited. The main issue for determination is whether the Summons by the Applicant is merited. It is not in dispute from the annexures and affidavits in support of the parties' respective positions that the applicant herein and the respondent petitioner are blood brothers and therefore sons to the deceased Peter alias Petro Okumbe Ouko who died on 2nd November 2008 at Kenyatta National Hospital. It is also not in dispute that both the parties hereto are co-petitioners in Bondo PM Succession Cause No 430 of 2018 over the same estate of the deceased Peter alias Petro Okumbe Ouko. It is also not in dispute that the parties hereto were issued with a grant in the Bondo PM's Court in Succession Cause No. 430 of 2018 which grant is yet to be confirmed and neither has that succession cause in Bondo been determined nor transferred to this court on account of any jurisdictional issue as no such application for transfer of proceedings is pending before this court.

17. The question therefore is whether the Succession cause herein is competently before this court and if not, whether it should be struck out.

18. The applicant claims that the Bondo Succession cause must first be extinguished before any other succession cause can be initiated over the same estate of a deceased person. He avers that the petitioner intermeddled with the estate of the deceased Peter alias Petro Okumbe Ouko and put up a property on a portion which is not his and which he now values to be exceeding the jurisdiction of Bondo PM's Court. Further, the applicant claims that the parcel of land which the petitioner now seeks to succeed vide these proceedings does not form part of the estate of the deceased Peter Okumbe Ouko but that it is registered in the name of the applicant.

19. On the part of the petitioner/Respondent, he claims that the applicant is the one who initiated the Bondo Succession matter and that there are disagreements between beneficiaries. Further, that the applicant fraudulently caused part of the deceased's estate property which has more value to be registered in his name. In addition, it is contended that the Bondo PM's court lacks pecuniary jurisdiction to entertain the succession cause as filed therein as the estimated value of the property of the estate exceeds the pecuniary jurisdiction of that court and that there are efforts to have the same transferred to the High Court for disposal.

20. It was upon discovery that a fresh petition for grant had been filed in this court while the Bondo Succession Cause was still pending that this Summons was lodged under certificate of urgency.

21. The power to strike out pleadings or proceedings is a draconian one that must be exercised judiciously and with caution. However, a court of law would not hesitate to strike out proceedings which are initiated with the intention of abusing the court process.

22. The Court of Appeal in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** stated:

"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

23. In that judgment, the learned Judge quoted Dankwerts L.J in **Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506**, where the Lord Justice stated:

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

24. Madan JA stated that the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

25. In **Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court summarized the principles as follows:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

26. See also **Yaya Towers Limited v Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 and DT Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1.**

27. In the instant case, whereas the Bondo Succession Cause is in respect of the estate of the late Petro Okumbe Ouko and the asset subject of the succession proceedings is Bondo/Nyangoma/1381, which is registered in the name of the said deceased person, what is unique and shocking about this succession cause lodged in this court is that one of the assets subject of the Succession Cause is Parcel No. Bondo/Nyangoma/5053 which is registered in the name of the applicant herein Dr. Joshua Abong’o Okumbe.

28. According to the Respondent petitioner, he has petitioned for grant in respect of the said parcel of land because the applicant fraudulently had it registered in his name and that it was part of the estate of his late father.

29. Assuming that that is the position on the ground, the question is whether this court in exercise of jurisdiction in probate and administration matters, it has jurisdiction to make a determination as to whether the applicant lawfully owns that parcel of land or whether registration should be cancelled and the same be reverted to the deceased Petro Okumbe Ouko for distribution to the eligible beneficiaries? No court of law can exercise jurisdiction by craft. Jurisdiction is conferred by statute and the Constitution.

30. In addition, succession proceedings are only instituted in respect of an estate of a deceased person and not in respect of a living person. If as alleged by the Respondent Petitioner herein, the applicant had himself fraudulently registered as proprietor of the parcel of land No. Bondo/Nyangoma/5053, then the petitioner could only challenge that registration by way of a suit and that suit could only be instituted before a court of competent jurisdiction. That court is Environment and Land Court- ELC and not the High Court. Article 162(2) (b) of the Constitution is clear that the ELC is the court established to exercise that special jurisdiction to hear and determine disputes relating to environment and title to, occupation and ownership of land. In addition, Article 165(5) (b) of the Constitution expressly prohibits the High Court from hearing and determining disputes exclusively reserved for the courts contemplated in Article 162(2). That being the case, this court cannot be called upon to upset the registration of the disputed parcel of land No. Bondo/Nyangoma/5053, whatever the circumstances.

31. It follows that this court has no jurisdiction to entertain a dispute over an alleged fraudulent transaction or transfer by the applicant of title to land and ownership thereof, which dispute is camouflaged as a succession cause and for that reason alone, this court must down its tools and say no more.

32. That notwithstanding, the question then arises as to whether it was proper to have the two succession causes filed in two different courts touching on land parcel NO. Bondo/Nyangoma/1381 and whether this court in exercise of its supervisory jurisdiction over subordinate courts can call for the Bondo Succession matter and consolidate the same with this succession case and hear it as one.

33. Preferably, consolidation of succession causes is permissible where several of them are initiated with respect to the estate of the same individual who has died intestate. The reasoning behind such consolidation is that there should not be more than one succession cause over the same estate of the same deceased since the deceased individual can only possibly have common assets and common survivors or heirs, and his estate should only be distributed once. Permitting separate succession causes in the estate of the same deceased person to run, risks a situation where the courts seized of the different matters make different orders on distribution. That would embarrass the courts and the parties, for having two inconsistent or contradictory orders on confirmation of the grants and would present a nightmare at distribution. Parallel succession processes should never be allowed at all costs, save where the deceased died partially testate and partially intestate, since in such cases, there would be separate administrations, one in testacy and the other in intestacy.

34. It is not in dispute that Land Parcel No. Bondo/Nyangoma/1381 is registered in the name of the deceased Petro Okumbe Ouko as shown by the search certificate. It is also not in dispute that the said parcel of land is subject of the succession proceedings in Bondo and is also subject of these proceedings filed by the Petitioner who is a co administrator with the applicant. The question is why did the petitioner file this succession cause yet there is another succession cause wherein both of them are co administrators, pending determination?

35. If as the petitioner claims that the applicant left out some other properties in the Bondo Succession matter, why did the petitioner herein who is a co administrator in the Bondo matter ensure inclusion of those properties by applying to the Bondo Court, assuming they are intestate property registered in the name of their deceased father Petro Okumbe Ouko, for administration?

36. In the circumstances of this cause, the petitioner did not require to cite any beneficiary as the proceedings were already in the Bondo PM's Court and what was expected of him was to cause the Bondo matter to be concluded in an appropriate manner and not to jump into this Court and initiate fresh proceedings.

37. Even if there was an issue of pecuniary jurisdiction in Bondo, the appropriate action would have been to file an application before this court raising that issue and seeking for transfer of the Bondo Succession cause into this court for hearing and final determination and not to file a fresh petition. The latter is what is called abuse of the court process.

38. In my view, the petitioner did not initiate these proceedings in good faith and appears to have been misguided and misadvised. Although he named the applicant as one of the sons of the deceased and even asked him to sign the petition but the applicant refused, the applicant had good reasons for refusing to cooperate as there was no reason why the petitioner filed these proceedings which are parallel to the Bondo Succession Cause.

39. I find the action of the petitioner filing these succession proceedings and including therein property which is not registered in the name of the deceased an abuse of court process and creating a situation where multiple disputes are initiated in different courts over the same subject matter thereby creating unnecessary workload for the courts.

40. I find the Summons by the applicant merited. I allow the application dated 28th January 2020 and proceed to strike out the petition for grant of letters of administration intestate filed herein by the petitioner James Ouko Okumbe on 14th November, 2019.

41. As the disputants are brothers and in order to promote harmony and reconciliation, I order that each party shall bear their own costs of these proceedings but the Petitioner should obtain proper legal advice on how to handle succession issues and avoid being frivolous, vexatious and wasting of the courts' precious time as another meritorious matter could have been determined in the place of such foolhardy litigation.

42. Orders accordingly.

Dated, Signed and Delivered at Siaya this 24th Day of February, 2020

R.E.ABURILI

JUDGE