



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 25 OF 2016 (O.S)

IN THE MATTER OF THE ESTATE OF THE LATE LUSILA WAIRU WAWERU

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT

AND

IN THE MATTER OF THE LATE LUSILA WAIRU WAWERU'S WILL DATED 25TH AUGUST 2013

BETWEEN

EMMANUEL JULIUS NYOTA

WILBERT NJUKI THUMBI

MARGARET THUMBI KONA.....APPLICANTS

AND

AGUSTA RWAMBA THUMBI

JOAKIM IRERI THUMBI..... RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Onyango Onunga advocates for the Applicants

Asige Keverenge & Anyanzwa advocates for the Respondents

RULING

The applicant **Emmanuel Julius Nyota** instated the notice of motion filed in Court on 8.5.2020 pursuant to Order 40 Rule 1, 2, 3, 4 of the Civil Procedure Act and Section 45 (1) and (2) and 47 of the Law of Succession Act, Rule 59 and 73 of the Probate and Administration Rules, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and 63 of the same Act.

The motion is supported by myriad ground on the face of it and an affidavit deponed by **Wilbert Njuki Thumbi** filed in Court on 8.5.2020. In his disposition the applicant deposes that on 25.3.2020 it came to their attention that the respondents had commenced works and renovations on the suit property by demolishing the roof of the suit property.

The respondents filed grounds of opposition dated 20.5.2020 alleging that by virtue of Section 79 of the Law of Succession, the assets of the deceased are vested upon her as the executor duly named in the deceased Will dated 25.8.2013.

Ms. Agusta Rwamba Thumbi further filed a replying affidavit to state that the applicants are being untruthful on the issues raised in the notice of motion.

Submissions by counsel for the Applicants

It was the submissions of **Onyango Onunga** counsel for the applicants that under Section 45 of the Law of Succession Act, the respondent is prohibited from intermeddling with any of the free property of the deceased. Learned counsel further submitted that there is no grant of probate that vested the assets of the deceased upon the respondent to give her authority to deal with any of the assets of the estate.

In this regard, he placed reliance on the legal principle in the case of **Gladys Nkirote M'itunga v Julius Majau M'itunga {2016} eKLR, John Kasyoki Kieti v Tabitha Nzivuli Kieti & Another High Court Civil Case No. 95 of 2001.**

In reply, the respondents counsel **Mr. Asige**, submitted that there exists a Will of the deceased appointing the respondent as the Executor and Trustee of the Estate.

Learned counsel relied on the cases of **Re Estate of Samson Nyambati Nyamweya (Deceased) {2019} eKLR**, to show that:

“the executor’s title date from the date of the death of the deceased and springs from the Will not from the grant of probate. The executors actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will...” (See also **Sakina Sote Kaittany & another v Mary Wamaitha {1995} eKLR, The estate of Thiong’o Nginyayu Muthiora (Deceased) {2013} eKLR**)

Further, Learned counsel raised the issue of legal representation under Order 9 Rule 5 of the Civil Procedure Rules as regards retainer of the current counsel during the pendency of the cause having been presented by the **Firm of Okello Kinyanjui & Co. Advocates**. It was therefore Learned counsel submissions that the application lacked merit.

Having carefully heard both parties through their written submissions, and filed materials it is my singular duty to determine whether the prayers sought are capable of being granted by this court.

Determination

This motion is about management of the Estate of the deceased usually vested in the administrators or executors pursuant to the Provisions in the Law of Succession Act. Executors specifically are appointed by the Testator in his or her Will to step in that shoes for reason of continuing to further the administration of the Estate. In a persuasive precedent on the tenure of the duty of an executor **Justice Laurenson** put it most emphatically in **Re Stewart, Smith & Another v Price & Others 51 TELR 622 at 630** where he stated as follows:

“An executor is the person appointed by a Testator or Testatrix to administer his or her property and carry out the provisions of the Will. To this end, the executor has certain specific statutory and common Law duties and powers namely to:

- (a). Bury the deceased.*
- (b). Make an inventory of assets.*
- (c). Pay all duties testamentary expenses and debts.*
- (d). Pay legacies.*
- (e). Distribute the residue to the persons entitled.*
- (f). Distribute the residue to the persons entitled and keep accounts.”*

The passage by **Learned author, G, Nevill in Maxton Ed “Law of Torts, Wills and Administration 8th Edition {1985}** is also important which contained the following:

“But before proceedings to discuss the technicalities of the duties, it seems opportune to mention that in the case where a Will has been left, many of the duties here set out are really facets of the one primary duty of an executor, to propound and maintain the Will by which he has been appointed. Let others attack that document if they wish. It is not for him to aid and abet them in their design of rewriting the Testators directions a little nearer to their hearts desire. It is not for him unwarrantedly to thwart them. The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property. The most obvious element of that relationship is the requirement imposed in equity that the Trustee will deal with those assets with the utmost probity which in turn, requires that the Trustee will not on any account allow him or her to have or acquire any personal interest in these assets without the express and informed consent of the beneficiary. There is, in addition, a further aspect to an executor’s fiduciary responsibilities namely a duty to act even handedly between the beneficiaries. It is written this area of responsibility that the obligation not to unwarrantedly thwart claim arises.”

The definition and role of an executor has been clearly purposed in the decisions of the Court in **Re-Estate of Samson Nyambati Nyamweya (Deceased) (supra)** and **Sakina Sote Kaittany & Another (supra)**.

In the present pending cause, the Will made by the deceased **Lusila Wairu Waweru** appointing **Agusta Rwamba Thumbi** as the sole

executor to the Estate has been challenged by the applicants to the extent of the said subject properties.

In respect to that Will and mode of appointment has been varied or set aside by this Court. The said Will stands valid for execution. At this time **Agusta Rwamba Thumbi** is the only person who has the legal right to deal with the property.

In **Commission of Stamp Duties v Livingstone {1965} AC 694:**

“Whatever property came to the executor virtute office came to him in full ownership, without destruction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit, and these duties would be enforced on him by the Court:- An executor is personally liable in equity for all breaches of the ordinary trusts which, in Courts of equity are considered to arise from his or her office.”

Drawing from the above principles there are issues pending resolution on account of the Will appointing the respondent as the Executor by the applicants.

As to whether in the interim period, the respondent is intermeddling in the Estate is a matter decided within the scope of the principles in **Giella v Cassman Brown {1973} EA, American Cynamid Co. v Ethican Ltd {1975} AC 396**. **Lord Diplock** in his later case stated interalia:

“At interlocutory stage the Court must assess the merits and demerits of granting or refusing an injunction. That means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendants freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff would be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages, would provide the defendant with adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice and to what extent, if it turns out that the injunction should not have been granted or withheld, as the case may be the basic principle is that the Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.”

In the instant motion, the applicant moved this Court pursuant to Section 45 (1) of the Law of Succession Act. The respondent is yet to obtain the purported probate to the Will under Section 79 of the Act. The matter is before this Court because the applicants have challenged the Will and the authority given to the respondent as the Executor. The Will has already been produced in Court as an exhibit for the Court’s consideration under Section 11 of the Act.

In the meantime, the Testator’s property vests in the Executor from the date of death without any interval of time. In respect of the Estate notwithstanding compliance with Section 79 of the Law of Succession. The applicants have failed to establish the amount of intermeddling with the property of the deceased by the Executor to call for an intervention by way of an injunction under Order 40 Rule (1) & (2) of the Civil Procedure Rules.

The tests applied in this context of **Giella v Cassman & American Cynamid cases (supra)** for interim relief that there is a serious issue to be tried, that damages are not an adequate remedy and whether the balance of countenance fills in favour of the applicants has not been satisfied as alleged to warrant grant of an injunction.

To that extent, the notice of motion dated 8.5.2020 fails with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29th DAY OF MAY 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Emukule holding brief for Onyango for the applicants