



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 111 OF 2007

IN THE MATTER OF THE ESTATE OF MOHAMMED BILALI (DCD)

ASHA SWALEH)

SALIM KIPRONO LANGAT RUTO).....PETITIONERS

VERSUS

YUSUF MOHAMMED & OTHERS.....RESPONDENTS/OBJECTORS

AND

LEONARAD MUTUKU SESI.....APPLICANT/INTERESTED PARTY

RULING

1. The Interested Party/Applicant herein filed an application dated 8/06/2020 seeking the following prayers namely:

(1) (Spent)

(2) That the Applicant be granted access to his property namely Plot No. B7/2D situated at Pumwani Estate Nairobi.

(3) That property known as Plot No. B7/2D situated at Pumwani Estate be struck off and removed from the cause herein as it does not form free property of the deceased and is registered in the names of the Applicant.

(4) That this Honourable court lacks the requisite jurisdiction to handle the matter.

(5) Costs do abide the application.

2. The application is supported by the Affidavit of the Applicant and grounds on the face of the application. The Applicant's gravamen *inter alia* is that he is the registered owner of the property namely plot number B7/2D situated at Pumwani Estate Nairobi having purchased the same from the widow of the deceased who was the administrator of his estate. The Applicant annexed copies of the sale agreement as well as the letter of rates clearance from Nairobi City County clearly indicating that he is the absolute owner of the property. The Applicant now wants to access the said property and to be able to get the requisite rental income therefrom. Finally, it was contented by the applicant that the court lacks jurisdiction to handle the matter which is a preserve of the Environment and Land Court.

3. The application was strenuously opposed by one Hadija Ali who was the initial Respondent/Objector in the cause who maintained that the Applicant is an intermeddler in the estate of the deceased. It was further her contention that the issue agitated by the Applicant has already been adjudicated upon and that the estate is currently being administered by the Public Trustee. Finally, it was her case that the purported administrator was never called Mwawawa and neither was she the registered owner of Flat No. B7/2D as the same was part of the estate of Mohammed Bilali.

4. It was submitted by Mr. Tamata learned counsel for the Applicant that since the Applicant is registered as owner of Plot No. B7/2D Pumwani Estate Nairobi, the same should be set aside from the Estate under Rule 41(3) of the Probate and Administration Rules and that the same be determined by the Environment and Land Court. Learned counsel added that most of the deceased's properties were bequeathed to the Applicant by the deceased's widow and administrator Mwawawa Mohammed. It was also counsel's submission that the deponent in the replying affidavit Hadija Ali is a stranger to the deceased and in these proceedings as she has not produced any document to prove her claim

to the property. Learned counsel relied on the following provisions and authorities:-

i) Article 162(2) (b) of the Constitution.

ii) Article 165(5) of the Constitution.

iii) Section 13(2) of the Environment and Land Court Act (2011).

iv) Rule 41 (c) of the Probate and Administration Rules.

v) Owners of motor vessel “Lillian S” –vs- Caltex Oil (Kenya ltd) [1989] eKLR.

vi) John Ogola Mukenya versus Ernest Mangala Ayugo [2016] eKLR.

vii) In the estate of Ndubi Javan (deceased) [2018] eKLR.

viii) Samuel Kamau Macharia & another –vs- Kenya Commercial Bank limited ltd [2012] eKLR.

5. Mr. Kahuthu for the Respondent submitted that this court vide its ruling dated 23/01/2020 has dealt with the initial issue of partial administration of the estate pending proof of entitlement by claimants and parties and that the Public Trustee is currently managing the estate. It was also submitted that the Respondent Hadija Ali had been one of the initial objectors who had filed an application for cross petition for grant. It was also submitted that the current application is a replica of the one dated 8/11/2016 which was dismissed on 19/07/2018 by this court. It was finally submitted that the interested party should proceed to tender his evidence regarding his claim to the estate as earlier directed and to stop filing numerous vexatious applications.

6. I have considered the rival affidavits and submissions as well as the authorities cited. It is not in dispute that vide this court’s ruling dated 23/01/2020 parties herein were directed to file and exchange witness statements and documents and to prepare to tender viva voce evidence regarding their rival claims. It is also not in dispute that this court on the 16/12/2009 ordered that the estate herein be administered by the Public Trustee pending further orders in a bid to safeguard the estate as the court dealt with the rival claims placed before it. It is also not in dispute that this court has since received some oral evidence from some of the beneficiaries as at 30/05/2011, when the Respondent herein Hadija Ali gave her testimony. The issue for determination is whether this court has jurisdiction to determine the matter involving Plot No. B7/2D Pumwani Estate Nairobi.

7. The issue of jurisdiction is quite crucial to a court of law as it delineates the sphere around which it can entertain a matter. Justice Nyarangi JA (as he then was) in the locus classicus case of **Owners of Motor Vessel “Lillian s” –vs- Caltex Oil (K) ltd [1989] KLR 1** held that jurisdiction is everything and that a court should down its tools the moment it finds that it does not have jurisdiction to decide on a matter placed before it. The Supreme Court of Kenya took this a notch higher in the case of **Samuel Kamau Macharia & another –vs- Kenya Commercial Bank limited & Two Others [2012] eKLR** when it held as follows:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law..... The issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality. It goes to the very heart of the matter. For without jurisdiction, the court cannot entertain any proceedings where the Constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation.”

Learned counsel for the Applicant has submitted that the property in issue does not form part of the estate of the deceased as it is registered in the Applicant’s name and that the same should be set aside and to be dealt with separately as provided for under Rule 41(3) of the Probate and Administration Rules. It is the view of learned counsel that the subject property should be determined by the Environment and Land Court. On the other hand counsel for the Respondent is of the view that parties should proceed to tender viva voce evidence regarding their rival claims as directed by this court on 23/01/2020.

Jurisdiction of this court in matters of Succession is provided for under Section 47 of the Law of succession Act which provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient;

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

A perusal of the petition forms P & A 5 filed initially herein indicates that the property sought to be set aside by the Applicant has been listed as an asset belonging to the deceased. Again the copy of the sale agreement annexed to the Applicant’s Supporting Affidavit shows that the same took place on 18/05/1995 way before the Succession Cause was lodged and which leaves no doubt that as at that time the said property formed part of the estate of the deceased. The Respondent’s contention is that the Applicant is an intermeddler in the estate of the deceased since the persons who lodged **Succession Cause No. 66 of 1998** were fictitious and strangers to the estate of the deceased. If indeed the said circumstances on face value are taken as true then it is incumbent upon this court to entertain the dispute. Suffice here to add that if the sale transaction took place prior to the institution of the succession cause, then the same were in violation of section 45 of the Law of Succession Act which forbids intermeddling with property of a deceased person and in which this court has the requisite jurisdiction to establish whether

or not intermeddling of the deceased's assets had taken place and to make the appropriate orders. This court vide the ruling dated 23/01/2020 had noted the fact that there is no clarity as to who are the administrators of the estate even as several claimants including the Applicant were staking claims to the estate. This court did direct the parties to file and exchange documents and witness statements and to prepare to tender their oral evidence regarding their rival claims since already evidence of one claimant had been received.

8. Even though the Applicant has beseeched this court to resort to Rule 41(3) of the Probate and Administration Rules and set aside the subject property to be handled by the Environment and Land Court. I find the request to be rather premature in that this court ought to be given the opportunity to receive the rival evidence of the parties before deciding whether or not to set aside such property to await the determination of the question in proceedings under Order XXXVI Rule I of the Civil Procedure Rules. The necessity to conduct a hearing of the dispute is borne out of the fact that this court being a succession court is mandated to distribute the estate of the deceased to the rightful beneficiaries. The expected evidence will help the court to establish the genuine administrators as well as determine whether or not the Applicant herein is a creditor to the estate. It is only after receipt of the evidence that the court can safely establish that a particular share or estate be set aside and to await a determination thereon before the confirmation can be finalized. The Applicant should not evade his responsibility of presenting his claim against the estate. In any event the Applicant's further affidavit sworn on 17/06/2020 alludes to having been bequeathed three other assets of the deceased by the purported administrator and which properties should now be put under scrutiny by this court. I find it rather curious that the Applicant has opted to agitate only on one property and leave out the rest. I find it is appropriate that all the assets be subjected to scrutiny and that a decision will be made borne out of the evidence as to whether or not to set aside any property pending the final confirmation of grant. I am not persuaded that the Applicant has made a good case for isolating the subject property from a determination on its status by this court. It my considered view that this court has jurisdiction to determine the dispute over the subject property. The applicant will not be prejudiced since the property in issue is safely being managed by the Public Trustee who can render accounts as when required.

9. Finally, the Applicant has sought to be granted access to the property namely Plot No. B7/2D situated at Pumwani Estate Nairobi and to obtain rental income therefrom. It is noted that this court way back in 2009 had directed that the property be managed by the Public Trustee pending further orders. This court later vide rulings dated 19/07/2018 and 23/01/2020 directed that the Order vesting the administration of the estate in the Public Trustee do remain in force until further orders. As at now there are questions lingering on who are to be made administrators of the estate. On the other hand the Applicant is staking a claim to one of the assets of the deceased. This state of affairs militates against granting the Applicant his request before a determination is made on the rival claims. Indeed, the Applicant is yet to establish his claim via viva voce evidence and hence it is fair and just to let the Public Trustee continue to manage the estate pending further orders and directions.

10. In the result it is my finding that the Applicant's application dated 8/06/2020 lacks merit. The same is dismissed with no order as to costs. Parties are now directed to set down the matter for hearing viva voce as earlier directed.

It is so ordered.

Dated and delivered in open court at Machakos this 21st day of September, 2020.

D. K. Kemei

Judge