



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT NAROK

SUCCESSION CASE NO. 13 OF 2015

IN THE MATTER OF THE ESTATE OF SIMON KIMENDERO alias

SIMON KIMENDERO KABARI alias SYMON KIMENDERO KABARI – (DECEASED)

TERESIA WANGUI.....1ST PETITIONER/RESPONDENT

JOHN KABARI.....2ND PETITIONER/RESPONDENT

-versus-

MONICAH WAMBUI KIMENDERO.....OBJECTOR/APPLICANT

RULING

1. Before court is a Notice of Motion dated 11th June 2020 expressed to be brought under *Section 48, 76 and 82 Laws of Succession of Kenya, Rules 44,49,59 and 73 of Probate and Administration Rules and Section 3A of the Civil Procedure Act*. The applicant is seeking for:

- i. Conservatory orders restraining the Petitioners/ Respondents from alienating, transferring, selling and disposing the property/assets of the deceased estate in any manner whatsoever pending the hearing and determination of this suit.**
- ii. An order to compel the administrators to provide accounts of all income generated from the assets of the deceased from the time of death and to be subjected to independent accounting audit at the expense of the estate.**
- iii. Orders that any income generated from the deceased's estate be deposited in an interest generating account where all beneficiaries are signatories and any withdrawals from the said accounts be done with authority from court and the consent of all beneficiaries of the estate.**
- iv. Costs of the application to be borne by the petitioners/respondents herein.**

2. The Summons is premised upon grounds are set out in its body and the Supporting Affidavit of the Applicant sworn on 11th June, 2020.

3. The main grounds are;

*(1) that the Petitioners/respondents have been squandering funds held in the deceased's **Bank Account Number ***** at KCB NAROK BRANCH**. That at the time of filing the summons for revocation of grant on 1st March 2019 the account had a balance of **Kshs. 10,68,757.50** and that as of May 2020 the account had a balance of **Kshs. 13,262.30**.*

(2) Further, that the Petitioners/respondents have been transferring other properties as well as the funds from the deceased's account by taking advantage that they are administrators of the estate.

4. The applicant deposes that she's the biological daughter of the deceased and therefore, a beneficiary entitled to a share in the estate of the deceased.

5. The application is opposed via a replying affidavit of Veronica Nyambura one of the respondents who was given authority to plead and act on behalf of the other two respondents. She averred that the estate has been distributed and every beneficiary has gotten their respective

shares and is settling there.

6. She further deposed that the applicant has always kept away from family gatherings held for distribution of property but nonetheless she received her share of the estate.

7. She further asserts in her replying affidavit that the applicant has always received her share of any such amount withdrawn from the bank and that she has personally been banking the said money into the applicant's bank account.

8. She states that the respondents have maintained a booklet of all withdrawals and that of distribution of withdrawals where the applicant has received her share.

9. Both parties herein filed their submissions in support of their arguments.

ANALYSIS AND DETERMINATION

10. The issue for determination is whether the orders sought herein are merited.

11. I note that the grant has been confirmed. I however do note that an application for revocation of grant is pending in court.

12. The applicant's main complaint is that the administrators are wasting away estate property by making withdrawals from the estate account to personal accounts. According to her, the deceased's **Bank Account Number **** at KCB NAROK BRANCH**, at the time of filing the summons for revocation of grant on 1st March 2019, had a balance of **Kshs. 10,68,757.50**. But, as of May 2020 the account had a balance of **Kshs. 13,262.30**. The administrators confirmed that they have been making withdrawals from the bank account and has been sharing the proceeds amongst the beneficiaries including the applicant. They averred that the applicant has been depositing her share in her bank accounts. They claim to have kept a booklet on the sharing of the estate. According to them the estate has been distributed. They also stated that the applicant refused to attend family meetings on distribution of the estate. Nonetheless, she has received her share.

13. Several pertinent matters arise from these facts. First, although the administrators claim that the estate has been distributed, no final accounts of administration have been filed in court as required in law. Notably, whereas the administrators stated that they have kept a booklet on how the money was shared out, the booklet is not the accounts envisaged in law. Second, the information provided show the deceased's account still holds some little money in the sum of Kshs. 13,262.30. This is a clear indication that the administration of the estate has not been completed. Third, a dispute has arisen on management of the estate and allegation that the estate is being wasted away have been made. Similarly, an application for revocation is pending. In such circumstances, the administrator must provide a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account under section 83 of the Law of Succession Act set out below: -

83. Duties of personal representatives

Personal representatives shall have the following duties-

(a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

14. See Musyoka J. **In Re Estate of David Kyuli Kaindi (Deceased) (2016) eKLR** in addressing the responsibility of an executor or representative to account stated that

“the personal representative must give account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving to court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this stage should also state the assets that generate income, stating how much has been collected and how it has been utilized.”

15. The accounts should be able to show the amounts allegedly paid out to the applicant. The court is interested on the respondents' claim that the applicant received her share of the money which she has deposited in her bank accounts.

16. Is a conservatory or preservatory order merited?

17. I should state that it is a misnomer for the applicant to have pleaded that she is applying for conservatory order. From the substance of the order it is clear that she is seeking a preservatory order to prevent further dissipation or wasting away of the estate property.

18. Preservatory order is issued to restrain a person from destroying or dissipating or wasting away a property. It is therefore in the league of freezing order or what is commonly referred to as a *mareva* injunction. The threshold to be met when these kind of orders are sought differ in a measure from ordinary interlocutory injunctions. In my view, the test for preservatory or preservation order should draw is as was stated in **Goode on Commercial Law, 4th Edition at Page 1287** that :-

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the court will usually require to be satisfied that:-

a. *The claimant has ‘a good arguable case’ based on a pre-existing cause of action;*

b. *The claim is one over which the court has jurisdiction;*

c. *The defendant appears to have assets within the jurisdiction;*

d. *There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and*

e. *There is a balance of convenience in favour of granting the injunction;*

f. *The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”*

18. I should think that the court has a statutory mandate to protect the estate property as well as the rights of beneficiaries. That is why it would act on information of intermeddling with estate property and may even impose criminal sanctions upon such intermeddler under section 45 of the Law of Succession Act. I therefore think appropriate order is one of preservation of the estate. I will formulate the test from existing law.

19. Of specific significance to preservatory order in respect of estate property is that: =

a. **The applicant has an arguable case;**

b. **The property is estate property; and**

c. **The property is likely to be dissipated or wasted away.**

Arguable case

20. In the case of **African Banking Corporation Limited –vs- Netsatar Limited & 6 Others Nairobi Milimani HCC no. 299 of 2009 (UR)** the court observed that:-

“A “good arguable case” was defined by Mustill J in The Niedersachsen [1983] 2 Lloyd's Rep 600 at page 605 to be:-

“One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.” (Emphasis added)

This in my view, is a sound principle to rely on in establishing whether a Plaintiff has a good arguable case.”

19. In this case, I note from the applicant's application, supporting affidavit and submissions that the bank account of the deceased had a huge sum of money (over Kshs. 10,000,000) at the time of death. It now has a paltry Kshs. 13, 262.30 out of the original Kshs. 50,000,000.

Whereas the administrator stated that they have kept a booklet, there are no proper accounts filed in court. I note also that there are other properties which the applicant also claims are being sold and transferred by the administrators. The applicant claims the dissipation of estate assets would affect her as she is a beneficiary. On prima facie basis, she has an arguable case.

Likelihood of dissipation

20. From the information available, it is clear the estate property is diminishing and it has not been accounted for. Therefore, it is likely the estate property may be dissipated. Such happening would not only injure the applicant but the estate too.

21. In light of the facts in the case, a preservatory order is merited. However, money has already been paid out- that aspect will be dealt with when accounts are filed. Accordingly, I will issue a preservatory order restraining the administrators from making any further withdrawals from the deceased's **Bank Account **** Narok Branch** or disposing of or in any manner whatsoever alienating any of the estate properties in the Certificate of grant until further orders of the court. The administrators are warned not to do anything which will be in violation of this order.

22. In making the orders below, I am also guided by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to meet the ends of justice.

Orders

23. I order; -

a. The administrator, within 30 days of today, to file and serve a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith including but not limited to the deceased's Bank Account **Narok Branch as at the time of death of the deceased up to the date of the account under section 83 of the Law of Succession Act.**

b. A preservatory order restraining the administrators from making any further withdrawals from the deceased's Bank Account ***Narok Branch or disposing of or in any manner whatsoever alienating any of the estate properties in the Certificate of grant until further orders of the court. The administrators are warned not to do anything which will be in violation of this order.**

c. Parties to bear own costs.

21. The application dated 11/6/2020 is allowed in the specific orders I have stated above.

Dated, signed and delivered at NAROK through Teams Application this 17th day of December, 2020

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F. GIKONYO

JUDGE