



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.1255 OF 2014

IN THE MATTER OF THE ESTATE OF MATHIAS MAINGI KITILI – (DECEASED)

RULING

1. The Co-administrator of the Estate of the deceased herein, CHARITY ITHIRU KOBIA filed a Summons for rectification dated 11.3.2019 seeking to have the property known as plot No. C6 – 133 Kayole removed from the list of Assets of the deceased for reasons that the same does not form part of the Estate of the deceased but belongs to her.
2. Her co-administrator, PAULINE MBAABU JOHN filed an Originating Summons dated 28.8.2019 seeking a declaration that the Respondent holds the said property known as Plot No. C6-133-Kayole as a trustee for the beneficiaries of the estate of the deceased herein and also for an order cancelling the title.
3. The Applicant in the Summons for rectification dated 11.3.2019 CHARITY ITHIRU KOBIA has raised a Preliminary Objection to the Originating Summons filed by her co-administrator PAULINE MBAABU JOHN on the ground that this Court has no jurisdiction to determine the issue of trust or ownership of the said property and that the same should be raised at Environment and Land Court.
4. I have considered the submissions by both parties and I find that the parties are administrators in the Estate of the deceased herein.
5. The mandate of the Probate Court includes determining the beneficiaries of the estate of the deceased determining what constitutes the estate of the deceased, who should administer the estate and how the estate should be administered.
6. I find that the issue for determination in the originating summons dated 28.8.2019 is whether the property known as C6-133 Kayole forms part of the Estate of the deceased.
7. The law that applies to matters and disputes of the nature raised by the Administrators is the Law of Succession Act whose application stated in **section 2** of the Act as follows:

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

8. Further to the foregoing, Musyoka J. in this regard in **In Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

“...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and

Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

9. I accordingly rule that this court is seized by the jurisdiction to determine the said issue.

10. I accordingly over-rule the Preliminary objection and direct that both the summons for rectification and the originating summons proceed to full hearing on a date to be agreed on by the parties.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 22ND DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.