



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 236 OF 2015

IN THE MATTER OF THE ESTATE OF BARRACK DEYA OKUL (DECEASED)

EDWARD O. OKUL..... 1ST PETITIONER

TOM MBOYA OKUL 2ND PETITIONER

- AND-

NATIONAL BANK OF KENYA LIMITEDCREDITOR

RULING

INTRODUCTION

1. By way of a chamber summons dated 18th April 2017, National Bank of Kenya Limited (Creditor) seeks orders;

1. **THAT** this Honourable Court be pleased to adopt the judgment and decree issued in NAKURU HIGH COURT CASE NO. 35 OF 1994, NBK vs BARRACK DEYA OKUL as a liability in the petition herein and proceed to make a provision for its settlement before the Estate can be distributed and or the grant confirmed.

2. **THAT** the costs of this application be provided for.

2. The application is based on;

a) The affidavit in support.

b) That there is in existence a decree in Nakuru High Court Case No. 35 of 1994, NBK vs Barrack Deya Okul which has not been satisfied.

c) The bank has been keen to pursue the debt and even filed a citation vide Nakuru High Court Succession No. 42 of 2014.

d) The petitioners have declined to acknowledge the obvious liability to the estate.

3. The application is opposed and in a replying affidavit, Edward O. Okul (1st Petitioner) has stated that no grant has been issued in the cause and that the Applicant is not a beneficiary of the estate.

4. The application is said to be premature and could only be entertained after confirmation of grant of letters of administration.
5. Directions were given that the application be disposed off by way of written submissions. Both parties complied.
6. For the creditor, it is submitted that the creditor is a holder of a decree against the deceased dated 6th February 2006. The said decree is still valid.
7. The debt has been brought to the attention of the administrators to pay up but they have failed so to do. Even the filing of a citation against Christabel Akinyi Deya and Evelyn Gati, widows of deceased bore no fruit.
8. The Petitioners have not included the debt as a liability to the estate.
9. The creditor seeks to compel the petitioner to comply with the Law and include the liability owed by the estate of deceased which is comprised of a lawful decree.
10. Form 3 of the Probate and Administration Rules provides that the Petitioner must make a disclosure if the Estate of the deceased has liabilities or not.
11. It is urged that **Section 86 of the Law of Succession Act** provides that **“Debts of every description enforceable at Law and ordered by or out of the estate shall be paid before any legacy.”**
12. Section 89 makes provision for insolvent estates and hence the need for full disclosure on whether the estate has liabilities or not.
13. If Petitioners are allowed to obtain the grant without settling the debts, the Petitioners shall distribute the estate to the detriment of the creditors that they have excluded.
14. For the Petitioners, it is submitted that the application essentially seeks to have this Court execute a decree emanating from a different court. It is urged that the jurisdiction of a probate court is limited.
15. Reliance is placed on the decision in **High Court at Chuka Succession Cause No. 660 of 2015**, in the matter of the **Estate of Zakaria Nthiga Matumo – Deceased** where *Justice Mabeya* relied on several cases quoted on page 4 & 5 all of which cases point to the principle that **“Such a Courts sphere of inquiry is limited to ascertain what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate.”** Executing decrees from other Courts is not one of the functions of the family court dealing with succession matters.
16. It is further submitted that even if this court was to execute the decree, the creditor has not followed the correct procedure as envisaged under Section 30 of the Civil Procedure Act.
17. Section 37(1) of the **Civil Procedure Act** provides;

“Section 37. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”
18. In our instant case, it is stated that;
 - a) No application has been made by the Applicant to the Court which passed the decree.
 - b) Secondly, the Respondents have petitioned but have yet to be appointed as the legal representatives of the deceased. The Court cannot commit them to satisfy a decree at this stage as

they are still unrecognized as lawfully representing the estate of the deceased. (See Section 79 of the Law of Succession Act).

19. I have considered the application, the affidavit evidence on record as well as submissions by counsel.
20. There is no challenge to the existence of the decree issued in Nakuru High Court Civil Case Number 35 of 1994 against Barrack Deya Okul now deceased.
21. There is no challenge to the fact that the said decree has not been satisfied.
22. The question for determination is whether the decree should be included at this stage as a liability to the estate and if so through which procedure or whether the creditor should initiate execution proceedings against the administrators of the estate of the deceased and if so whether this application is premature in that the administrators of the estate have not yet been appointed.
23. I agree with the holding of Mabeya J in the decision in the estate of Zakaria Nthiga Matumo (Deceased) that the probate court's sphere of inquiry is limited to *ascertaining what assets are available to the estate (emphasis mine)*, who the beneficiaries are and the mode of distribution of the estate.
24. Naturally, ascertaining what the assets are must of necessity involve the gathering of the net sum of assets and net sum of liabilities, to arrive at the net estate.
25. No wonder then that **Rule 7(1) of the Probate and Administration Rules** provides that;

“Rules 7. (1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars -

(a) the full names of the deceased;

(b) the date and place of his death, his last known place of residence, and his domicile at date of death;

(c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;

(d) a full inventory of *all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date)* together with an estimate of the value of his assets movable and immovable and his liabilities;

(e) in cases of total or partial intestacy -

(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39 (1) of the Act;

(ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;

(iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;

(f) the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;

(g) if the deceased died testate leaving a written will, the names and present addresses of any executors named therein; and

(h) the postal and residential addresses of the applicant.”

26. These details in the case of intestacy as herein will be captured in Form 5 in the First Schedule to the Probate and Administration Rules.

27. My clear understanding of this requirement is that once a Petitioner is notified of the existence of a liability (debt) by a creditor or once the Petitioner comes to learn of an existing proven liability (debt) owed by the estate, it is mandatory to include such a liability or debt as required above.

28. A decree against a deceased person, in the absence of a variation, setting aside or otherwise being stayed is in my view a proven liability against the estate of the deceased. It must be included in the list of liabilities in form 5 alluded to above.

29. Such a debt shall, as provided for in **Section 86** of the **Law of Succession Act**, be paid before any legacy. For emphasis, that section provides;

“Section 86: Debts of every description enforceable at Law and owed by or out of an estate shall be paid before any legacy”

I have no doubt in my mind that a decree of Court against a deceased person is a debt enforceable at Law.

30. At this point, it is opportune to look at the provisions of Section 83 of the Law of Succession Act. That Section provides;

“Section 83. 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. ”

31. From sub-section (b) above, it is quite clear that the duties of personal representatives would include getting in all free property of the deceased including debts owing to him and moneys payable to his personal representative by reason of his death and in the same vein under Sub-section (d), to ascertain and pay out of the estate of the deceased, all his debts.

32. Whereas it is correct as stated by counsel for the Petitioners that execution of a decree against a personal representative should follow the procedure under Section 37(1) of the Civil Procedure Act, that in my view does not preclude a personal representative listing a decree as a liability (if decree is not challenged) and paying out such a decree as a debt within the meaning of Section 83(d) of the Law of Succession Act.

33. Which brings me to the question whether this application is premature in that a personal representative to the estate of the deceased has not been appointed.

34. The submission by counsel for the petitioners that the petitioners herein have not been appointed as the legal representatives of the Estate of the deceased is not factually correct.

35. According to the record of Court, a Grant of Letters of Administration was made to Edward O. Okul and Tom Mboya Okul on the 25th day of October 2015.

36. The averment on oath by Edward O. Okul at paragraph 6 of his replying affidavit sworn on 2nd May 2017 is not legally tenable. For what use should this application be brought after the confirmation of grant of letters of administration at which point the estate will be distributed? This is a clear misapprehension of the Law.

37. From the foregoing, we have in place only appointed legal representatives of the deceased. They have been notified of an existing decree of Court against the deceased (hence against his estate). They have not challenged the existence and legality of that decree. They have not included it in the list of liabilities nor paid the same.

38. It is my considered view and finding that the applicant has every right to seek to have the decree (read debt) included in the list of liabilities to the estate.

39. With the result that the application herein is wholly successful. The decree arising from Nakuru High Court Case No. 35 of 1994, NBK vs Barrack Deya Okul be forthwith listed as a liability in the Petition herein and provision for its payment be made at the confirmation stage of this petition. The applicant shall have the cost of this application.

Dated and Signed at Kisii this 10th day of January, 2018.

A. K. NDUNG'U

JUDGE