



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 234 OF 2014

IN THE MATTER OF THE ESTATE OF

ROBERT NGUNDO NYIWA----- DECEASED

ELIZABETH KAMENE MUTINDA-----PETITIONER

-VERSUS-

ZIPPORAH MORAA NGUNDO ----- OBJECTOR

RULING

INTRODUCTION

1. This ruling is in respect of objector's preliminary objection (PO) dated 23/3/2016 and filed in Court on the same day.
2. In the preliminary objection, the objector raises the following points of Law;
 1. **THAT** this Court lacks Jurisdiction under the Law of Succession Act and the Probate and Administration Rules to entertain the entire Petition.
 2. **THAT** the Petition is wholly incompetent and unavailable to the Estate of the Late **ROBERT NGUNDO NYIWA** because the only available “property” in these proceedings is the pension of the deceased which does not devolve upon any personal representative of the deceased.
 3. **THAT** under Section 19 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000 (made under Section 55 of the Retirement Benefits Act – Act No. 3 of 1997, all the pension/benefits of the deceased should be paid to the nominated beneficiary only.
 4. **THAT** pension under a scheme which is subject of the Statutory/Discretionary Nomination does not form part of the Nominator's Estate.
 5. **THAT** even this petition has not undergone the mandatory procedure of Gazettement as required under Section 26 of the Law of Succession Act.
 6. **THAT** the litigation in this matter has been needlessly brought by the Petitioner and it should be terminated or struck out with costs to the Objector.

BACKGROUND

3. Robert Ngundo Nyiwa died on 22nd December, 2013, Elizabeth Kamene Mutinda petitioned for letters of administration of the deceased's estate vide a petition lodged in Court on 2nd April, 2014. She did so in the capacity of wife.
4. Subsequently, the said Elizabeth Kamene Mutinda took out a summons dated 31/3/2014 and obtained orders restraining Zipporah Moraa Mogire for collecting the deceased pension benefits from the department of defence.
5. That Summons and consequential orders elicited a summons by the said Zipporah dated 30/7/2014 seeking stay order against the orders granted to Elizabeth.
6. It emerges that there was another petition filed in the same Court being Nakuru Succession Cause No. 90 of 2014.
7. On 8th August 2014, Emukule J ordered that this cause was to be consolidated with Cause No. 90 of 2014 on 13th August, 2014. The second of 13th August, 2014 doesn't show that consolidation took place.
8. On 5th November, 2014, Zipporah Moraa Ngundo lodged a Notice of Objection objecting to the making and/or issuing of grant to Elizabeth Kamene Mutinda on grounds that she (Zipporah) was a legal wife to the deceased and the said Elizabeth had failed to disclose the objector as legal and only wife to the estate of the deceased.
9. It is during the pendency of the hearing of this objection that the preliminary objection herein was raised.

SUBMISSIONS

10. Directions were given that the preliminary objection be disposed of by way of written submissions, both parties duly complied.

OBJECTOR'S SUBMISSIONS

11. The Petitioner submits through her advocates Ms Karanja Mbugua & Company Advocates that the Petition herein is wholly misconceived. The matter before Court is purely based on money payable under a discretionary pension scheme.
12. I am referred to the book by **Justice William Musyoka "Law of Succession"** at **page 203 – 204** where the author states;

TITLE: PROPERTY WHICH DOES NOT DEVOLVE UPON PERSONAL REPRESENTATIVES

13. **"Discretionary pension scheme may allow the contributor to nominate a third party to receive benefits on the contributor's death. Such nominations are not binding on the Trustees of the scheme, with the consequence that they give no property rights to the deceased that can form part of the deceased's estate. Where the trustees do exercise their discretion in favour of the nominated person, they pay the lumpsum or pension directly to the third party."**
14. On **NOMINATIONS** at pages 32 – 33 of the said Book, His Lordship has clearly stated that funds under a pension scheme fall under rule 19 of the Retirement Benefits (Individual Retirement Schemes) Regulations 2000 (made under Section 55 of the Retirement Benefits Act (Act Number 3 of 1997) and gazetted as Legal Notice No. 118 of 2000 in Kenya Subsidiary Legislation 2000. A Nomination operates under the Rules of a particular scheme and although it does not dispose off property upon death, it does not comply with formalities of and is not subject to the Law of Succession Act. The property which is the

subject of a nomination does not form part of the nominator's estate and it cannot therefore pass under a will. It does not vest in the personal representative of the deceased as it does not form part of the deceased's estate. Consequently the payer (the person having the investment) does not require a grant of Probate or Letters of Administration before paying the funds to the nominee. All that the prayer requires is to see the nominator's death Certificate and release the funds to the nominee.

15. It is submitted that under the **Armed Forces (pensions and gratuities) – (officers and servicemen) regulation 13 states;**

“Where an officer dies while still serving in the armed forces the defence council in consultation with the treasury, may grant to his dependants a death gratuity or pension.

16. Counsel has impugned the entire petition submitting that under Section 67 of the Law of Succession Act **No** grant of representation except the grant ad colligenda bona should be made before a Notice of the Petition or application for grant has been published in the Kenya Gazette inviting objections to the same.

17. I am referred to the decisions in **Karanja – vs – Karanja [2002] 2 KLR 22, Raphael Samuel – vs – The Public Trustee and Others, Civil Appeal No. 16 of 1980 (NBI) and in the matter of the Estate of Riitho Mahira (deceased) Nairobi High Court Succession Cause No. 320 of 1991.**

18. On costs, it is urged that Elizabeth Kamene Mutinda should bear costs as she brought this matter in the current form despite having good legal counsel and even when notified of the difficulties this petition faces, counsel insisted on going on.

PETITIONER'S SUBMISSIONS

19. It is submitted for the petitioner that since the demise of the deceased, a Board of inquiry was convened by the Department of Defence as by Law Required.

20. The board made the following findings among others;

- (That the deceased left behind the following as heirs to his estate

- (a) Zipporah Moraa Mogire - Wife
- (b) Elizabeth Kamene Mutinda - Wife
- (c) June Kanini Nyiwa - Daughter
- (d) Harriet Ndinda Ngundo - Daughter
- (e) Jeffrey Nyiwa Ngundo - Son

21. On jurisdiction, it is submitted that Section 47 of the Law of Succession Act donates to the High Court unlimited jurisdiction to deal with succession matters.

22. The Department of Defence Board of inquiry has already dealt with and recommended that the estate of the deceased be dealt with in accordance with the provisions of **Section 298 (2) of the Kenya Defence Forces Act Cap 199 Laws of Kenya.**

That Section provides;

“If a member of the defence forces dies without leaving a valid will, the paymaster or any officer having charge or control of any pay, accumulation of pay, allowances, gratuity or other money or any property belonging to the member, shall pay or deliver to the personal representative...”

23. It is urged that it is upon the Court to appoint a legal representative of the estate of the deceased and determine who are the rightful dependants and/or beneficiaries thereof.

24. In view of the objection proceedings, this is only possible upon adjudication of the issues in controversy by the Court. There is no evidence of a nomination of a beneficiary as alleged and in any event this is an issue to be subjected to prove and therefore falls outside the threshold set in Mukisa Biscuit Manufacturing Company Limited – vs – West End Distributors Limited (1969) EA 696.

25. On whether failure to gazette the cause is fatal, it is submitted that having paid for the gazette of the cause, it was incumbent upon the Registrar of the Court to cause, the said Gazette. In any event it is said the objector stalled the process by lodging objection proceedings.

26. I am referred to the decision in the Estate of Isaka Muthembwa Cited in Meru Succession Cause No. 285 of 2009 and High Court Succession Cause No. 2226 of 2008 Lucy Wanjiru Kibaba and Another – vs – Lucy Wanjiru Muchena (2013) eKLR where the Court emphasized that technicalities of procedure in Succession matters are treated less seriously than in Civil matters because of the nature of the civil proceedings and the great need to focus on substance with a view to do justice to the parties.

ANALYSIS AND DETERMINATION

27. On the material before me the issues arising for determination are;

1. Whether the objector's preliminary objection meets the threshold set in the Mukisa Biscuits case (supra).
2. Whether this cause was gazetted vide a Notice in the official Kenya Gazette and if in the negative, the resultant effect.
3. Based on the answers to 1 above whether the Petition herein should be terminated or struck out with costs to the Objector.

28. The principle set in Mukisa Biscuit Manufacturing Company Limited – vs – West End Distributors Limited (1969) EA 696 sets out quite clearly what constitutes a proper preliminary objection.

29. Such an objection must be based purely on a point of law and it will not qualify as such if certain facts have to be proved through evidence.

30. On point No. 1 of the preliminary objection, it is stated that the Court lacks jurisdiction under the Law of Succession Act and the Probate and Administration Rules to entertain the entire Petition.

31. Section 47 of the Law of Succession Act gives the High Court an unlimited jurisdiction to deal with any dispute under the Act it states;

“S 47: 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.”

32. According to Section 1 of the Law of Succession Act, the said Act came into operation on 1st July, 1981.

33. Section 2(1) of the said Act provides

“Section 2(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.”

34. In our instant suit, the deceased Robert Ngundo Nyiwa died on 22nd December, 2013. He died intestate.

35. It follows then that the intestate succession to his estate falls squarely under Section 2(1) of the Law of Succession Act the deceased having died after the commencement date of the Act.

36. To state therefore, that this Court has no jurisdiction to determine the dispute herein flies on the face of the Law and is not tenable based on the very clear provisions stated above.

37. It matters not that a property (in this case a gratuity of Kshs. 800,000) may be subject to distribution under any other written law.

38. The fact of the matter is that upon the demise of the deceased it is legally necessary to have appointed an administrator to the estate of the deceased. If in the end it is found that there was no property to distribute or that any property listed as an asset was not subject to distribution under the Act, it will be the duty of the Court so to pronounce.

39. Certainly, to arrive at whichever finding under paragraph 38, evidence would have to be called supporting either side including but not limited to the citation of any existing Law that may oust the jurisdiction of the Court to deal with any or all the property of the deceased if at all.

40. Based on the above preliminary objection No. 1 comes a cropper and must fail.

41. Preliminary point No. 2 is anchored on the fact that the only property of the deceased is the pension payable by the employer and which does not devolve upon the personal representative of the deceased. This preliminary objection is not a pure point of Law within the principle in the Mukisa Biscuit case. It is only after adduction of evidence that the extent of the property would be determined and also the question of which property devolves to the personal representative determined.

42. Preliminary objection No. 3 is a statement of the Law (Section 19 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000 (made under Section 55 of the Retirement Benefits Act – Act No. 3 of 1997. It is the objector's case that all the pension benefits of the deceased should be paid to the nominated beneficiary only.

43. The above preliminary objection, too, cannot stand. It is during the hearing that the question whether a beneficiary had been nominated by the deceased will be determined. Again, parties will have to submit on the interpretation of the quoted law vis-a-vis the Law of Succession Act.

44. The position taken in paragraph 43 above applies Mutatis Mutandis to preliminary objection No. 4.

45. The preliminary objection No. 5 challenges the propriety of the Petition filed herein stating that the petition flouts Section 26 of the Law of Succession Act in that the Petition was not gazetted as required under this Section.

46. My reading of the Act shows that the quoting of Section 26 of the Law of Succession Act is in error as that Section deals with provision for dependants. Nevertheless, it is clear that the objector's reference is to the Gazette Notice envisaged under Section 67 Laws of Kenya and Rule 7(4) of the Probate and Administration Rules which states;

“Rule 7(4): The Registrar shall cause to be inserted, at the cost of the applicant, in the Gazette and, if he so decides, in a daily newspaper, and to be exhibited conspicuously in the

courthouse attached to the registry where the application is intended to be made, a notice of the application for the grant in Form 60 inviting objections thereto to be made known to that registry within a period, to be specified in the notice, of not less than thirty days from the date of the last of such publications”.

Indeed in submissions counsel corrects this position.

47. The Objector may as well be referring to the Notice envisaged under Rule 26 of the Probate and Administration Rules to every other person entitled in the same degree as or in priority to the Applicant. Since no grant has been made yet, no party is prejudiced for failure of this notice.

48. So was this cause gazetted? I have meticulously gone through the record herein, I have not come across any evidence of gazettelement of this cause.

49. Of note is that no grant has been issued yet.

50. The position taken by counsel for the Petitioner in his submissions on this aspect is that it is the duty of the Registrar or Resident Magistrate under Rule 7(4) of the P & A Rules to cause Gazettelement. The Petitioner discharged her duty upon payment of the requisite fees and in any event the objector stalled the process upon lodging objection proceedings.

51. A proper interpretation of Section 67 and Rule 7(4) would inevitably arrive at the conclusion that the purpose of gazettelement out of the Notice of the institution of the petition is to notify the public in order that anyone who would be interested in the estate either by way of being a beneficiary, creditor, debtor or however interested in the estate would come out and either object to the issuance of the grant or gain entry into the proceedings as may be provided in the Law relevant to the persons relationship to the deceased estate.

52. The issue of this notice is a key component in the process of Succession and cannot be wished away. Indeed within the wording of **Section 67 of the Law of Succession Act**

“No grant, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant inviting objections thereto to be made known to the Court within a specified period of not less than 30 days from date of publication and the period so specified has expired”.

53. In our instant suit, and as observed earlier, no grant has been issued yet.

54. The fact of the matter is that even assuming that the Objector got no notice of this Petition and the Petitioner proceeded in the matter unhindered, this Court would not possibly issue a grant owing to the mandatory requirement of notice under Section 67 of the Law of Succession Act.

55. This Succession is still in process. Indeed the course of the process was diverted by the process of interlocutory applications by both sides before a full objection to issuance of grant and a cross petition was filed.

56. The failure of Gazettelement cannot be fatal to this Petition at this point in time. The Succession Cause is work in progress. The fatality would only arise when either a grant is issued without the requisite notice, in which case the grant would be revoked for the proceedings being defective in substance under Section 76(a) of the Law of Succession Act, or where on moving the Court to issue the grant, the Judge would decline for the obvious reason.

57. This is not to say that the Court is satisfied with the state of affairs in this petition.

58. Even at this point in time. There could be persons out there interested in the estate yet they have no notice. The matter is being litigated on and this may give rise to Court orders adverse to other interested

parties without notice.

59. As far as procedure is concerned when the Petition is lodged in court, among the mandatory payments is for the publication of the notice in the Kenya Gazette. How a Petition lodged in Court on 2nd April 2014 remains in our registry ungazetted is a serious indictment of our registrars and registry processes. No wonder, counsel for the Petitioner is throwing the buck at our door.

60. In view of the foregoing, I am of the considered finding that the points of preliminary objections as raised fail the critical test. For reasons stated none succeeds and the preliminary objection is dismissed in its entirety.

61. This petition needs to be moved forward. I have observed that the Gazettement of the notice of the institution of this cause has not been published. For the sake of the other parties who may be interested in the estate and the general public, the Deputy Registrar is to cause the Gazettement of this cause within the next 30 days hereof.

62. The Preliminary Objection is dismissed. Costs awarded to the Petitioner.

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

A. K. NDUNG'U

JUDGE