



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 159 OF 2015

IN THE MATTER OF THE ESTATE OF NATHAN OANDA OMARI.....DECEASED

BETWEEN

BENSON NYAGAKA MOKUA

JOSEPH MOKUA ABUGA.....APPLICANTS

VERSUS

DOUGLAS KIBIWOTI BARISA

LILIAN CHEMTAI TOWETT.....RESPONDENTS

RULING

1. This ruling relates to the application dated 24th February 2017 brought under **Rule 49 and 73 of the Probate and administration Rules, Section 66, 76 and 47 of the Law of Succession Act** in which the applicant seeks orders that:

1. Spent.

2. The Honourable Court issue a restraining order against the Respondents DOUGLAS KIBIWOTI and BARISA LILIAN CHEMUTAI TOWEET from administrating and or intermeddling in the estate of the late NATHAN OMAR OANDA by themselves or anyone acting and on behalf of them pending the hearing and determination of this application.

3. The grant of Letters of Administration issued to DOUGLAS KIBIWOT BARISSA and LILIAN CHEMUTAI TOWEET on 23rd February 2016 be revoked.

4. The certificate of confirmation of grant and all proceedings in the Cause Succession Cause 159 of 2015 Kisii be reviewed and dismissed.

2. The application is premised on the grounds that matters relating to the estate of the late **Nathan Omari Oanda** (hereinafter “the deceased”) were determined vide Kisii Succession Cause No. 442 of 2015 which was subsequently transferred to Nyamira High Court as Nyamira H. C. Succession Cause No. 181 of 2015 (hereinafter “Nyamira Case”). It is therefore the applicants’ case that the instant succession cause is duplicitous and further that the respondents herein are strangers to the estate of the deceased.

3. The application is supported by the affidavit of the first applicant JOSEPH MOKUA ABUGA sworn

on 24th February 2017 in which he repeats the grounds stated in the summons for revocation of grant and reiterates that since the Nyamira case has by consent already been confirmed as shown in the certificate of confirmation of grant dated 22nd July 2016, that was attached to the affidavit, it was not open for the respondents to continue pursuing the instant Succession Cause.

4. It was the applicants' case that the respondents are at liberty to pursue their stake, if any, in the deceased's estate through the Nyamira case and that all the assets of the estate of the deceased had been disposed off following the confirmation of grant at Nyamira.

5. The respondents did not tender any response to the application despite having been served with the same and further that they did not attend court on the hearing date despite service with the hearing notice.

6. I have carefully considered the application dated 24th February, 2017 the supporting affidavit and the annexures thereto. I have also considered the oral submissions made by the applicant's counsel at the hearing of the application. The main issue that presents itself for determination is whether the applicant is entitled to the orders sought.

7. My take is that even though the application was not opposed by the respondents who did not file any response to it or appear in court during the hearing, the case involves the administration of the estate of the deceased and this court is under a duty to consider all the facts and the law before arriving at its considered determination.

8. The main gist of the applicants' application is that since the Nyamira case has already been determined, then the instant succession cause should be done away with by revoking the grant issued on 23rd February 2016 and the subsequent Certificate of Confirmation grant, and further that the respondents should be restrained from administering the estate of the deceased.

9. With all due respect to the applicant and his counsel on record, I note that their appreciation of the doctrine of *res subjudice* is not correct. I say so because I note that the instant succession was filed before succession cause No. 442 of 2015 that was eventually transferred to Nyamira court. Under the above circumstances, I find that the Nyamira case was not properly before the court in view of the fact that it related to the same estate of the deceased that was already the subject matter of the instant case.

10. The rationale behind the *sub-judice* rule is to prevent parties from filing numerous cases before different courts over the same subject matter.

11. In the instant case, I find that it was not proper or procedural, for the respondents to file succession cause no. 442 of 2015 before Kisii High Court or before any other court for that matter when this succession cause No. 159 of 2015 was already pending before the same court. I find that it does not matter that the Nyamira case was eventually determined, through the confirmation of grant, earlier than the instant case. The bottom-line is that the instant case was filed prior to the Nyamira case and the mere fact that the Nyamira case was determined earlier than this case does not validate the Nyamira case or entitle the applicants to the orders sought in the instant application. It is therefore my finding that the applicant, having acknowledged that this petition was filed prior to the cause that was transferred to Nyamira High court, was precluded from proceeding with the second case as to do so would contravene the clear rules of Res sub Judice.

12. **Section 6** provides for the doctrine of *Sub Judice* as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having the same jurisdiction in Kenya to grant the relief claimed.”

13. The sections of the law relied on by the Applicant is section 47 of the Law of Succession Act, which gives this court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice. The Applicant wants this Court using this law to stop the Respondents from intermeddling with the estate of the deceased.

14. I note in this regard that section 45 of the Law of Succession Act is the operative law when seeking to stop intermeddling with a deceased's estate and provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

15. In the instant case, the applicants seek orders, inter alia, to restrain the respondents from administering or intermeddling in the estate of the deceased. They also seek the revocation of the grant issued to the respondents herein on the basis that the Nyamira case has already been determined. I note that the applicants have not specified what constitutes intermeddling with the estate of the deceased or how the court can stop persons duly appointed as administrators of the estate of the deceased can be restrained from administering his estate.

16. Section 76 of the Law of Succession Act under which this application has been filed stipulates as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;

or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

17. I find that none of the conditions set out by the above Section for revocation of grant have been proved by the applicants. The allegation that the respondents are strangers to the estate of the deceased is a claim which is not consistent with the documents filed before this court that show that the 1st and 2nd respondents are the widow and son of the deceased respectively. Be that as it may, even assuming that the

allegation was true, the issue of whether or not the respondents are related to the deceased is an issue that can only be determined after the full hearing of objection proceedings should the same be filed by the applicants.

18. Consequently I find that the instant application is misconceived and the order that commends itself to me is the order to dismiss. By dint of the provisions of section 47 of the Law of Succession Act, I on my own motion hereby annul the said grant issued in the Nyamira Petition, in which case, its confirmation does not arise. Having regard to the fact that both the Nyamira petition and the instant petition refer to the same estate, I would direct that the said Nyamira file be consolidated with the present petition for the purposes of ease of reference in the event that any party wishes to make any further application(s) over the said estate.

19. In a nutshell therefore, I find that the instant application lacks merit and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court this 27th day of February, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Mugun for the Applicants

N/A for the Respondents

Omwoyo: Court Clerk