



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS CAUSE NO.26 OF 2017

TITUS MWIRIGI.....APPLICANT

versus

IMELDA MURAMBA JUMA.....RESPONDENT

RULING

PLEADINGS

By an application filed on 22nd February 2017 the Applicant sought orders that this Court issues *limited grant ad litem* to the Respondent for purposes of defending the estate of the late Prof. Francis Doil Juma in **High Court ELC 826 of 2016**.

The Applicant based his application on grounds that he filed **ELC 826 of 2016** for an order of specific performance following a Sale Agreement with the Respondent for sale of suit property.

The Respondent now widow of the deceased Prof. Francis Doil Juma was appointed guardian of the subject and manager of her late husband's estate in **Misc Application 16 of 2014**. The Court order appointing the Respondent Guardian and Manager is annexed to the application and the Agreement for Sale of suit property is also annexed and the Plaintiff of the Subject suit filed in ELC Division of the High Court is also annexed.

The Applicant sought the limited grant issued to the Respondent so as to defend the suit in **ELC 826 of 2016**.

FACTS:

The Respondent was the Guardian and Manager of the estate and its affairs prior to the death of Professor Francis Doil. This was pursuant to a court order dated 9th July 2014. A *sale agreement* and transaction between the parties hereto was entered into on 23rd February 2015 in relation to land parcel No L.R No 1338/123. The Applicant made payments of **Kshs. 2,500,000** which was deposited in the Respondent's account on 11/03/2015. The Applicant expected the Respondent to fulfill her part of the agreement which she failed to do so. Through a letter dated 24th March 2015, the Respondent opted not to proceed with the transaction. By various correspondences exchanged between the parties' advocates, the Respondent failed to fulfill her obligations.

The Applicant herein then filed a suit in Nairobi **ELC No.826 of 2016** for an order of specific performance in relation to the suit property. Thereafter, the Respondent in her defense disclosed that the owner of the suit property, Professor Francis Doil had in fact passed away on 12th May 2016 and therefore she has no legal right to sell the land as she had not obtained the Grant of Letters of Administration.

Thereafter the Applicant filed an application to this Court, by Notice of Motion, for orders that the Respondent be issued Grant of Letters of administration *ad litem* for purposes of defending the Estate of the late Professor Francis Doil Juma in the case before the Environment and Land Division of the High Court **ELC No.826 of 2016**.

This court granted directions that the preliminary objection be disposed of by way of written submissions. The Applicant filed a Replying affidavit on 20th April 2017 and the Respondent filed written submissions on 31st October 2017 opposing the application and supporting the Preliminary Objection.

It was the Applicant's contention that the said P.O. has no merit and should be dismissed with costs. He avers that the service of a citation is

not a requirement when a limited grant is being sought and that a citation is required where the letters of administration are sought to be issued to any other person. There is also no statutory requirement for issuance of citations to the dependants. She only has to demonstrate whether she falls under the category of dependants or not. Since the Respondent is the immediate Guardian and Manager, she should therefore be appointed by the Court. Regarding the question whether the agreement for sale was rescinded, the Applicant states that the ELC Court only can determine this.

The Respondent filed Notice of Preliminary Objection on 04th November 2016. Therein the Respondent raised the following issues:

- 1. The Applicant has not, prior to filing of the said Notice of Motion, served any Citation upon the persons beneficially entitled to inherit the estate of the Deceased as required in Law.**
- 2. The Applicant has no *locus standi* to file the present Notice of Motion herein as the same is based on an Agreement for Sale that was effectively rescinded vide the Respondent's letter dated 24th March 2015 and the suit (E.L.C. NO. 826 of 2016) in which the Applicant wants the Respondent enjoined to is in itself time-barred under the Mental Health Act.**
- 3. The entire Application is therefore incompetent, fatally defective, bad in Law and an abuse of the process of the Court, hence the same should be struck out with costs.**

This court gave directions that the preliminary objection be disposed of by way of written submissions. The Applicant filed a Replying affidavit on 20th April 2017 and further by written submissions filed on 31st October 2017 opposing the Preliminary Objection. It was the Applicant's contention that the said P.O. has no merit and should be dismissed with costs. He avers that the service of a citation is not a requirement when a limited grant is being sought and that a citation is required where the letters of administration are sought to be issued to any other person. There is also no statutory requirement for issuance of citations to the dependants. She only has to demonstrate whether she falls under the category of dependants or not. Since the Respondent is the immediate Guardian and Manager, she should therefore be appointed administrator of the deceased's estate by the Court. Regarding the question whether the agreement for sale was rescinded, the Applicant states that the Court only can determine this.

DETERMINATION

A Preliminary Objection is defined in the **MUKISA BISCUIT MANUFACTURING CO. LTD VS WESTEND DISTRIBUTORS LTD [1969] E.A. 696** as:

"...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

I am therefore of the opinion that the objections raised by the Respondent, constitute pure points of law.

In relation to the first objection on the service of a citation, **Section 62 of the Law of Succession Act** which provides;

'letters of administration shall not be granted to any other person until a citation has been issued...Provided that there may be such limited grants of letters of administration in accordance with the provision of section 54 of this Act as may, in the opinion of the court, be necessitated by any special circumstances.'

The Court has the discretion of limiting grants to any of the forms listed in the **5th Schedule of the Law of Succession Act**. A limited grant is issued after the beneficiaries' petition the Court for a grant of letters of representation and due to pressing urgent and special circumstances, the Court is satisfied and issues limited grant for the specific stated purpose pending obtaining the full grant.

The Respondent cannot be issued Grant of Letters of administration at this stage and in the present circumstances because she has and did not apply for the limited grant herself. There are no reasons presented to this Court on why the family of the deceased has not begun the process of obtaining a grant of letters of administration intestate for the deceased's estate in line with **Section 66 of Law of Succession Act Cap 160**.

Rule 22 of the Probate and Administration Rules, 1980 provides;

'A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto'

The Respondent was guardian of the subject and Manager of his estate. Upon his death, the guardianship and management of his estate ceased and the only legal process to administer the deceased's estate is as provided under **Law of Succession Act Cap 160 whose Preamble provides; 'the law relating to intestate and testamentary succession and the administration of estates of deceased persons'**.

So that the present application is misplaced because, the family of the deceased has not embarked on instituting a Succession Cause through filing petition for grant of letters of administration of the deceased's estate. To allow or grant the instant application is tantamount to seamlessly but illegally and unlawfully transiting from proceedings under the Mental Health Act which were operational and applicable when the deceased was alive to a Succession Cause without instituting the Succession Cause by filing a petition or a beneficiary, dependant or creditor filing and serving the beneficiaries of the deceased's estate with a citation. The present case is not one that this Court can exercise

discretion as allowed by **Section 62 of the Act** as the application is not properly before Court and there is no Succession matter before this Court.

Secondly, it is unprocedural for the Applicant to file without the Respondent's knowledge, approval or consent an application to grant the Respondent limited grant to defend **ELC No.826 of 2016** where the Applicant is the Plaintiff. The Respondent ought to file the application for limited grant herself and if anyone files on her behalf reasons are advanced for the Court to consider. In the absence of the Respondent's authority to allow the Applicant to file for limited grant on her behalf; the application is moot.

This Court agrees with the Respondent's submission that the Applicant is not related to the deceased in any way, neither by way of consanguinity nor affinity and therefore a stranger to the estate. The Applicant can therefore not be issued the citation to serve to the Respondent as he is not entitled to a grant in the event she renounces her right.

The Applicant has no **locus standi** to file the Notice of Motion as the Agreement of Sale was rescinded. The High Court (Family Division) is restricted to matters involving the family unit and therefore cannot decide on whether a contract is valid as that is dealt with in a different forum. Regarding the Applicant's claim that the said **E.L.C. 826 of 2016** is time barred, the claim can only be entertained by the Environment and Land Court but not in the Family Division of the High Court.

DISPOSITION

Consequently, the Preliminary Objection is upheld and the Applicant's application Notice of Motion dated 22nd February 2017 is dismissed with costs to the Respondent.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH MARCH 2018

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

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