



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC SUCC NO. 34 OF 2017

IN THE MATTER OF THE ESTATE OF DAVID KAINDI MBULUI (DECEASED)

ESTHER NDETEI MBULUI

ERICK MUSYA KAINDI.....PETITIONERS

VERSUS

DANIEL KIOKO KAINDI.....OBJECTOR

RULING

1. By a Notice of Motion dated 13/04/2017, the applicant sought the following orders:-

- a) **THAT** an order do issue for the objector to start depositing rent in court starting from April 2017 for his commercial use and income derived by his operating of a Club (Bar) and Restaurant on MACHAKOS/KONZA NORTH BLOCK 1/122 pending hearing and determination of this cause.
- b) **THAT** an order do issue for the Objector to furnish accounts in court for all the income and/or Rent which he has earned from the Estate and more specifically his commercial use of Machakos/Konza north block 1/122 pending hearing and determination of this cause.
- c) **THAT** in the alternative, an order do issue directing the Objector to close and/or stop operating both the Club (Bar) and Restaurant he is operating on MACHAKOS/KONZA NORTH BLOCK 1/122 pending hearing and determination of this cause.
- d) **THAT**, the costs of this application be borne by Respondent.

2. The same is supported by grounds:-

- (i) *That sometimes back, the objector started operating a Club (Bar) and a restaurant on MACHAKOS/KONZA NORTH BLOCK 1/22 and has declined to account for the proceeds and rent.*
- (ii) *That the use is commercial in nature thus he is getting income from the Estate.*
- (iii) *That the Objector should be ordered to account for the rent income derived from the Estate for the said use which is not for subsistence by commercial in nature.*

(iv) That the Objector should also be ordered to start depositing rent in Court from April 2017 until the cause is heard and determined as the commercial use is not authorized by the Estate.

(v) That in the alternative, the objector be ordered to close down the Bar and restaurant pending the hearing and determination of this cause.

(vi) That it is in the interest of Justice to grant the orders sought.

3. The application is further supported by affidavit of Esther Ndele Mbulu sworn on 13/04/2017 which retails the content of the grounds.

4. The Respondent opposes same and he has filed a Replying Affidavit which he swore on 22/09/2017.

5. Parties agreed to canvass the application via written submissions which they filed and exchanged.

PETITIONER/APPLICANT SUBMISSIONS.

6. This court is vested with jurisdiction by the Law of Succession Act to grant the prayers sought.

7. Section 45 proves thus;

No intermeddling with property of deceased person.

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall –

(a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

8. The objector was directed on the 29th June 2017 to render accounts and up to date, he has never obeyed the said orders of court. He thus remains in contempt of court a clear indication that he is not taking these proceedings seriously.

9. Under S. 47 of Law of Succession Act provides as follows:-

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.

10. This court should thus protect the Estate from the unauthorized commercial use by the Objector pending the determination of the Estate.

11. It is not in dispute that the Objector is a son of the deceased and the Petitioners are not objected to his use of the Estate for any subsistence use. However, they are objected to the commercial use of which he has declined to pay rent for that long.

12. Therefore, unless the court exercises its jurisdiction, the Estate will continue to lose income which is contrary to the law.

13. Further, the operation of a club on the said property goes against the wishes of the deceased who was a devoted Christian. As such, the Petitioners don't want to go against the sentimental value and attachment of the Estate regarding the said land.

14. They thus pray for the court to allow the Application as prayed with costs to the Petitioner.

15. The objector are object to only prayer 4 on the face of the said Application reason being that there is a similar Application dated 20th August 2013 on which parties took directions on the 6th October 2015 for it to be heard through viva voce evidence.

16. After taking the said directions, parties filed witness statements and the said directions have never been set aside. As such, the said prayer should be struck off for duplicity and going against the orders of the court as stated above.

17. On the issue of prayer 2, the Petitioners are not objected to the same save that the Objector should bear their expenses and costs together with recording their statements, filing and serving the same. The Petitioners are actually shocked why the Application had to be filed in the first place as parties were directed on the 6th October 2015 to file witness statements for their witnesses. Why did he not file their statements then? The Petitioners submit that the Application was made to scuttle the hearing of the main Application thus the Petitioners pray for costs too.

OBJECTORS SUBMISSIONS

18. The matter before this Honourable Court is one of succession the main issue being the Objector seeks distribution of the Estate of David Kaindi Mbului the Objector's father. What the Petitioner in both the affidavits dated 13th April 2017 and 9th October 2017 raises the following issues that this Honourable Court needs to address.

a) Are the structures on Machakos/Konza North Block 1/122 structures that were built by the Deceased before his death on 31st December 2002?

b) How did the Objector come to be in possession of the premises on Machakos/Konza North Block 1/122?

c) Are the issues being raised herein issues that can be addressed at the full hearing of this matter herein?

19. The Petitioners herein are Administrators of the Estate of David Kaindi Mbului who died on 31st December 2002.

20. To date they have neglected and or refused to distribute the estate to the beneficiaries and instead opted to have all the deceased property registered in the name as owners.

“Refer to Objectors affidavit dated 20th August 2013 filed on 21st August 2013 on record in this matter.”

21. The Objector in his replying affidavit dated 22nd September 2017, avers to having been in possession of the property in question since 2006.

22. The property **Machakos/Konza North Block 1/122** is currently in the name of the Administrators/Applicants and the title deed is dated 18th July 2007, five (5) years after the demise of the Deceased.

23. The Objector herein on 20th August 2013, filed an application seeking to revoke a confirmed Grant issued to the Applicants on grounds that the Applicant had omitted properties that belonged to the

deceased from the Succession Cause and further that they have failed, neglected and/or refused to distribute the estate.

24. On 11th March 2016 the Objector while giving evidence in support of the Application, addressed the issue of **Machakos/Konza North Block 1/122** property having been a property gifted by the deceased during his life time to the Objector, as Administrators of the estate of David Kaindi Mbului and the same seeks to confuse and divert the courts attention from the issue to be addressed but which was currently in the Applicants names produced an affidavit sworn by Irene Mkacharo Kaindi (**refer to affidavit dated 23rd August 2001 filed in (OS) 1433 of 2001**) confirming this. The Objector had not completed giving his evidence and the matter was scheduled to proceed on another date.

25. The Locus of the Applicants as Administrators has been challenged by the Objector, while at the hearing Machakos High Court and alleged that **Machakos/Konza North Block 1/122** is a property not deemed to fall under the estate of David Kaindi Mbului, but the matter was transferred to Makueni after the Judge who had part heard the matter transferred.

26. It is rather mischievous for the Applicants at the juncture to file the application dated 13th April 2017 seeking order on an issue raised in, evidence previously tendered by the Objector in court before Hon. Justice Muriithi.

27. For the Applicants to proceed with such prayers at this juncture not only implies mischief but also malice on their part, that is clearly intended to avoid having to deal with the evidence that confirms the Objectors continuous averments of their failing and neglects of the Applicants as Administrators.

28. The Applicant in their affidavit clearly confirms that in fact the Objector is in possession of **Machakos/Konza North Block 1/122**, the questions being:-

a) Is the Objector renting out the premises on **Machakos/Konza North Block 1/122**?

b) Were the premises on **Machakos/Konza North Block 1/122** constructed by the Deceased David Kaindi Mbului?

29. The Objector in his response states he has possession of the property **Machakos/Konza North Block 1/122** and has resided there in 2006. A fact the Applicants have not disputed. The Objector being an adult of sound mind may choose to reside with whoever he chooses as a wife, his marriage not being an issue before this court.

30. He further states that the structures on the property were constructed by him using his funds and those from Ruth Chepkorir. If this Honourable Court chooses to request proof the same can only be established and produced at a full hearing.

31. The Petitioners have since the commencement of the objection filed herein, failed to address the main issues:-

a) **Why has the estate of the David Kaindi Mbului not been distributed to date?**

b) **What is the extent of David Kaindi Mbului estate?**

c) **What portion is every beneficiary entitled to?**

32. It is our humble opinion that parties herein ought not to digress to issue at hand.

33. Section 72 states:-

“After an expiry of a period of six months, or such shorter period as the court may direct under

subsection (3), from the date of any grant of representation, the holder thereof shall apply to the Court for confirmation of the grant in order to empower the distribution of any capital assets.”

34. Further that:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the representatives identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

35. The Objector herein has been denied his share of the estate of David Kaindi Mbului and despite being in physical possession of **Machakos/Konza North Block 1/122**, the title bears the name of the Administrators who have failed, neglected and/or refused to distribute the estate.

36. On 29th June 2017, the court directed the Objectors to render accounts in the absence of a response to the application by the Objector. These directions having been issued based on misdirection by the Petitioners/Applicants Counsel.

37. The objector had not replied to the application and as a result any information placed before Court was one sided.

38. The Objector having replied on 22/09/2017 has established and states that he has been in possession of **Machakos/Konza North Block 1/122**, a fact not disputed by the Administrators. The Objector possession arises from being a dependent of the deceased who gifted the land to him.

39. The Administrators have placed no evidence before this Honourable court establishing that the premises on **Machakos/Konza North Block 1/122**, existed and were actually constructed by the Deceased herein and as such the order sought in prayer 2 of the application dated 13/04/2017 are brought before this court out of malice and with clear intentions to avoid distributing the estate.

40. The Administrators do not show if at all they have contributed to the existence of the premises on **Machakos/Konza North Block 1/122**, or how closing down an establishment would benefit the estate.

41. In fact we do submit that if at all it is established at the full hearing that any proceeds from **Machakos/Konza North Block 1/122** fall within the properties of the estate herein it would result in additional income for the estate to distribute. Hence our submissions that the issues raised can be determined at the full hearing of this matter.

42. Section 27 of the Law of Succession gives un-fetered discretion to this court in sharing the estate among the dependents, the dependents being clearly set out in Section 29. The deceased herein died in 2002, it is only fair and just that the dependents of the deceased David Kaindi Mbului receive their share of the estate.

43. The orders sought in prayer 2 of the Application dated 13th April 2017 can be comprehensibly addressed at a full hearing of this matter, hence prayer 2 of the application dated 13/04/2017 should be denied, and this matter proceed for full hearing by way of viva voice evidence as directed on 6th October 2015.

ISSUES AND DETERMINATION

44. After going through the material in the court and parties submissions, I find core issue is –

- **The identification of parties/beneficiaries shares.**

- **Whether objector should be compelled to render account as ordered by the court?**

45. The Petitioners' complaint is principally that, the objector was directed on the 29th June 2017 to render accounts for the premises he occupies which form part of the deceased estate, and up to date, he has never obeyed the said orders of court. The Petitioners thus contend that the Objector remains in contempt of court a clear indication that he is not taking these proceedings seriously.

46. The Objector started operating a Club (Bar) and a restaurant on MACHAKOS/KONZA NORTH BLOCK 1/22 and has declined to account for the proceeds and rent.

47. The Petitioners submit that the estate of the deceased should be protected. They are objecting to the commercial use of which he has declined to pay rent for that long.

48. The Objector contention is that there is application dated 20/08/2013 seeking revocation of grants, inclusion of omitted deceased properties and distribution of the estate herein.

49. The grants were issued on 15/07/2005 and to date no identification of beneficiaries' shares nor has distribution. The objector contend that, on 11th March 2016 while giving evidence in support of the Application, he addressed the issue of Machakos/Konza North Block 1/122 property having been a property gifted by the deceased during his life time to the him.

50. The said application is partly heard and the instant application is intended to derail the same hearing. He claims to be in possession and being the developer of the same structures therein.

51. To say the least I have perused the file and am not impressed in the handling of the instant matters and un-necessary delays in finalizing the same.

52. Section 72 states:

“After an expiry of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the Court for confirmation of the grant in order to empower the distribution of any capital assets.”

Further that:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the representatives identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

53. Instead of complying with the aforesaid provisions of the law, the parties are engaging in collateral issues which will not expedite the disposal of the disputes herein.

54. To expedite the conclusion of this matter, the court finds it just to make the following orders;

- i. The hearing of application dated 20/08/2013 to be concluded on priority basis.**
- ii. The instant application is stayed and the issues raised to be raised in the above hearing.**
- iii. Costs in the cause.**

SIGNED, DATED AND DELIVERED THIS 19TH DAY OF APRIL, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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