



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL SUIT NO.1 OF 2018

HAWO SHANKO.....PLAINTIFF

VERSUS

MOHAMED UTA SHANKO.....DEFENDANT

RULING

The Plaintiff filed this suit seeking orders of injunction restraining the defendant from intermeddling or dealing with the property forming the estate of the late **Adima Huta Chuka**. The Plaintiff is also seeking an order reversing or cancelling the transfer of **Plot number Marsabit Town 236** to another person that was done after the deceased had passed on. The parties herein are children of the deceased.

The defendant raised a preliminary objection to the Plaintiff's suit. The nature of the Objection dated 23rd January, 2018 is as follows: -

Take notice that the defendant shall prior to the hearing raise a Preliminary Objection on a point of law against the entire suit on ground that the plaintiff lacks the necessary locus to institute the instant suit as she has not obtained a grant of representation to the estate of DIMA HUTA CHUKA (Deceased).

Mr. Cheruiyot appearing for the defendant submitted that the Plaintiff lacks the necessary locus to institute the suit. It is admitted in the plaint that no petition or application for a grant has been made. Without a grant, no one can deal with a deceased's property including the preservation or collection of the estate. Leave of the Court is not required to taken out letters of administration. The plaintiff ought to have first filed an application for a grant limited to the filing of the suit.

Mr. Wakoko, Counsel for the plaintiff, submit that the suit herein is brought under Sections 45 and 46 of the Law of Succession Act. Section 45 deals with intermeddling of an estate when no grant has been issued. Section 46 deals with the estate itself to avoid wastage. The plaintiff has sued her elder brother. Part of the estate has been registered in the defendant's name. Plot number, 345 Mountain has been apportioned without the applicant's input. The Court granted the applicant and any other beneficiary the right to apply for a grant of letters of administration. That order has not been set aside.

The parties herein are a brother and a sister. The dispute involves the estate of their late father, **DIMA HUTA CHUKA** who died on 20th September, 2017. According to the plaint, the deceased was survived by a widow, **ASHA SANKO**. Two sons and eight daughters. The nature of the Preliminary Objection is that the Plaintiff ought to have first obtained a grant limited to the filing of the suit before filing the suit. The issue at hand is whether the Plaintiff lacks the requisite locus to file this suit in view of the fact that she did not obtain a limited grant before filing the case in Court.

The record shows that the suit was contemporaneously accompanied with an application seeking interim orders of injunction as well as an authority to take out a grant of representation for the estate of the deceased. Counsel for the Plaintiff contends that the suit is brought under Sections 45 and 46 of the Law of Succession Act Cap. 160.

Section 45 of Cap. 160 states as follows: -

(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.

Section 46 of the Law of Succession Act deals with duties of officers in relation to protection of a deceased's property.

The issue as to whether a party can file a suit involving a deceased's estate before obtaining a limited grant has been the subject of several Court cases. The general consensus is that a party lacks the *locus standi* to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit. The leave of the Court is not required before one seeks a grant limited to the filing of the suit. The orders granted to the plaintiff herein authorizing her to seek a grant of letters of administration are superfluous and cannot assist her. She ought to have sought a limited grant first before filing this suit. The Judgement by Justice **M.A. Ang'awa** (as she then was) **in Nairobi Succession Cause No.1731 of 2000**, in the **matter of the estate of MORAJI BHANJI DHANAK** (deceased) delivered on 30th November, 2000 is to the effect that a grant limited to the filing of a suit has to be issued before the suit is filed.

In the case of **MORJARIA V ABDALLA [1984]KLR, 490** holding No.7 of the Court of Appeal reads as follows as page 491:-

Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the Law of Succession Act as provided by rule 36(2) of the Probate and Administration Rules, the grant was specifically limited to "the purpose only" of representing the appellant in his appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal.

In the case of **JULIAN ADOYO ONGUNGA V FRANCIS KIBERENGE ABANO Migori Civil Appeal No.119 of 2015**, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

"Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

The effect of the above cases is that for a party to have *locus standi* and appear in a case involving a deceased person, he or she must first obtain a grant limited for that purpose.

There is no dispute that the plaintiff did not obtain a limited grant allowing her to file this suit. Such a grant is the key which allows the plaintiff access to the Court. Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who

has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes **void ab initio** and cannot be resuscitated by the issuance of a subsequent limited grant.

Section 54 of the Law of Succession Act provides as follows: -

A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule.

Similarly, the 5th Schedule to the law of succession Act provides for grants limited for specific purposes. There is a general consensus that paragraph 14 of the 5th Schedule empowers the Court to issue a grant for the sole purpose of filing a suit. The paragraph reads as follow:-

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letter of administration may be granted to the nominee of a party in the suit, limited for the purposes of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matter at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

The Law of Succession Act clearly allows a party to obtain a grant limited to a specific purpose. Section 67 of the Act provides that a limited grant need not be publicized for purposes of inviting objections. Rule 36(1) of the Probate and Administration Rules states as follows:

Where, owing to special circumstances the urgency of the matter is to great that it would not be possible for the court to make a

full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

All the above provisions are avenues enabling a party obtain the relevant grant before approaching the Court. The mere fact that one is a son, daughter, wife or husband of the deceased is not sufficient. That relationship does not give the *locus standi* to the deceased's relatives to file suits before obtaining limited grants. One's relationship to the deceased does not clothe such a party with the *locus standi*. It is the limited grant which does.

Since the plaintiff did not obtain a grant limited to the filing of the suit, I do find that the suit herein cannot be sustained. However, the defendant should be made aware that transferring a deceased's property to another person without obtaining a confirmed grant is unlawful and punishable by imprisonment.

In the end, I do agree with the Preliminary Objection and uphold the same. This suit is hereby struck out. The plaintiff is at liberty to file a fresh suit after obtaining a limited grant for that purpose or can decide to file a succession cause before the Kadhi's Court or any other Court as the case may be. The Court where a succession is filed will be able to issue orders restraining the intermeddling of the estate.

Since the parties are a brother and a sister, I do find that it is imprudent to grant costs to any of them. Parties shall meet their respective costs.

Dated, Signed and Delivered at Marsabit this 11th day of April 2018

S. CHITEMBWE

JUDGE