



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1267 OF 2008

IN THE MATTER OF THE ESTATE OF LUCY AKUKU MAINGEY (DECEASED)

JOHN IAN MAINGEY.....APPLICANT

VERSUS

ONESMUS GITHINJI ADVOCATE.....EXECUTOR/1ST RESPONDENT

ANGELA NJOKI MWANGI.....EXECUTOR/2ND RESPONDENT

AND

JOSEPH RASHIDI MASENGO.....1ST BENEFICIARY

LUC RASHIDI NKULWA.....2ND BENEFICIARY

PAULINE NDITO MASENGO.....3RD BENEFICIARY

RULING

1. There are two applications for determination in this matter: an application for confirmation of grant dated 22nd September, 2016 and filed on 23rd September, 2016 and a Preliminary objection dated 14th July 2017 and filed on 17th July, 2017.
2. The application for confirmation was filed by John Ian Maingey, the Applicant herein, seeking that the grant of probate of the last will of Lucy Akuku Maingey (deceased) made to Onesmus Githinji Advocate and Angela Njoki Mwangi, the Respondents herein, on 16th October, 2008 be confirmed in terms of the last written will of the deceased dated 1st October, 2007. The Applicant presented a list of beneficiaries who are entitled to share in the deceased's estate. The identification and shares of the persons have been ascertained and determined according to the copy of the deceased's written will. There is no application pending for provision of dependants nor is there estate duty due in respect of the estate.
3. He urged the court to order the Executors to render a true and just account of the income in respect of all assets listed in the will.
4. The Applicant asserted that the Executors had intermeddled with the estate of the deceased. To support the assertion, the Applicant filed affidavits dated 9th March, 2017, 4th April, 2017 and 24th July, 2017 respectively. He maintained that the Executors had intermeddled with the estate of the deceased as evidenced by correspondence between Onesmus Githinji Advocate and Muthoga Gaturu & Company Advocates. He urged the court to stop any further sub-division, alienation or sale of the remaining properties pending the final distribution of the estate in accordance with the written will.
5. The deceased's estate comprises of 30 acres out of L.R 1338/98 Mavoko Municipality. The land parcel was awarded to the deceased during her lifetime vide **Nairobi High Court Succession Cause No. 1678 of 1994 – In the matter of the Estate of Paul Maingey (deceased)**. The Applicant asserted that the Executors caused the 30 acres to be illegally sub-divided, transferred and registered in the names of Joseph Rashidi Masengo, Luc Rashidi Nkulwa and Pauline Ndito Masengo, to the exclusion of other beneficiaries listed in the will. The three resultant titles are L.R 1338/98, L.R. No. 1338/89 and L.R No. 1338/93.
6. On 17th July, 2017, Mr. Masila, learned counsel for the Executors/Respondents, filed a notice of preliminary objection, renunciation of right to probate of written will and an affidavit sworn by Onesmus Githinji Advocate all dated 14th July, 2017, to contest the summons for confirmation of grant.

7. Mr. Masila submitted that the summons is bad in law and incurably defective. That by virtue of **section 62 and 71 of the Law of Succession Act** as read with **rule 40(1) of the Probate and Administration Rules**, the Applicant lacks *locus standi* to file for confirmation of grant with respect to the deceased's estate. Counsel urged that the Applicant raised issues which cannot be canvassed and determined summarily by way of affidavits but by way of evidence under trial.
8. The renunciation of right to probate of written will was filed in the prescribed Form 101 under **section 59 of the Law of Succession Act** and **rule 18 of the Probate and Administration Rules**. In it, the Executors renounced all their rights and title to probate and execution of the will while asserting that they had not intermeddled with the estate of the deceased.
9. On 18th August, 2017, the Beneficiaries filed an affidavit dated 16th August, 2017 and sworn by Joseph Rashidi Masengo, the 1st Beneficiary herein, in response to the summons for confirmation of grant. Joseph stated that he had been duly authorized by the other two beneficiaries to swear the affidavit on their behalf. He stated that at the time of her death, their mother who is the deceased herein was due to receive a portion of land measuring approximately 30 acres from the estate of her late father Paul Maingey. That their late mother nominated the three of them, namely Joseph, his sister Pauline and his brother Luc, to receive her interest instead.
10. Joseph contended that sometime in 2013, the Estate of their late grandfather Paul Maingey was distributed and a property known as L.R No. 1338/89 measuring about 6.084 Ha transferred to the three of them as the interest gifted to them by their late mother. He produced a certificate of title to support his contention. The property was later sold to Kabansora Millers at the price of Kshs. 8.5 Million per acre. The money was paid through their then advocates Muthoga Gaturu Advocates.
11. Joseph urged that they were at all material times aware that John Ian Maingey, the Applicant herein, was entitled to a portion of 2 acres out of L.R. No. 1338/89. That Onesmus Githinji Advocate made them believe that the Applicant had agreed to take a sum of money equivalent to the price of 2 acres from the proceeds of sale of the property. It is upon this belief that they recorded a consent dated 18th November, 2016 in HCCC No. 171 of 2016 stipulating that Muthoga Gaturu Advocates do pay Onesmus Githinji Advocate a specified sum of money as the Applicant's entitlement in the deceased's estate. The sum was subject to costs incurred in the sub-division of the property before its sale and legal fees owing to the firm of Muthoga Gaturu.
12. Joseph maintained that the Applicant was at all times aware of the negotiations and that a sum of money equivalent to his entitlement had been paid to Onesmus Githinji Advocate on his behalf. That the Executors had not denied receipt of the sum of money and the Applicant therefore has no claim against them or the estate of the deceased. He urged that there is no longer an estate capable of sustaining the proceedings since all the property pertaining to the estate has been distributed and transferred to third parties. That the Applicant's claim can only lie against Onesmus Githinji Advocate seeking release of the sum of money paid to the Advocate as the Applicant's inheritance.
13. Mr. Isindu filed written submissions dated 13th September, 2017 and further submissions dated 7th May, 2018 on behalf of the Applicant. Counsel reiterated the contents of the four affidavits filed by the Applicant in this case and submitted that Onesmus Githinji Advocate was to apply for confirmation of the grant issued to him within 6 months of its issuance, distribute the estate and thereafter render a true and accurate account of the assets of the estate. This he stated was by virtue of **section 83 of the Law of Succession Act**.
14. Mr. Isindu submitted that the Preliminary Objection filed by Onesmus Githinji Advocate is without merit and is intended only to cause confusion and subvert the course of justice. That Mr. Githinji obtained the grant of probate nine (9) years ago on 16th October, 2008.
15. Counsel contended that the summons for confirmation sought to achieve substantive justice for all the beneficiaries provided for under the deceased's written will. That since the Executors have failed to act diligently, lawfully and in good faith, the court ought to proceed under **sections 70-73, 76 and 94-95 of the Law of Succession Act** to compel the Executors to perform their duties. This, he urged, was the overriding objective in civil litigation. To buttress his point, Counsel cited **Article 159** of the Constitution of Kenya, **section 47 of the Law of Succession Act**, **section 3(2) of the Judicature Act** and the case of **Nicholas Kiptoo Arap Korir vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**.
16. Learned Counsel Mr. Masila filed written submissions dated 6th November, 2017 on behalf of the Executors, supporting their preliminary objection and opposing the summons for confirmation of grant. Counsel submitted that at the time of her death, the deceased did not have any specific assets in her name as her only property was her entitlement out of her late father Paul Maingey's estate as awarded in Succession Cause No. 1678 of 1994. That at the time of obtaining the grant, no property had devolved to the deceased's estate from her late father's estate.
17. Mr. Masila maintained that the Applicant lacked *locus standi* to make an application for confirmation of grant stating that the application as filed is unknown in law. He cited **section 71(1) of the Law of Succession Act** and **Rule 40(1) of the Probate and Administration Rules** and urged that the making of an application for confirmation of grant is the sole reserve of a holder of such grant. That the Application which is by a supposed beneficiary has no foundation in law and cannot stand. To support his assertion, Counsel cited the decision of Etyang, J in **the Matter of the Estate of Njoroge and Another (2003) KLR 73** and the decision of Okwengu, J in **the Matter of the Estate of Kihagi Wamai (deceased) Nyeri HCSC No. 266 of 1995**. In the two cases, the learned judges held that confirmation should only be applied for by and be made to the holders of the grant.
18. It is Mr. Masila's submission that if the allegations of wrongdoing on the part of the Executors had any basis, the appropriate application would be an application for revocation of the grant in accordance with **section 76 of the Law of Succession Act**.
19. Mr. Masila further submitted on the issue of an Application for Revocation of Grant dated 22nd May, 2013, and filed by the beneficiaries herein. The Application was however withdrawn by an order of the court issued on 25th July, 2017 on an application by Mr. Makambo learned counsel for the Beneficiaries.

20. M/s Ojiambo filed written submissions dated 26th March, 2018 on behalf of the Beneficiaries. Counsel submitted that the deceased's estate was distributed in accordance with the written Will of the Deceased and all beneficiaries duly catered for. That the ultimate purpose of the Law of Succession is to ensure that the property of a deceased is eventually distributed as held in the case of **Re G.K.K (Deceased) [2013] eKLR**. Counsel urged that in the present case however, it is not that the deceased's estate was not distributed or that the Applicant was disinherited from the will, but one in which the Applicant is feigning ignorance of his benefit and seeking double enrichment. That the Applicant whose portion of inheritance was provided for and duly paid to his Advocates has failed to seek release of the money paid from the firm of Onesmus Githinji Advocates.

Determination

21. I have considered the pleadings and submissions filed by Counsels and authorities in support of their respective cases. I will first deal with the Preliminary Objection dated 14th July, 2017. The law pertaining to a Preliminary Objection is settled. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Co. Ltd [1969] EA 696** Law JA rendered himself thus on the question of preliminary objection:

“So far as I'm aware, 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. Similarly Sir Charles Newbold in the above cited case of **Mukisa Biscuit** observed thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

23. The basis of the preliminary objection filed by the Executors is that the Applicant lacks *locus standi* to file an application for confirmation of grant. The definition of the term *locus standi* in the **Black's Law Dictionary 9th Edition** is, **“the right to bring an action or to be heard in a given forum.”**

24. The issue of *locus standi* raises a point of law that touches on the jurisdiction of the court and it should be resolved at the earliest opportunity. - See **Mary Wambui Munene vs. Peter Gichuki Kingara and Six others, Supreme Court Petition No. 7 of 2013; [2014] eKLR**.

25. The Law on confirmation of grants is provided under **section 71(1)** of the **Law of Succession Act** which provides thus:

“After the expiration 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.”

26. The manner in which the application is filed is provided under **rule 40** of the **Probate and Administration Rules** which provides thus:

“Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 exhibiting the grant together with an estate duty compliance certificate or other satisfactory evidence that no estate duty is payable and setting out the full names of the deceased person to whose estate the grant relates, and he shall satisfy the court that no application under Part III of the Act is pending.”

From the provisions cited above, it is evident that an application for confirmation of grant is the preserve of the holder of a grant which is sought to be confirmed.

27. The Applicant argued that save for himself, all other beneficiaries are not keen to finalize the succession process and as such have not consented to the mode of distribution as per the deceased's written will. That the Executors have also been uncooperative and excluded him from the administration and conduct of the affairs of the estate.

28. These grievances advanced by the Applicant herein are envisaged under **section 76(d)** and **(e)** of the **Law of Succession Act** which provides that:

“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) ...

(b) ...

(c) ...

(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 period 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 particular material particular; or

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

The Applicant can therefore properly bring a suit to seek for revocation of the grant under any of the grounds set out above if he is so minded.

29. M/s Ojiambo learned counsel for the beneficiaries further submitted that the orders sought by the Applicant are in a vacuum since there is no property pending distribution under the deceased’s estate. Counsel pointed out that the dispute before the Court is one between an Advocate and client and the parties should therefore be referred to the appropriate forum.

30. In light of this argument by the Beneficiaries, it appears that the grant in this instance has become inoperative since there is no property pending distribution. While the grant issued to the Executors, has never been confirmed, the Applicant cannot purport to apply for a confirmation thereof since he is not the holder of the grant.

31. It is important to note that the Executors filed a Renunciation of their right to probate the deceased’s written will. This was pursuant to the order of this court issued on 2nd March, 2017 through which the court directed that the Executors do render accounts and file for renunciation of the executorship if they were unable to discharge their mandate. The renunciation also creates a vacuum which renders the grant inoperative. In filing the renunciation of probate, the Executors have therefore abandoned their rights in relation to the will. The court notes that the Executors did not however render accounts as ordered prior to filing the renunciation.

32. From the foregoing, it is apparent that the Preliminary objection has merit as filed. The Application for confirmation of grant is not properly before this court and the court cannot therefore hear and determine it.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 25th day of July 2018.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Executors/Respondents

In the presence ofAdvocate for the Beneficiaries