



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 41 OF 2018 (O.S.)

GULAMHUSSEIN F. GULAMHUSSEIN.....PLAINTIFF

VERSUS

1. GEORGE MATHOLE KONDE

2. NATHANIEL KAZUNGU KONDE

3. ELINAH SHALI KONDE.....DEFENDANTS

RULING

1. By an originating summons dated and filed in court on the 11/6/2018 the applicant has asked of the court for the determination of the following questions:-

i. “Whether the said GEORGE MATHOLE KONDE, NATHANIEL KAZUNGU and ELINAH SHALI KONDE are administrators of the estate of RICHARD KAZUNGU KONDE DECEASED.

ii. Whether the said GEORGE MATHOLE KONDE, NATHANIEL KAZUNGU KONDE and ELINAH SHALI KONDE should be appointed as Administrators of the Estate of RICHARD KAZUNGU DONE (DECEASED).

iii. Whether an order should issue appointing the said GEORGE MATHOLE KONDE, NATHANIEL KAZUNGU KONDE and ELINAH SHALI KONDE as Administrators of the Estate of RICHARD KAZUNGU KONDE (DECEASED) for the purposes of enabling the plaintiff herein proceed with execution proceedings in MOMBASA CMSS 2136 OF 2007 GULAMHUSSEIN F. GULAMHUSSEIN VS RICHARD KAZUNGU KONDE (NOW DECEASED)”.

2. The summons was taken out and grounded on the affidavit of the applicant whose gist is that he holds a decree dated 18th December 2015 against one Richard Konde, who died on the 18/12/2017, and needs to execute the decree but nobody has taken out grant of representation to the estate yet the applicant know the Respondents as the biological son of the deceased. The affidavit then concludes that unless the orders are granted he would be curtailed from ever executing the decree against the estate of the deceased.

3. The application was evidently served upon the 1st defendant on behalf of the other brothers and co-respondents as shown by the affidavit sworn by MICHAEL THOYA sworn on 22/6/2018 and filed in court on 8/8/2018 but no papers were ever filed in opposition. The hearing notice was equally served upon an advocate identified to the process server by the 1st Respondent but at the date set no papers had been filed nor was any attendance made. The matter therefore proceeded *ex parte* and without any opposition by the Respondent.

4. From the papers filed, the question that begs determination as an issue in the matter is whether or not the applicant is entitled to the remedies sought? In other words can this court sitting to determine an originating summons pursuant to Order 37 Rule 1 & 2 Civil Procedure Rules issue an order for the administration of a deceased person’s estate outside the provisions of the Law of Succession Act?.

5. To answer that question, it is important to reproduce here what the rule relied upon by the Applicant says.

“Order 37, Rule 1: Who may take out originating summons and in respect of what matters

The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative

of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions:-

- a) Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or *cestui que trust*;
- b) The ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- c) The furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- d) The payment into court of any money in the hands of the executors, administrators or trustees;
- e) Directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- f) The approval of a sale, purchase, compromise or other transaction;
- g) The determination of any question arising directly out of the administration of the estate or trust.

Order 37, rule 2: Order for administration of estate or trust

Any of the persons named in rule 1 may in like manner apply for and obtain an order for:-

- a) The administration of the personal estate of the deceased;
- b) The administration of the real estate of the deceased;
- c) The administration of the trust”.

6. To this court the operative words are “without administration of the estate”. I interpret that expression to say that an order issued pursuant to the two rules must not be in relation to the administration of the estate. I consider this to agree with my appreciation that the Law of Succession Act is a complete code in matter of appointment of administrators/executors, the application of the property of an estate and its distribution including the ascertainment due debts, bequests and beneficiaries. That is what, I understand from the Provisions of Section 2 of the Law of Succession Act which provides;

“Application of Act

2(1)

Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons”.

7. With this provision of the statute, I do construe and interpret Order

37 Rule 1 & 2 not to purport to vest in a court, sitting as a civil court, the power to appoint any person as an administrator of the estate of the deceased person outside the otherwise elaborate provisions of the Law of Succession Act and the Rules made thereunder.

8. For that reason, I hold the view that the Applicant needs to re-visit the provisions of the Law of Succession Act and the subsidiary legislation made there under and find a remedy in those provisions regarding citation proceedings and even special grants^[1].

9. Even if I was to grant to the applicant the prayers, particularly the 3rd one, such would be no more than a nomination under paragraph 14, schedule 5 of the Law of Succession Act and the person(s) so nominated would still have to petition the court to be granted a grant of letter of administration if the deceased died intestate.

10. I do therefore find and hold that to issue the orders sought or determine the isolated issues in the application and give such effect as to declare the three persons named as administrators or personal representatives to the deceased would be country to the purpose and intention of the Law of Succession Act. I am hesitant to do so and I therefore find no merit in the application which is hereby dismissed.

11. Since the matter proceeded expert, I make no orders as to costs.

Dated and delivered at Mombasa this 26th day of October 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Part VI Probate and administration rules and fifth schedule to the Act