



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO. 13 OF 2016

IN THE MATTER OF THE ESTATE OF TIRIME OLE KUYA (DECEASED)

NKOBULU OLE KUYAPETITIONER

VERSUS

FRANCIS MASIKONDEPROTESTOR

(Arising from the order of reference by the Chief Magistrate at Narok in Succession Cause No. 57 of 2016 Nkobulu Ole Kuya (Petitioner) v. Francis Masikonde (Protester))

RULING

INTRODUCTION

1. This is a ruling in respect of a reference by the chief magistrate, before whom there is pending the above succession matter. She seeks the opinion of this court by virtue of the following circumstances. On 4th April 2014, the petitioner was granted letters of administration by the High Court sitting in Nakuru. Subsequently, the succession cause was transferred by High Court at Nakuru to High Court at Naivasha.
2. On 29/9/2016, the High Court at Naivasha (Meoli, J) in the absence of the protestor/respondent and in the presence of Mr. Kiptoo holding brief for Mr. Agina for the petitioner, the court transferred this cause for hearing and determination by chief magistrate's court at Narok. As a result, the chief magistrate proceeded to hear and determine the matter.
3. In the process of hearing the matter, counsel for the petitioner raised a preliminary objection in relation to this reference and urged the court to dismiss it. After considering the objection, the chief magistrate ruled that it was necessary to stay the making of a decision on the preliminary objection. This was necessary because the High Court had already issued an order granting letters of administration to the petitioner. The court further stated that in the event it were to revoke of the grant, it would amount to overturning the decision which was made by the High Court. It is in those circumstances that the chief magistrate referred this matter to High Court for directions, before ruling on the preliminary objection.

The case for the petitioner

4. Counsel for the petitioner filed written submissions dated 3/10/2016 urging the court to dismiss the reference to the High Court by the chief magistrate. According to him, the reference to the High Court was unconstitutional, unlawful, an abuse of the magisterial powers and unknown to the law of Kenya. It was his contention that there were no enabling statutory provisions upon which that court would refer the issue to High Court for directions. According to counsel, a subordinate court like the court of the chief magistrate, may only refer the issue to the High Court, when that matter relates to a question of law. He further submitted that in the instant matter, there was not any constitutional issue raised; since the issue relates only to succession matters.

5. Furthermore, counsel cited Rule 73 of the Probate and Administration Rules which provide as follows: "*nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*"

Finally, counsel submitted that the reference should be dismissed and the case be sent back to chief magistrate to proceed with determining the issue according to law.

The case for the protestor/respondent

6. Counsel for the protestor filed written submissions in opposition to the position taken by the petitioner. She submitted that the chief magistrate was within the law in seeking directions from this court. She further submitted that the preliminary objection raised by the

petitioner does not raise any point of law. And for this reason, the objection taken by the petitioner should be dismissed.

7. In the light of the foregoing submissions and the applicable law, I find the following to be the issues for determination.

1. Whether or not the court of the chief magistrate has jurisdiction to hear and determine the succession cause.
2. Whether the chief magistrate court should proceed to hear and determine the preliminary objection raised by the petitioner.
3. Who bears the costs of this reference?

Issue No. 1

8. By virtue of the order of the High Court (Meoli, J) of 29/9/2016 which transferred the succession cause to the court of the chief magistrate; that court had jurisdiction to hear but could not determine the cause; due to the following reasons.

Issue No. 2

9. However, if the court of the chief magistrate was to proceed with hearing and determining the preliminary objection, it might result in “*overturning the order of the High Court that granted letters of administration to the petitioner.*”

10. In the circumstances, the hearing and determination of the preliminary objection raised by the petitioner would amount to an exercise in futility. The question that calls for consideration is whether or not the court of the chief magistrate had jurisdiction to refer the matter to the High Court. In this regard, I find that there are no statutory or constitutional provisions that enabled the magisterial court to make a reference to the High Court. However, this is not the end of the enquiry. I find that Rule 73 of the Probate and Administration Rules confer on a court inherent powers to make orders that are necessary to meet the ends of justice. I therefore find that the chief magistrate was entitled pursuant to rule 73 of the Probate and Administration Rules to refer this matter to the High Court for directions, notwithstanding the lack of statutory and constitutional provisions.

11. In view of the foregoing considerations, I find that the *ex-parte* order made by the High Court in transferring this succession cause for hearing and determination by the chief magistrate was made in error. First, it did not give a right of audience to the protestor. Second, it ignored the early order of the High Court, which granted letters of administration to the petitioner, which was still in force. By virtue of that order that granted letters of administration to the petitioner, the chief magistrate’s court lacked jurisdiction to hear and determine the protest.

12. The upshot of the foregoing is that this court hereby recalls its order of 29/9/2016, which transferred the instant succession cause to the magisterial court.

13. In the circumstances, I hereby re-transfer to the High Court the succession cause for hearing and determination including the protest.

Issue No. 3

14. Costs of this application will be costs in cause

Ruling delivered in open court this 24th day of October, 2018 in the presence of Ms Adhiambo holding brief for Mr. Agina for the petitioner and Ms Mogere for the respondent.

J. M. Bwonwonga

Judge

24/10/2018