



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 112 OF 2014

IN THE MATTER OF THE ESTATE OF JOB NDUNDA MUTHIKE (DECEASED)

RULING

Introduction

1. By Summons dated 7th February, 2018, the Applicants/Objectors herein, **Ruth Mbithe Ndunda** and **Mary Mutheu Munyao**, seek the following orders:

1. THAT the property known as Mavoko Town Block 3/2586 be struck off from the list of properties forming the estate of Job Ndunda Muthike (Deceased).

2. THAT the honourable court be pleased to compel the administrators to the estate to produce before the court documents for registration of the property known as Mavoko Town Block 3/2588 obtained by the deceased from the Lukenya Ranching Company and that the same be registered in the joint names of the administrators and the objectors.

3. THAT upon successful execution of No. 2 above the property known as Mavoko Town Block 3/2588 be included in the list of properties forming the estate of Job Ndunda Muthike (Deceased).

4. THAT accordingly the list of the extent of the estate of Job Ndunda Muthike (Deceased) as earlier presented in this cause be hereby rectified for confirmation as follows:-

5. THAT pursuant to Order 3 above, the comprehensive list of the property of under the estate of the deceased and available for distribution be certified as follows:

a) Mavoko Town Block 3/2718

b) Mavoko Town Block 3/2588

c) Plot At Ndovuini Market

d) Masii/ Vyulya /492

e) Masii/ Vyulya /1064 and

f) Masii/ Vyulya /1437

6. THAT the administrators be ordered to disclose to the court the progress of Machakos ELC No.5 of 2014 which is before the Land court involving Mavoko Town Block 3/2718.

7. THAT Costs be provided for.

The Applicants' Case

2. The Applicants averred that they are the daughters of **Job Ndunda Muthike (Deceased)**. According to them, the administrators have deliberately engaged in misrepresentation aimed at concealing some portions of the properties under the estate of the deceased for the benefit of the administrators and it was their case that the said misrepresentations by the administrators are as follows:

a) The property known as **Mavoko Town Block 3/2588** which constitutes the estate of the deceased is not included in the list of properties forming the estate of **Job Ndunda Muthike (Deceased)**.

b) The property known as **Mavoko Town Block 3/2586** is included as forming part of the estate of the deceased while the said property does not constitute the deceased's estate.

c) That the property known as **Mavoko Town Block 3/2718** has a court cause in Machakos **ELC No.5 of 2014** which is yet to be determined and therefore this court cannot distribute the said asset.

3. It was the applicants' case that a search conducted on **Mavoko Town Block 3/2586** on 15th September 2015 revealed one **Nashon Mutiso Muthike**, their uncle as the absolute and sole owner of the property.

4. The applicants averred that upon noticing the misrepresentations raised in above, they made several enquiries to their brothers who are the administrators to the estate herein but no responses were given. Consequently, the applicants engaged their advocate who proceeded to make a formal letter seeking an explanation why **Mavoko Town Block 3/2586** belonging to **Nashon Mutiso Muthike** had been listed as being part of the deceased's estate but this letter elicited no response or reaction from the petitioners.

5. The Applicants deposed that on the 23rd November 2017 their lawyers informed them that while sitting in Machakos High Court he heard Machakos ELC No. 5 of 2014 being called and upon perusing the file he found out that there was a court case involving **Mavoko Town Block 3/2718** going on and which had never been disclosed to them.

6. It was the applicants' case that the actions of the administrators are detrimental and prejudicial to the estate of the deceased as they are meant to defraud the rest of the beneficiaries and enrich the administrators who are fully aware of the existence of **Mavoko Town Block 3/2588** which was allotted to their father by **Lukenya Ranching Company** but have failed to disclose its existence or the documents and details of ownership thereof by the deceased, which property was in the process of being registered by the deceased in his name prior to his death. Similarly, the administrators have failed to disclose the existence of **Machakos ELC No.5 of 2014** and its progress and misled the applicants and the Court to write submission on a premature issue.

7. It was the applicants' case that all the beneficiaries to the estate of the deceased should without discrimination get equal shares of the estate in its entirety. The applicants therefore sought that the property known as **Mavoko Town Block 3/2586** be struck off from the list of properties forming the estate of **Job Ndunda Muthike (Deceased)** and property comprised in **Mavoko Town Block 3/2588** be included in the list of properties forming the estate of **Job Ndunda Muthike (Deceased)**. It was consequently sought that a complete list be reconstituted to include a comprehensive and truthful list of properties forming the deceased's estate as follows:

a) **Mavoko Town Block 3/2718**

b) **Mavoko Town Block 3/2588**

c) **Plot At Ndovuini Market**

d) **Masii/ Vyulya /492**

e) **Masii/ Vyulya /1064 And**

f) **Masii/ Vyulya /1437**

8. It was the Applicants' case that it is in the interests of justice that the reconstituted list be used as the reference for distribution of the estate equally to all the beneficiaries of the deceased's estate.

9. On behalf of the Applicants, it was submitted that section 73 of the **Law of Succession Act** confers on the courts inherent powers to grant orders for the ends of justice to be met. It is therefore incumbent on this court to first determine the issues raised to prevent an obvious scenario of revocation or review of the grant which is a most likely eventuality if the grant is confirmed with the matter addressed herein not determined. It was their case that the present application is presented under Rule 49 of the **Probate and Administration Rules** which is the proper procedure for such an application. Additionally the provisions of rule 73 of the **Probate and Administration Rules** grant the court inherent powers to grant orders for the ends of justice to be met.

10. According to the applicants, that waiting for the grant to be confirmed and later approaching the court for an order of review or revocation would now amount to an abuse of the court process. It is trite law that orders of the court are not to be made in vain. A confirmed grant is a court order that essentially distributes the properties of a deceased person in accordance to the mode of distribution agreed upon by all the beneficiaries. If the order is granted without due consideration into all the matters raised then the same would only be in vain and a total abuse of the court process.

11. The Applicants submitted that the Respondents have raised factual issues in their Grounds of Opposition contrary to the holding in **Kennedy Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Limited [2010] eKLR.**

12. In any case it was submitted that the said grounds are in no way a response to the application which has raised pertinent issues that should either be denied or admitted by the Respondents in the interest of justice and to facilitate the court in deciding the application in merit. In this respect the applicants relied on **Africa Merchant Assurance Company Limited vs. Titus Kinyanjui Kienjoku [2017] eKLR** in which the

Court of Appeal decision of Mohamed & Another vs. Haidara, (1972) E.A. 166 was cited to the effect that a replying affidavit was essential as it sets out the real evidence of the material facts that is contained in the appellant's affidavit.

13. It was therefore submitted that the failure to file a replying affidavit in contention of a fact amounts to an admission of facts on the Application since the Applicants have not rebutted a single claim raised in the Supporting affidavit of the Applicant and in the absence of such rebuttal of averments stated in the supporting affidavit then it only means that the Respondents have no plausible objection to the Application filed herein and they admit to the facts raised.

14. The applicants therefore prayed that the orders sought herein be granted in the interest of justice and in the interest of the beneficiaries of the estate of the deceased.

Petitioners' Case

15. To the instant application was filed the following grounds of opposition:

(1) The application is an abuse of the court process.

(2) The application is bad in law and incurably defective and has no legal basis.

(3) The application is mischievous and frivolous since the objectors have already raised objections to the confirmation of grant.

(4) The objectors should argue the issues raised therein as part of their objection.

(5) The application is made in bad faith and is only meant to gag the application for confirmation of grant.

(6) The applicants are feigning ignorance and retracting own statements having initially agreed to the confirmation of grant only to change their minds when the matter came up for confirmation of grant.

16. In their submissions, the Petitioner relied on The Matter the Estate of Sophia Watare Gachigua – Deceased [2016] eKLR.

17. Based on that decision it was submitted that the objectors failed to discharge the duty cast on them and hence the application must fail. It was therefore submitted that what the Objectors have tabled before this Court are rumours as no document has been tabled before this Court to establish the link between the Deceased and the mentioned parcels of land.

18. While the Petitioners were not averse to the inclusion of any property in the name of the deceased or exclusion of any property that does not rightfully belong to the estate, it was their position that for the administrators to act, there need to be lawful claims and not mere allegations of fact.

19. The administrators therefore prayed that the application be dismissed.

Determination

20. I have considered the issues raised in this matter. The main issue for determination here is whether the Administrators included as part of the deceased's estate some properties which do not belong thereto and whether they excluded properties which belonged to the estate.

21. According to section 3 of the Act "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

22. In Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR, the Learned Judge observed that :

“This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

23. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant. In this case the Objectors contend that Mavoko Town/Block 2/2586 be struck out from the list of properties forming the estate of **Job Ndunda Muthike (Deceased)**. According to them, this property belongs to their uncle one **Nashon Mutiso Muthike**. In support of this contention the Objectors have exhibited a copy of the Certificate of Official Search dated 15th September, 2015 according to which **Land Parcel No. Mavoko Town/Block 3/2586** was as per that date registered in the name of **Nashon Mutiso Muthike**. That registration was in actual fact done on 16th August, 2007. According to these proceedings, the deceased died on 1st August, 1997. Whereas there is no evidence that the said property was by that time registered in the name of the said **Nashon Mutiso Muthike**, it is clear from the evidence before this

Court that the said property does not form part of the estate of the deceased. The Petitioners have not sworn any affidavit to challenge this position. I agree with the position in Kennedy Otieno Odiyo & 12 Others vs. Kenya Electricity Generating Company Limited [2010] eKLR wherein the court held:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”

24. Similarly in Mohammed & Another vs. Haidara [1972] E.A 166 at page 167 paragraph F-H, Spry V.P considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent’s affidavit gives no material facts and the only real evidence of facts is that contained in the appellant’s affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

25. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

26. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

27. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

28. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

29. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

30. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

31. I must however state that where the allegations made even in an affidavit fall short of the legal threshold expected in a matter the Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed. This was the Court of Appeal’s position in Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 where it was held that it is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders *ex parte* as the applicant is not relieved of the onus on him of justifying his application.

32. This is my understanding the holding of Rajah, JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59 that:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

33. In this case however the Objectors have produced records showing that *Mavoko Town/Block 2/2586* does not belong to the estate of the deceased.

34. As regards the inclusion of the other properties, there is clearly no evidence showing that they belong to the estate of the deceased. It is trite that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of a fact which he asserts, must prove that those facts exist and that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Further the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. That it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed was restated in **Koinange and 13 Others vs. Koinange [1968] KLR 23**. Similarly, Denning, LJ in **Miller vs. Minister of Pensions [1947] 2ALL ER 372** held that:

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

35. While I appreciate that ideally the Petitioners ought to have challenged the factual averments made by the Objectors by way of affidavit, I agree with Lord Brandon in **Rhesa Shipping Co SA vs. Edmunds [1955] 1 WLR 948 at 955** that:

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

36. In Succession matters where the Court is called upon to determine whether a property in question belongs to the estate of the deceased, the Court must be satisfied that that is the position so as to avoid a possibility of wrongfully incorporating a third party’s property into the estate as that may lead to serious consequences. I therefore associate myself with the views of **Mativo, J** in **The Matter the Estate of Sophia Watare Gachigua – Deceased [2016] eKLR** where it was held that:

“In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist...I am also aware that proof in cases of this nature cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case. For example, availing documents to confirm how the shares were acquired or the share certificates, or evidence of dividend payment, or the transfer instruments purporting to transfer shares to the petitioner could have shed light on the issue.”

37. In this case the allegations that certain properties were excluded from the list of assets that form part of the estate of the deceased has not been proved to the required standards. Nothing would have been easier than for the Objectors to carry out a search of the said properties at the relevant registries in order to prove that the said properties belong to the estate. In the premises that prayer must fail.

38. The Petitioners have contended that the issues raised in this application ought to await the determination of the pending application for confirmation of grant where the same can be ventilated. The question is then whether in light of the uncontroverted evidence regarding the proprietorship of *Land Parcel No. Mavoko Town/Block 3/2586* the Court should defer making a determination thereon. In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal dealing with the Overriding Objective stated *inter alia* as follows:

“the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day”.

39. Similarly, the same Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** expressed itself thus:

“Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow”.

40. In the premises I hereby direct that *Land Parcel No. Mavoko Town/Block 3/2586* be excluded from the estate of the Deceased.

41. While the Objectors complied with the directions of this Court to furnish soft copies of the pleadings and submissions, the Petitioners did

not do so. Section 1A(3) of the *Civil Procedure Act* provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

42. One of the overriding objectives of the *Civil Procedure Act* is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, the costs of this application are awarded to the Objectors.

43. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 22nd day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muoki for the Objector

Mr Mutua Makau for Mr Kirimi for the Respondent

CA Geoffrey