



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS SUCCESSION CAUSE NO. 7 OF 2017

In the Matter of the Estate of BENSON MURIUNGI (DECEASED)

ZIPPORAH MUKAMI.....1ST PETITIONER/APPLICANT

VERSUS

EVANGELINE NGUGI MBOBUA.....2ND PETITIONER/ RESPONDENT

RULING

1. Benson Muriungi (hereinafter “the deceased”) died on 25th September, 2016. He left behind two (2) widows and five (5) children as follows:-

- (a) Zipporah Mukami (widow)
- (b) Evangeline Ngugi (widow)
- (c) Susan Kainyu (daughter)
- (d) Elizabeth Kaari (daughter)
- (e) Benjamin Muthuri (son)
- (f) Benard Muriki (son)
- (g) Dennis Mugambi (son)

He also left behind sizeable estate consisting of both moveable and immovable assets.

2. On 10th March, 2017, Zipporah Mukami (hereinafter “the Petitioner”) lodged this Succession Cause. She named her co-wife Evangeline Ngugi Mbobua as a co-petitioner. In Form No. P & A 5, she disclosed who the beneficiaries of the estate were as well as what she considered constituted the estate of the deceased. Evangeline Ngugi Mbobua (hereinafter “the Respondent”) her co-wife did not execute the Petition. Further, in Form No. P & A 57, she had Benjamin Muthuri and Susan Kainyu execute personal sureties as her guarantors.

3. On 28th March, 2017, the Petitioner lodged an application dated 24th March, 2017 seeking various orders supposedly to conserve the estate from what she termed as intermeddling. The orders were directed at her co-wife, the Respondent. On being served, the Respondent filed a Replying Affidavit on 7th April, 2017 together with a Preliminary Objection. When the matter came up for hearing before me, the parties

urged that the Preliminary Objection be determined first as it raised the issue of jurisdiction. This ruling then relates to that preliminary objection.

4. The Preliminary Objection dated 7th April, 2017, contended that the Petition was an abuse of the Court process; that the Petition was bad in law as it was both a Succession Cause and a Civil Case; that the Petition did not have capable and able guarantors as the estate was valued at KShs.20 million; that the Court lacks jurisdiction to deal with the Petition and that the Petitioner lacks capacity to bring the application dated 24th March, 2017. Mr. Rimita, Learned Counsel for the Respondent cited the cases of **In Re Estate of Wilfred Ntarangwi Succession Cause No. 223 of 2008 (UR)** and **In Re Katumo and Another EALE (2003) 2 EA 502 at Pg 510** in support of those contentions. Counsel urged that the objection be upheld.

5. On his part, Mr. Riungu, Learned Counsel for the Petitioner submitted that the Respondent had not demonstrated that this Court does not have jurisdiction to entertain the matter; that Section 47 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter “the Act”) gave the Court wide jurisdiction to entertain the subject application; that there was nothing to bar the children of the deceased from standing as guarantors for the Petitioner; that there was no evidence that the estate was valued at KShs.20 million as alleged by the Respondent. Counsel urged that the Preliminary Objection breached the rule in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 696** that such matters should be purely on a point of law and not disputed fact. The case of **Seven Seas Technologies Ltd v Erich Chege (2014) eKLR** was cited in support of that submission. That the Respondent was claiming properties belonging to the estate as her own which was intermeddling. It was urged on behalf of the Petitioner that the objection was misguided and should be rejected.

6. I have carefully considered the Affidavits on record and submissions of Counsel. This is a Preliminary Objection on the grounds, inter alia, that the Court has jurisdiction to entertain the matter. A preliminary Objection is a point of law which when taken is capable of disposing off the suit. In **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (Supra)** the Court of Appeal for Eastern Africa held:-

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.”

7. Of course once an issue of jurisdiction is raised, the Court must deal with it in limine since once it is found that the court lacks jurisdiction, it must down its tools at the earliest. See the case of Owners of the **Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1**. The basis of this is that jurisdiction must be acquired before judgment is given.

8. The basis of the objection or jurisdiction is that the Petition before Court deals with properties belonging to the deceased as well as the living. That Motor Vehicle Registration Numbers KBC 227G and KBV 423K belong to and are registered in the names of the Respondent. Registration Certificates were produced and relied on to support that contention. On the other hand, the Petitioner has in Paragraph 11 of the Supporting Affidavit alleged that by 25th October, 2016, the said vehicles were owned by the deceased who had died on 25th September, 2016. Of course, the Petitioner has not produced any searches from the relevant authorities to show that as at that date the said vehicles were in the name of the deceased, but there is that allegation of ownership by the deceased. That is a matter of fact yet to be established. It cannot be raised as a Preliminary Objection as the fact of ownership is disputed. On that ground, the contention that the Petition is a mixture of a Succession Cause and Civil Case is without basis. That ground is rejected.

9. The other ground was that the Petition is an abuse of the Court process, it lacks capable and able guarantors as by law. It was contended that the guarantors in this matter were children of the deceased who were not financially capable of guaranteeing the Petitioner and that the estate was valued in excess of KShs.20 million. A close perusal of the record will show that the Petition indicated the estate as being

worth KShs.1 million. The Respondent did not produce any valuation report to show that the sureties of KShs.500,000/= given by the guarantors were insufficient. Without Valuation Reports, the allegation that the estate is valued at KShs.28 million has no basis.

10. As regards the locus of the guarantors to stand surety, there was no authority that was produced to show that the beneficiaries of the estate are barred from giving sureties. The provision of law that provides for guarantees in a Succession Cause is Rule 29 of the Probate and Administration Rules. That Rule provides:-

“1. In the exercise of its discretion as to the person to be appointed an administrator (with or without the will annexed) the court shall endeavour to satisfy itself as to the financial solvency of such person and having regard to the nature and extent of the estate of the deceased likely to come to his hands, as to the probability of his being able property to complete the administration of the estate.

2. For the purpose of subrule (1) the court may require the proposed administrator to furnish an affidavit in Form 12 as to his means.

3. As a condition of granting letters of administration (whether with or without the will annexed) the court may, for reasons to be recorded and subject to the following provisions of this rule, require one or more sureties to guarantee that they will make good, within any limit imposed by the court pursuant to subrule (8) on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of a breach by the administrator of his duties as such.

6. This rule shall not apply where administration is granted to the Public Trustee or to a widow of the deceased or, except in special circumstances and for reasons to be recorded, where it is granted to:-

(a) a trust corporation;

(b) an advocate of the High Court holding a current practicing certificate who has never (save at his own request) been struck off the roll of advocates or suspended from practicing as an advocate;

(a) a public officer acting in his official capacity;

(d) a person specifically authorized in writing by a Government Department to apply for administration and to act as such administrator if appointed;

(e) the attorney of an executor who is absent from Kenya, there being no executor within Kenya who is willing to act, for the use and benefit of his principal and limited until such principal shall obtain probate or letters of administration granted to himself.”

11. From the foregoing, it is clear that the requirement for sureties is not a mandatory requirement but is in the discretion of the Court. It is meant for the Court to satisfy itself of the solvency of the proposed administrator and for purposes of taking a precaution that the beneficiaries are protected in the event of mismanagement. Further, that requirement does not extend to widows when they are the Petitioners. In the present case, there is no dispute that the Petitioner is the widow of the deceased. That ground also lacks merit and is rejected.

12. The last ground was that there is no jurisdiction to grant the injunction sought as the Petitioner made the application before being issued with the grant of representation. In the cases relied on by the Respondent, ***In Re Estate of Wilfred Ntarangwi (Supra)*** and ***Re Katumo (Supra)***, it was held that an injunction cannot issue in a Succession matter; and that before a grant is issued, one cannot mount an action. As regards the submission that this Court cannot grant an injunction in a Succession matter, I do

not agree. I do not think the Courts in the cases referred to by Mr. Rimita considered the provisions of Section 47 of the Act and Rule 73 of the Probation and Administration Rules. Section 47 of the Act provides:-

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

On the other hand, Rule 73 of the Probate and Administration Rules provides that:-

“73. 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.”

13. My reading of Section 47 aforesaid is that, the High Court has very wide powers to issue any orders and decrees including injunctions on matters touching on estates of deceased persons. Rule 73 reserves the inherent power of the Court and the Court can perfectly resort to that residue power to preserve an estate through an injunction. Indeed, the Court of Appeal in the case of *Floris Piezzo & Another v Giancarlo Falasconi (2014) eKLR*, while considering whether an injunction can issue in a Succession Cause held:-

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.” (Emphasis mine).

14. In this regard, the finding of this Court is that under Section 47 of the Act and Rule 73, the High Court has jurisdiction to issue all manner of orders including injunctions to preserve the estate. To hold otherwise will be a travesty of justice.

15. Mr. Rimita submitted that the Petitioner does not have *locus standi* to bring the application dated 24th March, 2017 as no grant has been issued to her. It is not in dispute that no grant has been issued in this matter. In the case relied on by Mr. Rimita of *In Re Estate of Wilfred Ntarangwi (Supra)*, Ouko J. held:

“Such an intermeddler is also answerable to the rightful executor or administrator. Section 46 of the Law of Succession Act enjoins the police, chiefs or administrative officers to preserve the estate of a deceased person in their local areas before the grant is issued. In other words, before the grant is issued to dependant, he/she cannot bring an action in respect of the estate of the

deceased. See Virginia Edith Wamboi Otieno v Joash Ochieng Ongo and Omolo Siranga (1982-1988) 1KAR.

Although in the present cause, the applicant has obtained a temporary grant, the instant application was filed before the grant was issued. At the time the application was brought, the applicant lacked competence to do so. She could only proceed under the provisions of section 45 of the Law of Succession Act by making a report of the respondents' intermeddling with the estate to the police. The court of course has inherent powers to make such orders under the Law of Succession Act as may be expedient. But in exercising those powers the court has to do so within the law."

16. It is clear that what gives locus to a party on matters touching on the estate of a deceased person is a grant of Letters of Administration. The Act contains elaborate provisions on how one can be empowered to protect the estate. There is the procedure of reporting to the local Chief or Police under Section 46 of the Act or even applying for a limited grant which would clothe a party with the necessary locus. I entertain doubt whether a proposed administrator has locus by the mere fact of applying for letters of administration before being issued with a grant. Until a grant is issued, a party, be it a Petitioner or a beneficiary lacks the legal standing to sue or institute a proceeding in relation to the estate of a deceased person. In this case, the Petitioner filed her summons dated 24th March, 2017 before any grant was issued. Although she is the prospective administrator, that legal status has not yet crystalised. Until she is clothed with such authority by being issued with a grant, she is like anyone else.

17. Accordingly, I am satisfied that the Petitioner lacked the capacity to lodge and sustain the summons. The same is incompetent. That summons is hereby struck out and orders discharged. This being a family dispute, I will make no order as to costs.

It is so ordered.

DATED, AND DELIVERED AT MERU THIS 25TH DAY OF MAY, 2017.

A. MABEYA

JUDGE

25/05/2017