



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 140 OF 2014

**IN THE MATTER OF: THE ESTATE OF LILLI JORGENSEN
(DECEASED)**

SALLY NJAMBI MAHIHU 1ST APPLICANT

RUPERT PATRIDGE 2ND APPLICANT

VERSUS

MWANGUZA KAI DECHE 1ST RESPONDENT

JEFWA ERCKSON 2ND RESPONDENT

RULING

The application dated 8th May 2015 seeks the following orders: -

2. THAT pending the hearing and determination of this application, this Honourable Court be pleased to stay, suspend and defer the duties of the Respondents as administrators of this estate granted pursuant to the Grant issued on 24th March 2015.
3. THAT this Honourable Court be pleased to revoke or annul the Grant of Letters of Administration Interstate issued to the respondents on 24th March 2015.
4. THAT this Honourable Court be pleased to transfer this cause to the High Court sitting in Mombasa and consolidate the same with Succession Cause Number 431 of 2014 estate of Lilli Jorgensen.

The application is supported by the affidavit of sally Mahihu sworn on 8th May, 2015. The Petitioners filed a replying affidavit sworn by Jefwa S. Erickson on 16th June, 2015: Parties agreed to determine the application by way of written submissions.

The main issue raised by the Objectors is that the deceased left a written Will. The two Objectors are the executors of the deceased's estate as per the Will. The Petitioners were made aware of the existence of the Will but chose to ignore that information and decided to file this cause. It is further submitted that the Objectors filed Succession Cause Number 431 of 2014 before the Mombasa High Court on 10th October 2014: the Petitioners filed this cause two months later on 1st December, 2014.

It is further contended by the Objector that the grant issued to the Petitioners was issued before the expiry

of the requisite period. The grant was gazetted on 18th March, 2015. The Objectors maintain that the High Court in Mombasa has jurisdiction to hear and determine this dispute. The Petitioners knew very well that the Objectors were appointed to be the executors. The Petitioners alleged that there was an oral Will yet they did not indicate that alleged fact in their petition.

On their part, the Petitioners maintain that the deceased lived in Kilifi and subsequently died in Kilifi. Her estate ought to be dealt with by the Malindi Court. According to the Petitioners, the deceased had prepared a Will which she revoked. The Petitioners maintain that the deceased left no written Will. Her relationship with the firm of Bowyer Mahihu & Co. advocates was frosty and she had withdrawn instructions.

The Petitioners maintain that the Objectors were not appointed to be the executors of the deceased's estate as there is no written Will. The Petitioners worked for the deceased for long period of time and maintain that at no given time did the deceased mention about the existence of a will being kept by the Objectors. The Petitioners contend that the signature on the alleged Will is not that of the deceased and that the Will is a fraud.

The main issues to be determined by this court is whether this file should be transferred to Mombasa for purposes of it being consolidated with file No. 431 of 2014 and whether the grant issued by this court should be revoked/annulled. The pleadings herein confirm that the deceased died at Kilifi on 11.9.2014 at the age of 86 years. From the death certificate, it is clear that the deceased died at her resident at Konjora in Kilifi County. Cases from Kilifi County involving High Court Court disputes are ordinarily handled by the Malindi High Court. According to the pleadings, the deceased was buried in Kilifi.

Section 47 of the Law of Succession Act states as follows: -

“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.”

The above Section is reinforced by the provisions of Section 44(3) of the same Act which state the following: -

“44. (3) Where the operation of Section 48 and 49 is suspended in any area, the High Court may make a grant of representation in respect of the estate of a deceased person whose last known place of residence was in that area, whether the value of the estate exceeds or does not exceed one hundred thousand shillings.”

Section 44 refers to the provisions of Section 48 and 49. The import of these two Sections is to give jurisdiction to the Magistrates Courts to handle succession Causes where the value of the estate is less than Kshs.100,000/=. According to Section 44(3), the High Court in the area where the deceased resided can make a grant of representation even if the value of the estate is below Kshs.100,000/=.

From the above provisions of the Succession Act, I do find that the deceased lived and died in Kilifi and therefore her estate should be dealt with by a court based in Kilifi County. The Objector's request to have this cause transferred to Mombasa High Court is therefore declined.

It is clear to me that whereas the Objectors maintain that the deceased left a valid Will, the Petitioners contend that the Will is a fraud. According to the Petitioners, the deceased had revoked her initial Will. In view of the two variant positions taken by each party, it would be prudent to have the dispute heard by way of oral evidence. The Objectors shall inform the court as to the manner in which the deceased made the Will and on the other hand, the Petitioners shall tell the court their side of the case. This will enable the court to make a decision from an informed point of view.

The grant issued to the Petitioners cannot enable them to make any meaningful transactions. The court is empowered under Section 76 of the Law of Succession Act to revoke a grant even if it has not been confirmed. The best way forward for this dispute is not to revoke the grant at the moment. The pleadings indicate that the deceased was a shareholder in different companies. The court in Mombasa had not issued any grant. It would be prudent to allow the grant to continue operating so that the Petitioners can collect any income and deposit the same in the deceased's accounts with no powers to distribute the estate pending the determination of the dispute.

The Objectors contend that the grant was issued within less than 30 days after it was gazzetted. The Kenya gazette which gazzetted the grant was issued on 18.3.2015. The notice itself was dated 5.3.2015. the notice does clearly indicate that a grant of letters of administration testate would be issued if no objection was filed within 30 days after the publication of the notice. Procedurally, the grant would have been issued on 19.4.2015. the objection was filed on 23.4.2015. It is the court which issues the grant and the Petitioners play no role once the petition is filed. It is the court which issued the grant on 24.3.2015. The fact that the grant was issued before the expiry of 30 days cannot be visited upon the Petitioners. The court is empowered under Section 71(3) of the Law of Succession Act to confirm a grant under certain circumstances before the expiry of six (6) months. The same powers can be exercised by the court to issue a grant before the expiry of thirty days. The court has the power to revoke or annul any grant and it is up to the Court to decide whether to revoke the grant or not. There is no evidence that the Petitioners triggered or influenced the issuance of the grant by the court. I do find that the grant herein was properly issued.

There is an application dated 14.10.2015 seeking the confirmation of the grant. I do find that the oral proceedings can revolve around that application. I proceed and give the following directions: -

1. The Objectors herein are hereby deemed to be the Plaintiffs while the Petitioners shall be the Defendants.
2. The Objection and the application for the revocation of the grant together with the Objectors' affidavits shall be deemed as the plaint while the petition, the replying affidavit and the application for confirmation of the grant shall be deemed as the defence.
3. The dispute herein shall be determined by way of oral evidence and parties shall be at liberty to call witnesses.
4. Each party is at liberty to file further affidavits or documents in support of their respective cases.
5. Parties to file and exchange their respective witness statements.

In the end, the application for revocation of the grant dated 8th May, 2015 is hereby disallowed: Succession Cause number 431 of 2014 before the Mombasa High Court to be transferred to Malindi High Court to be consolidated with this cause. The dispute herein to proceed to full hearing by way of oral evidence. Costs shall follow the outcome of the main case.

Dated and delivered in Malindi this 22nd day of March, 2016.

S. CHITEMBWE

JUDGE