



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.1122 OF 2015

IN THE MATTER OF THE ESTATE OF SILAS NDWIGA ISAAC (DECEASED)

JANE SELLA WANJA AMOSPETITIONER

VERSUS

MARY IGANDU NJAGI..... OBJECTOR /APPLICANT

RULING

1. The petitioner filed a summons dated 11th May 2015 seeking the orders that;

i. The Honorable court be pleased to issue an interim order restraining the respondent, her agents and or assigns and or any other person from applying for receiving and or dealing with the terminal dues, compensation and any other assets of the deceased including pension, insurance compensation bank account held at co-operative bank Kenya Ukulima Branch Account Number [particulars withheld] and other assets pending the hearing and determination of this application.

ii. That this honorable court be pleased to issue an interim order restraining the respondent her agents and or assigns or any other person from receiving income, rent transferring, disposing and or dealing in any way with the property and other assets of the deceased.

iii. pending the hearing and determination of this application.

iv. That the honorable Court be pleased to issue an interim order restraining the Kenya Police Service, Pioneer Insurance, co-operative Bank of Kenya and any other entity or person from releasing, paying out or in any other manner dealing with the final dues compensation and assets of the deceased that would be detrimental to the rightful beneficiaries pending the hearing and determination of this application.

v. That further orders as rein the best interest of the petitioner /Applicant do issue.

2. The affidavit in support of the said summons dated 11th May 2015 is sworn by Jane Sella Wanja Amos. She avers that she was a wife to the deceased having married him in 1993. That the deceased was a corporal serving in the Kenya Police Service. She avers that the respondent who claims to be a wife to the deceased has taken possession of vital documents of the deceased including title documents for properties in Nairobi and Embu as well as burial permit and is in the process of applying for the deceased's terminal dues and compensation as next of kin. That it is imperative and to the interest of justice that this honorable Court grants the orders hereby sought so as to protect and safeguard the petitioner's rights. That the respondent has been excluding her from participating in matters relating to the estate of the

deceased, including ensuring that she did not participate in the deceased's burial ceremony by employing armed security personnel to restrain her access during the burial. That all efforts to stop payment of final dues and compensation by the Kenya Police Service have been fruitless despite evidence of the marriage certificate and has been informed that only a court order issued by this honorable court would stop the process of payment of final dues to the person indicated as next of kin. That unless the court issues the orders sought the rightful beneficiaries of the deceased's estate will suffer irreparable harm. Further, she urged the court to grant a limited grant ad colligenda bona for purposes of collecting and preserving the estate of the deceased. The said application was supported with an affidavit listing the assets and liabilities of the deceased.

3. The matter was certified urgent by this court on 11th May 2015. The petitioner was granted letters of administration ad colligenda bona of the estate of the deceased Silas Ndwiga Isaac who died on 23/4/2015 limited to the purpose of collecting and getting in and receiving the said estate and doing such acts as may be necessary for the preservation of the estate.

4. The respondent subsequently filed a Notice of preliminary Objection dated 25th May 2015. The respondent stated that the petition was fatally defective for the reasons that the petition was filed in contravention of **Rule 36(3)** of the Probate and Administration Rules. That the said **Rule 36(3)** provides to the effect that the petition shall be signed by the petitioner, "*in the presence of not less than two adult witnesses.*"

5. The respondent in reply to the said application filed a replying affidavit dated 9th July 2015. She avers that she is the legitimate wife of the deceased having married him under Embu customary law and were blessed with three children Dennis Murimi Ndwiga, Pauline Wawira Ndwiga and Victor Macharia Ndwiga. She acknowledges that the petitioner had once been married to the deceased and had a daughter named Glorious Anita Nyakio but had abandoned the deceased for over 15 years preceding his death. She depones that she has not applied for the deceased's terminal dues and compensation as alleged by the petitioner adding that she was the owner of Embakasi property which was transferred to her by the deceased on 11th August 2014. That the bank account alluded to by the petition was no longer operational having been abandoned by the deceased when the petitioner abandoned him. That the petitioner should not be allowed to process the deceased final dues because she was not his next of kin and that the deceased's employer's and Pioneer Assurance stated that she was the deceased's next of kin.

6. The Respondent further filed the summons, dated **9th July 2015** seeking to set aside injunction orders and vacation of the grant of letters of administration ad colligenda bona defunct granted by this court on 13th May 2015. The respondent sought orders from the court to compel the deceased's employer the Kenya Police Services and Pioneer Assurance to furnish the respondent with all the records of the next of kin to the deceased's terminal dues or any other compensation the deceased maybe entitled to upon his death.

7. The application was based on grounds that; this court granted a temporary injunction on 13th May 2012 restraining the respondent from receiving the terminal dues compensation and other assets of the deceased including pension insurance compensation and bank account held at Co-operative Bank of Kenya at Ukulima Branch **A/C no. [particulars withheld]**. She stated that the petitioner misled the court to grant the said orders in light of the respondent replying affidavit. That she obtained the said orders on false premises that she was the legitimate wife of the deceased when in fact she deserted the deceased's 15 years preceding his death while she was the legitimate wife of the deceased by virtue of customary law marriage between her and the deceased and they had been blessed with three children. She stated that she was the next of kin to the deceased's terminal dues and all other compensations entitled to the deceased upon his death. In this regard the respondent avers that the grant of letters of administration ad colligenda bona defuncti were issued in error through the concealment of material facts by the petitioner as the petitioner was not the right person to collect or preserve the said assets when she is not the next of kin. That despite seeking details of the next of kin from the employer and insurer they have declined to do so claiming they can only act on a court order.

8. The respondent filed a Notice of preliminary Objection on 25th May 2015. The said preliminary application seeks to have the petition dated 11th May 2013 dismissed based on facts that it offends Rule 36 of the Probate and Administration Rules which provides that; *“Application for such a grant shall be by petition in Form 85 signed by the applicant in the presence of not less than two adult witness supported by an affidavit containing material facts together with reasons for the application and showing urgency of the matter”*.

9. The petitioner filed a supplementary affidavit dated the 9th December 2015. In it she reiterates what she deposed in her earlier affidavit rebutting the respondents claims and adduces further evidence that 2 of the respondents children were not of the deceased. There is also an affidavit by one Perminus Mwaniki Kageta who avers that the respondent was married to the deceased under customary law.

10. Parties proceeded through written submissions. The respondent in support of the said preliminary objection argues that the petitioner’s summons and entire petition is defective for contravening probate and administration rules 36(3) which provides that, *“(3) Application for such a grant shall be by petition in Form 85 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing the material facts together with the reasons for the application and showing the urgency of the matter and shall be made at the principal registry or at the Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries.”* It was submitted that it was not in dispute that the said petition was only signed by the petitioner and commissioned by Joash Ratemo Advocate and as such the same is fatally defective and should be struck out. On this she relied on the case in ***Re The Estate of Timothy Mukwa Mangoli (deceased) 2015 eKLR***, *“The date poof the deceased was not given nor was evidence of death furnished. Under Rule 36(3) of the Probate and Administration Rules, an application under Section 67 of the Succession Act is required by the petition in form 85. The said application was brought by Summons. It was fatally defective and it was therefore struck out.”*

11. The petitioner in opposition to the said preliminary object argued that the same was not merited and was a waste of the court’s time since the said application has been commissioned by a commissioner of oath’s and that the said petition and application dated 11th May 2015 both contains substantial details as envisaged by the Probate and Administration Rules hence the said petition is not defective as alleged by the respondent to warrant dismissal.

12. It was further submitted that the omission to have the said petition witnessed by two witnesses only amounts to a procedural technicality especially where the substance of the Petition has not be called into question. On this the petitioner referred the court to Article 159(2)(d) of the Constitution which provides that, *“In exercising judicial authority, the courts and tribunals shall be guided by the following principles*

(d) justice shall be administered without undue regards to technicalities..”

Further, that Section 72 of the Interpretation and General Provisions Act which provides that, *“save as is otherwise provided, whenever a form is prescribed by written law, an instrument or document which purports to be in that form shall not be void by reason of deviation there from which does not affect the substance of the instrument or document, or which is not calculated to mislead.”*

13. The petitioner stated that the alleged omission was not calculated to mislead and the respondent has not suffered any prejudice as a result. The petitioner relied on Election Petition 2 of 2013 which held that cases should be determined on tested evidence at a full hearing. In support of her argument she relied on the case of ***Dyson –v-s Attorney General [1982] KLR 1*** where ***Fletcher Moulton L*** expressed himself as follows; *“To my mind it is evident that our judicial system should never permit a plaintiff to be ejected from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously incontestably wrong.”*

Further in the case of ***D.T. Dobie & Company (Kenya) Limited –vs- Muchina [1982] KLR1***, where it was held that *“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and*

*incurable by amendment. If a suit shows a mere semblance of cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice not to act in darkness without full facts of a case before it.” Further the petitioner relied in the case of **Dickson Karaba vs John Ngata Kariuki & Another 2010 eKLR**; where it was held that “striking out is a serious matter, it is draconian and it should be resorted to as an avenue when cause of action filed is hopeless or it is meant to be resorted to as an avenue when the cause of action so filed is hopeless or it is meant or intended abuse the process of the court.....I think striking out of a petition is outside the inherent jurisdiction of the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to the acts and omission of another party. ”*

14. It was further submitted that the respondent has not demonstrated any prejudice suffered and sought to emphasize that the omission by the petitioner was not calculated to mislead hence the preliminary objection should be dismissed and their application should be allowed; that the petition having not been witnessed by two witnesses does not make it fatally defective since the same was commissioned and the lack of attestation did not in any way affect the substance of the petition. That the same amounts to a procedural technicality under Article 159 of the Constitution which should not be entertained; that the issue of attestation is one of form and not substance and should not render the petition defective and that the respondent has not demonstrated the prejudice that she will suffer if the petition is not struck off.

15. The respondent in her supplementary submissions dated 16th March 2016 argues that the requirement that the petition be signed and witnessed by two witnesses is not a mere technicality or case of want of form and that the same goes to the root of the matter. Further, that Article 159 of the Constitution does not render all procedural requirements obsolete and should not be taken as a panacea for all procedural lapse or inadequacies on the part of the parties in a suit. She relied on the case of **NASIMIYU WASIKE –VS- SAMUEL KAMAU (2013) Eklr BGM HC PET NO 107 OF 2009 Re Ex Parte ELECTINA WANG’ONA** where it was held that “*But the utter misconception that must be avoided is to think that all procedural requirements have been rendered obsolete. In spite of the constitutional admonitions against placing undue regard to technicalities, there is nothing pernicious in observing procedural rectitude provided it is kept under proper constitutional control, and relates to a technicality of a nature that is the Centre piece of administration of justice. For example, service of court process and pleadings is an integral part of due process and natural law; its role can never be dwindled an iota. I admit that in a great many cases, and I have said this earlier, procedural law facilitates substantive law.*

16. It was submitted that the mandatory requirement for the petition to be witnessed by two witnesses was important due to the seriousness of the court document and the same signifies the authenticity of the document so filed and failure to do so renders the said document fatally defective. She relied on the case of **Re Matter of Bactlab Limited (2013) eKLR**, the court in citing the case of **IGI HOLDINGS LTD W.U. CAUSE NO 9 OF 2011(UR)** where it was held that, “*I have perused the petition dated 10th may 2011 and amended on 1st July 2011. The same does not appear to have been sealed in terms of rule 10 of the Winding up rules. in my view the purpose of having the document set out in rule 10 sealed is to have them authenticated as having emanated from the company court.....by having them sealed, they are validated to be serious and are then to be acted upon. Being of that view I hold that the sealing of the documents under Rule 10 is not just a procedural step in winding up proceedings and cannot be disregarded.*”

17. The preliminary objection is brought on grounds that the petitioner did not have her petition for a limited grant witness as laid down in the Probate and Administration rules. This is in my view is a defect in form. Dismissing the said petition would go contrary to Article 159(2)d) of the Constitution of Kenya which provides that, “*in exercising judicial authority, the courts and tribunals shall be guided by the following principles — justice shall be administered without undue regard to procedural technicalities;*”

I find that the preliminary objection is unmerited and dismiss the same.

Notice of motion dated 11th May 2015

18. The petitioner sought an interim order restraining the Kenya Police Service, Pioneer Insurance, co-

operative Bank of Kenya and any other entity or person from releasing, paying out or in any other manner dealing with the final dues compensation and assets of the deceased that would be detrimental to the rightful beneficiaries pending the hearing and determination of this application. The petitioners had obtained interim injunction restraining the respondent from receiving the terminal dues compensation and other assets of the deceased including pension insurance compensation, bank account held at Co-operative Bank of Kenya Ukulima Branch account Number [particulars withheld] pending the inter partes hearing and determination of the said application.

19. Hence the only prayer pending determination is an interim order restraining the respondent her agents and or assigns or any other person from receiving income, rent transferring, disposing and or dealing in any way with the property and other assets of the deceased pending the hearing and determination of this application. The applicant seeks to collect and consolidate the assets of the deceased as such and in order to safeguard the said property this court found it fit to allow injunction sought in regards to

Summons dated 9th July 2015

20. Submissions in support of the summons dated 9th July 2015. The respondent in reference to the list of deceased's assets argued that it was only the bank account that was held at co-operative bank [particulars withheld] and developed parcel of land in Embu that belonged to the deceased. Hence the other assets listed were not subject to these proceedings. It was submitted that terminal dues, compensation and pension from Kenya Police Service are governed by the Public Service Superannuation Scheme Act 2012, which in section 36 provides that, Upon the death of a member of scheme, the benefits payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustee in accordance with the scheme rules.

21. Further that Regulation 23 of the Retirement Benefits (Occupation Retirement Benefits Schemes Regulations 2010). *"The scheme rules shall provide that upon the death of a member the benefits payable from the scheme shall be paid to the nominated beneficiary and if the deceased member has not named the beneficiary then the trustees shall exercise their discretion in the distribution of the benefits to the dependents of the deceased member, provided that the trustees may refuse to pay the nominated beneficiary and the reasons for such refusal shall be so recorded,"*

Section 29 *"(3) of the Public Superannuation Scheme provides that where upon the death of a member the benefits are paid to a person validly nominated under this section, no other person shall have any other claim to the benefits against the scheme."*

22. On this she relied on the case of In ***Re Estate of Caroline Achieng' Wagah (Deceased) (2015)*** where the deceased was a member of the social Service League staff Retirement Benefit Scheme. She had made nomination in favor of her children. The court in rejecting an application for the said benefits to be made part of the deceased's estate for distribution stating that, *"6. It is the law that the funds the subject of a nomination do not form part of the nominator's estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing the nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute."*

23. That the law governing life insurance policy assets in the Insurance Act, Chapter 487 Laws of Kenya. Section 111(1) provides that, *"a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of death"*.

24. It was submitted that the person nominated by the policy is the only person who shall be paid the money secured by the policy. In the case of ***Re Estate of Caroline Achieng' Wagah (supra)***, it was held that, *"I have noted from the record that the only assets listed as comprising the estate of the deceased are the very same assets the subject of the nominations. The grant was confirmed and there is on record a certificate of confirmation of grant dated 3rd December 2007. I dare say, in view of what I have stated above, that the said certificate is a worthless piece of paper, to the extent that it sought to distribute*

property that the court had no jurisdiction to distribute in the first place. “

25. It was submitted that the Embakasi property (plot No.12) did not form part of the deceased's estate as the same had been transferred to the respondent as a gift inter vivos. The transfer certificate issued by Parkmansion Limited on 25th June 2011 and the same indicates that the respondent transferred the said property to the respondent on 11th August 2014. It was submitted that it is trite law that anything that is transferred by the deceased during his lifetime is no subject to probate and administration. He relied on the case of **James Maina Anyanga –vs- Lorna Yimbitha Ottaro & 4 Others**, where it was held that, *“I do note that the title to the parcel of land known as W. BUKUSU/S. KANDUYI/2187 was transferred to Wycliffe Wanzetse by the deceased during his lifetime and this shall be taken into account by the Executor in the distribution of the property in favour of Wycliffe Wanzetse. The management, use and occupation of the properties by the deceased's widows during their lifetime shall remain as per the wishes of the deceased. The Executor's proposals for provision of the children of the deceased shall be filed before this court for confirmation.”*

26. The respondent submitted that the said orders obtained by the letters of administration as colligenda bona defuncti couldn't be used to access the bank account held at Co-operative bank since the grant is limited to collect the property of the deceased where it is of perishable or precarious nature and where regular probate and administration cannot be granted at ones. Hence the bank account and the property at Embu are not perishable in nature. They relied on the case of **Re Estate of Arthur Nganga Njunguna Ndoro (deceased)**, *“The proceeds in the bank accounts belong to the deceased and form part of the estate, not the school. A party holding Letters of Administration ad colligenda bona cannot be authorised to access the funds as the grant is limited. For the school business, the applicant or any of the other beneficiaries may change particulars of the business name and open and run new bank accounts for the use and running of the said school. Only after a full grant of letters of administration has been issued and confirmed can the administrators have full access and distribution of the funds in the said accounts.*

27. *Taking into account the observations and issues raised by both parties, I find serious and weighty issues that can only be adequately conversed, not in an application for a limited grant, but in a full application for grant where the beneficiaries or the persons entitled to a grant as provided for in the Act may be at liberty to raise their concerns and objections, if any, during the full hearing.”*

28. It was further submitted that the petitioner failed to disclose material facts and as such the petitioner was erroneously given the said letters of administration ad colligenda bona defuncti since she had no capacity nor authority to the orders. That she had deserted the deceased for over 15 years during the time which she married the deceased and sired 3 children with the deceased. Hat the petitioner in failing to disclose the said information to the court in her said petition. That the petitioner knowing the said facts chose to conceal the same from the court and as such she did so in bad faith. It is in this regard that the respondent seeks the court to vacate the said orders granted by this court. It was argued that the said concealment amounted to non-disclosure and concealment of something important or information which is a ground for revocation of grant as provided for under Section 76 of the Law of succession Act (cap 160). He relied on the case of **“COSIMO POLLICINO VS TONEY KENT [2014] eKLR** the court of appeal held that *non-disclosure of a material fact is sufficient to set aside a grant under Section 76 of the Act.”*

Conclusion

29. From the foregoing it is clear that the petition had knowledge that the deceased had another family as in her affidavit she indicated that she was barred from attending the deceased's burial. She however, did not disclose that she and the deceased had separated for over a period of 15 years and as such I find that there was concealment of material facts important in this cause as provided for under section 76 and as such respondent's application for annulment of the said grant is allowed. The grant of letters Colligenda bona defuncti issued by this court on 11th May 2015 is set aside. Having set aside the said grant I therefore discharge the injunction granted by this court on 13th May 2015 which was based on the said grant.

30. There is issue raised in regards to the final dues and insurance policy held by the deceased prior to his demise. The law in regards to Insurance policies and final dues is clear and on this I agree with the submissions made by the respondent the same is paid to the nominated person. It is however not clear who is nominated and as such the same will not form part of the proceedings in this cause. There are no copies of documents in possession of the petitioner and respondent that can I find that this information can only be obtained from the Kenya Police Service who were employers of the deceased and Pioneer Insurance with whom the deceased had taken out a life insurance policy. In this regard I find it imperative to compel the Kenya Police Service and Pioneer Insurance to adduced certified copies of the nomination details and forms signed by the deceased nominating the person to receive his final dues and policy premiums respectively before this court to enable the court make out the beneficiary of the same.

31. The respondent argues that some of the properties listed by the petitioner do not form part of the deceased's estate. She argues that Embakasi (Plot12) was gifted to her by the deceased and she has adduced a copy of a transfer of certificate which was issued to the deceased Silas Ndwiga Isaac on 21st June 2011 and which the deceased transferred to Mary Igandu Njagi on 11th August 2014 which was several years before the demise of the deceased. The same the respondent argues was gifted to her by her husband hence the same qualifies as a gift inter vivos. Section 42 of the Law of succession act provides that, "*Where- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house." see the case of ***Estate of Stephen Ngure Mbuthia, Nairobi HCSC 2611 of 1998.***

The gift so made will be considered in the final determination of the matter and not at this stage as of now the same. Both petitioner and respondent should discuss and decide on what forms part of the deceased's estate and who should be the administrator of the deceased's estate so that a proper petition is filled. Cost in the cause. It is so ordered.

Dated, signed and delivered this **19th** day of **August** 2016.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Petitioner**

.....**For the Respondent**

MS. Charity Court Clerk