REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1828 OF 2007

IN THE MATTER OF THE ESTATE OF STONE KATHULI MUINDE (DECEASED)

RULING

1. An application was lodged herein on 1st December 2014, dated 27th November 2014, by a clan called Mbaa Mulea-itema, seeking joinder of the clan to the proceedings, stay of the proceedings and reference of the matter to arbitration by the national committee of the clan. The grounds upon which the application is premised are set out on the face of the application, while the facts are deposed in the affidavit in support sworn on 27th November 2014 by Joel N. Ngui, in his capacity as Chairman of the clan.

2. It is averred that the matter had been commenced in court without the knowledge of the clan. After its inception several applications are said to have been filed in the matter, whose effect has been to delay finalization of the matter and to create discord amongst family and clan members. The deceased is said to have been a member of the clan, who was a strong believer in its laws, policies and dispute resolution mechanisms. The clan deplores the fact that the family of the deceased has ignored that fact and failed to refer the disputes in the estate to the clan. It is stated that the clan is capable of and willing to arbitrate in the matter.

3. Upon service, two of the parties to the dispute filed grounds of opposition. Esther Kathuli filed her grounds, dated 22nd April 2015, on 29th April 2015. The grounds by the executors are dated 11th May 2015 and were filed in court on 12th May 2015. Both argue that the clan has no jurisdiction in the matter as the deceased died testate. The petitioners, on their part, stated at the hearing of the application on 23rd September 2015 that they associated with the position of the executors and that they therefore did not intend to file any response to the application.

4. At the taking oral submissions on 23rd September 2016, it was argued for the clan that the deceased was the sitting national Chairman of the clan as at the time of his death. The clan was said to be competent to deal with the matter for it is of the kind that the clan ordinarily deals with. It was urged that there was jurisdiction as the clan had authority to settle disputes concerning its members.

5. For the executors, it was argued that there was no legal basis for the orders sought. The applicants were dismissed as busybodies. It was emphasized that the matter was part-heard as at the stage when the application was lodged. It was submitted that arbitration is consensual, and that a court ought not to abrogate its mandate to hear and determine matters and handover to entities that were unknown in law without the consent of the parties. It was submitted that the executors, beneficiaries and petitioners had not reached a consensus on the matter. It was argued that there was nothing in the Law of Succession Act,

Cap 160, Laws of Kenya, nor in the Probate and Administration Rules, which allowed reference of succession disputes to arbitration by the clan. Furthermore, it was argued, the issue of the validity of a will cannot be resolved by the clan for it lacks the technical competence to deal with it.

6. Esther Kathuli, on her part, argued that the clan had no *locus standi* to bring the application, as it had no interest in any way from the will of the deceased or from the estate. It was also submitted that the clan did not guarantee justice or expeditious determination of the matter.

7. The application is predicated on sections 4 and 47 of the Law of Succession Act and Rule 16 of the Probate and Administration Rules. It would be worth of note that counsel for the applicant did not submit on these provisions. The issue of jurisdiction and *locus* was raised by the opposition, and it was expected that the applicant would advert to these provisions, upon which it has anchored its application, to establish *locus* and jurisdiction.

8. Section 4 states as follows:-

> *'(1) Except as otherwise expressly provided in this Act or by any other written law –*
>
> > *(a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicil of that person at the time of his death;*
> >
> > *(b) succession to the movable property of a deceased person shall be regulated by the law of the domicil of that person at the time of his death.*
>
> *(2) A person who immediately before his death was ordinarily resident in Kenya shall, in the absence of proof of domicil elsewhere, be presumed to have been domiciled in Kenya at the date of death.'*

9. Section 4 relates to domicil as a determinant of the applicability of the provisions of the Law of Succession Act, and of the Kenyan law generally, to certain classes of property. For immovable property, the question of the domicil of the deceased at the point of his death would be irrelevant, for the law of Kenya would apply in the circumstances. For movable property, the applicable law would be law of the dead person's domicil at the time of death. The law of domicil is relevant only where there is a conflict of laws, and the said law is designed to resolve such conflicts.

10. The deceased's domicil is of little relevance in this matter. There is no conflict of laws with regard to the matter. The deceased was Kenyan, he died in Kenya and the assets that make up his estate are all situated in Kenya. Section 4 of the Law of Succession Act is of little relevance to the current dispute. It does not grant any legitimacy for the application by the clan, nor does is confer any jurisdiction to the court to refer the matter for arbitration by the clan.

11. Section 47 of the Law of Succession Act states that:-

> '*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 thereto 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.'*

12. The provision in section 47 states the jurisdiction of the courts with regard to the operationalization of the Law of Succession Act. It identifies the High Court as the court for the purposes of implementing the provisions of the court, although the resident magistrates' courts may also exercise jurisdiction where the same is extended to them by the Chief Justice. Section 47 does not purport to grant the High Court unlimited jurisdiction to entertain any application or determine any dispute under the sun. The jurisdiction given is limited to hearing applications and determining disputes 'under the Act.' This envisages the entertainment of such applications or determination of such disputes as are contemplated 'under the Act.'

13. That then should raise the question whether the application by the clan is one that can be said to be 'under the Act' or whether the handling of the dispute can be said to a determination thereof 'under the Act.' The provision, in my very humble view, does not envisage reference of succession disputes for determination by the clan. Therefore, section 47 cannot be the basis for entertaining an application of the kind now before me, nor for permitting reference of a dispute for determination by a clan.

14. Rule 16 on the other hand states that:-

> '(1) *Any person who wishes to bring to the notice of the court any matter as to the making or contents of the will of a deceased (whether written of oral), the rights of defendants or of persons who might be entitled to interests on the intestacy of the deceased, or any other matter which might require further investigation before a grant is made or confirmed, may file in any registry in which an application for a grant to the estate has been made or in the principal registry an affidavit giving full particulars of the matter in question.*
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> *(2) No fee shall be payable on the filing of such a statement.*
>
> *(3) Upon the filing of such a statement the registrar may take such action thereon as he deems fit.'*

15. The provision above is designed to facilitate furnishing the court with facts that are relevant to an application for a grant of representation or for confirmation of the grant. What is envisaged is not the filing of an application, but of an affidavit, not for the consumption of the Judge or resident magistrate, but for consideration by the registrar. Such affidavit is to be considered administratively. That is the reason why it is for consideration by the registrar; it is not for judicial consideration.

16. The matter which is now before does not satisfy the requirements of Rule 16. It is not meant to be handled administratively by the registrar, but judicially by the Judge. It is not in affidavit form giving details or particulars of the matters the subject of Rule 16; rather it is a formal application, designed, not to provide any particulars to the court for further investigation by it, but praying for joinder of the applicant to the cause and reference of the matter to a clan for resolution.

17. In view of what I have stated above, it is my conclusion that the provisions upon which the application before court is premised are of no application to the circumstances of the matter.

18. Is there jurisdiction for the court to entertain the application or grant the orders sought therein? There is certainly no power to do so under the provisions of the law cited by the applicant. But there is Rule 73 of the Probate and Administration Rules, which provides that:

> '*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.*

19. In my opinion the court can, in appropriate cases, join parties to a succession cause and refer disputes for arbitration by competent persons and entities. It must be emphasized that joinder or reference to arbitration must be only on the basis of appropriateness.

20. Joinder of parties to a suit is concept in the ordinary civil process, where suits in the proper sense of the word are between two rival or contending sides. Other persons or entities not named as parties in the dispute may be joined, on application, to the suit if they meet certain conditions. The Civil Procedure Rules have provisions on joinder of parties, especially in Order 1 thereof. Usually a person or entity will be joined where they have complementary claims with the parties arising from the same facts.

21. The probate process can be said to be a civil process only to the extent of it not being a criminal process. It is, in most respects, a process completely distinct from that governed by the Civil Procedure Act, Cap 160, Laws of Kenya, and the Civil Procedure Rules. It is regulated instead by the Law of Succession Act and the Probate and Administration Rules, which prescribes processes that are clearly removed from those intended for the ordinary civil process. In other words, the probate process is a

special jurisdiction with its own processes and procedures. Such special jurisdiction and procedures are saved by section 3 of the Civil Procedure Act.

22. The legislation that regulates the probate process has, however, imported into its practice certain provisions of the Civil Procedure Rules. That it has done through Rule 63 of the Probate and Administration Rules. However, the provisions of the civil process relating to joinder of parties are not among the provisions so imported under Rule 63.

23. The rationale for the omission to import the said rules has something to do with the design of the probate process. Succession causes are not ordinary suits in the sense where there are two rival claimants, asserting certain rights. Rather, it is a cause designed for the sole purpose of facilitating succession to the estate of a dead person. The ultimate goal being distribution of the estate amongst the persons, if they are more than. There are no parties as such in the succession cause akin to plaintiffs and defendants, or petitioners and respondents.

24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.

25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.

26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.

27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.

29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.

30. Joinder of parties is not envisioned in the probate process and should be avoided at all costs. It is not provided for under the relevant legislation, and it can only be allowed by the court in exercise of its inherent discretion. It is however my view that making an order to join an interested party in probate

causes, even though I have on occasion done so, amounts to exercise of inherent discretion outside of its bounds.

31. This begs the hypothetical question that were this court to be of the persuasion that it had discretion to join third or interested parties to a probate cause, does the applicant qualify for exercise of that discretion in its favour? In the civil process, the persons who are joined to a suit as parties (whether as substantive parties or third or interested parties) must have an interest in or claim to whether directly or indirectly, to the subject matter of the suit.

32. The subject matter herein are the assets of the estate that are up for distribution. A person interested in the probate cause would be he that claims a right or interest in the assets, either as heir or dependant or survivor or beneficiary or creditor of the deceased or estate. The applicant is none of these. It has no interest in the subject matter, the assets. Its interest is in facilitating the resolution of the dispute. In my view, that would not qualify the applicant, under the principles for joinder of parties under the civil process, to be joined as an interested party.

33. Furthermore, the applicant wishes to play the role of an arbiter. It seeks reference of the matter to itself for arbitration. An arbiter in an arbitration process, a mediator in a mediation process or a conciliator in conciliation plays the role very much akin to that of a judge. He is a referee, not a player or party to the dispute. His role is neutral, and facilitative. He has no interest in the subject matter in dispute. Making him a party to the cause is allowing him to descend to the arena of conflict. The joinder of the arbiter to the cause or dispute as a party is antithetical to the process of arbitration. It's an alien concept in dispute resolution.

34. Is there room for reference of succession disputes to arbitration or mediation? The answer to this is in the affirmative. Article 159(2) identifies alternative dispute resolution as one of the principles that ought to guide the courts in the exercise of judicial authority. Opportunities for dispute resolution outside of the court process is therefore envisaged under the supreme law of Kenya. The court can refer the whole dispute or portions of it to resolution vide mechanisms that are alternative to the court process.

35. Should the current matter be referred to alternative dispute resolution? Where a court is seized of a matter, the practice is that reference of the matter to alternative dispute resolution would be subject to the willingness of the parties. The modes of alternative dispute resolution mentioned in paragraph 33 here above are voluntary. The said processes are private. The parties ordinarily present their matter to court, and should they choose to have settlement facilitated out of the court process they would have the liberty to take that route. The court cannot, however, compel them to go for resolution of their dispute through an alternative dispute resolution mechanism.

36. The application before me is by a party which is offering itself as an arbiter. It is asking the court to refer the dispute to them. The parties to the dispute, however, are not willing to be party to an arbitration facilitated by the applicant. There is no consent from them for the proposed arbitration, nor consensus that they would like their dispute referred to arbitration by the applicant. Perhaps the offer to resolve the dispute through the clan ought to be made by the clan directly to the parties to the dispute.

37. Furthermore, the central issue for determination at present is whether the deceased died testate or not. The court is currently conducting a trial to determine the validity of a will that the deceased allegedly made. The making of a will is governed by legislation. It has not been demonstrated that the applicant has the technical competence to resolve that question.

38. I need not say more. The application dated 27th November, 2014 is lacking in merit. It is for dismissal and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH DAY OF AUGUST, 2016.

W. MUSYOKA

JUDGE