



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 894 OF 2014

IN THE MATTER OF THE ESTATE OF DESTERIO OTENG'O (DECEASED)

AND

ZAINABU SHEUNDA EKOMBE.....1ST PETITIONER/APPLICANT

MARY MMBONE SHIMBA.....2ND PETITIONER

CAROLYNE NASAMBU WAFULA.....3RD PETITIONER

RULING

1 By the summons dated 8th December 2014 the applicant herein seeks for orders that :

1. WYCLIFFE MALALA CHITECHI be appointed to collect rent from the deceased's property known as East Wanga/Lubinu/2500, East Wanga/Lubinu/1438 and East Wanga/Lubinu/1116 and distribute the rent proceeds among the three (3) widows who are administrators herein equally pending finalization of this succession cause.

2. The deceased's motor vehicle Reg. No. KBM 385R Toyota Saloon and KBC 099J-Lorry Canter be parked and/or preserved at the home of CAROLYNE NASAMBU WAFULA the 3rd Petitioner herein for safe custody pending finalization of this cause.

3. The deceased's business at Ekeru market be managed and/or controlled by WYCLIFFE MALALA CHITECHI and the proceeds be shared equally among the three Widows of the deceased herein.

4. Costs of this application be provided for.

2. The summons is based on the grounds set out on the face of it and supported by the affidavit of ZAINABU SHEUNDU EKOMBE sworn on the same date. Briefly she states that she is the widow of the deceased herein and she was dependent on him entirely before he died. She states that she has no form of income and her life is now miserable while the estate of the deceased attracts rental incomes of about Kshs. 60,500/= from Land Parcel Nos. East Wanga/Lubinu/2500, East Wanga/Lubinu/1438 and East Wanga/Lubinu/1116 which monies she says are collected by

the 2nd Widow of the deceased MARY MMBONE SHIMBA and other beneficiaries who use the same to her exclusion. She depones further that the two vehicles namely motor vehicle Reg. No. KBM 385R Toyota Saloon and KBC 099J-Lorry Canter owned by the deceased are being mismanaged by other heirs of the deceased and the same ought to be preserved at the 3rd Petitioners Home for safety. She also proposes that the deceased's businesses which are still running be managed by WYCLIFFE MALALA CHITECHI who should collect rent from the three plots above mentioned and distribute the same equally amongst the three (3) widows.

3. The application is opposed. Mary Mmbone Shimba the second surviving widow to the deceased has sworn a replying affidavit dated 17th December 2014 where she claims that the 1st and 2nd Petitioners/Applicants secretly filed these proceedings without getting her consent and those of other beneficiaries. She depones that the applicant has come to court with unclean hands and that her application is frivolous, vexatious and an abuse of the court process. She adds that the said application is grounded on hearsay and speculation. She states that motor vehicle Reg. No. KBM 385R Toyota Saloon is being used by one DENIS ASEKA EKOMBE a beneficiary to the estate of the deceased who parks it at the homestead where she and the applicant reside. Further that motor vehicle Reg. No. KBC 099J-Lorry Canter is parked at CAROLYNE NASAMBU WAFULA'S residence. She objects to one WYCLIFFE MALALA CHITECHI being appointed as the Manager of the estate of the deceased for reasons that he has personal interest in the estate of the deceased prior to distribution. She admits that she has been managing and collecting rent from Plot No. East Wanga/Lubinu/1116 even before the deceased's death. She maintains that she contributed towards the acquisition and development of the said Plot through loans from her employer with authority from the deceased who allocated her the same for her benefit and that of her children see Exhibit "MM1". She depones that she has no knowledge about who manages and collects rent from the other plots and denies the allegations that she collects a sum of Kshs. 65,000/= from plot no. East Wanga/Lubinu/1116. Lastly she objects to the request that the motor vehicles herein be parked and preserved at CAROLYNE NASAMBU WAFULA's residence.

4. The application was canvassed before me on the 18/12/2014 where Mrs. Muleshe was present for the applicant whereas the 2nd Petitioner acted in person. Having heard all parties this court notes that there is an application pending for grant of letters of administration to the Petitioners who are ZAINABU SHEUNDA EKOMBE, MMBONE SHIMBA and CAROLYNE NASAMBU WAFULA the 1st, 2nd and 3rd wives to the deceased herein respectively. The said grant has not been issued to them which then raises the issue as to whether the instant application is properly before this court and whether the orders sought therein should be granted. The petition for grant has not been gazetted to enable persons raise objections to the same which this court would not want to pre-empt. Further the grant has not been confirmed to allow distribution of the deceased's estate as is being prayed by the 1st Petitioner.

5. Be that as it may, Section 47 of the Law of Succession Act Cap 160 Laws of Kenya(The Act) states as follows:

“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 magistrate appointed by the Chief Justice.”

This section thus gives jurisdiction to the court to entertain any application and make determination on any dispute under the Act.

6. Further Sections 55 and 67 of the Act provide as follows:

55.“(1)No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to

make any division of property, unless and until the grant has been confirmed as provided by section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

“67.”(1)No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

(2)A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.”

7.The purpose of section 67 of the Act is to give the notice by Gazette to all concerned to avoid fraud and concealment except in the limited grant for collection and preservation of assets.

8. Now after carefully considering the application by the 1st Petitioner. I find the same to be incompetent as it has been brought under wrong provisions of the law in the first place. It is incumbent upon an applicant whoever she or he is In any matter to bring applications under proper provisions of the law. I have made mention of the above listed sections of the Act purposely since there is no grant in the first place issued to any party to these proceedings. It is noted that the deceased herein passed early 2014 and all the petitioners depended on him before his demise

9. I also note from both the application and counsel’s submissions that no reason has been advanced by the petitioner barring her from collecting rents from plot numbers East Wanga/Lubinu/2500 and East Wanga/Lubinu/1438nor has she shown that it is the respondent who has denied her the opportunity to collect such rents.

10. In my considered view, bringing in Wycliffe Malala Chitechi into the administration of the deceased’s estate would only be creating an unnecessary problem for the deceased’s estate even before the grant is issued. It is not even clear from the application whether the said Wycliffe Malala Chitechi would do the work of collecting rents for free or whether he would do so at a fee. It is also not clear from the application whether the other beneficiaries of the deceased’s estate approve or do not approve of such proposed “appointment”.

11. For the above reasons, I do not find it necessary to interfere with the status quo of the deceased’s estate pending issuance of the grant of Letters of Administration intestate in respect of which a Petition has been filed by M/s Phoebe Muleshe & Co Advocates on behalf of the Applicant, the Respondent and the 3rd Petitioner Carolyne Nasambu Wafula. Counsel should expedite the process of gazetteement of the Petition so that the grant is issued within the shortest time possible from today. The application is therefore found to be without merit and the same is accordingly dismissed. Costs shall be in the cause.

Orders accordingly.

Ruling, delivered, dated and signed in open court at Kakamega this 21st day of January 2015.

R.N. SITATI

JUDGE

In the presence of

Mr. Masheti hold brief for M/s Muleshe.....For applicant

Present in person.....For Respondent

Mr. Masheti hold brief for MulesheFor 3rd Petitioner

Fredrick JumaCourt Assistant.