



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 599 OF 1986**

**IN THE MATTER OF THE ESTATE OF ANDREW SAIKWA (DECEASED)**

**RULING**

1. The application for determination is the Notice of Motion dated 11<sup>th</sup> May 2015, wherein the applicant, Vomorono Limited, seeks to be joined to these proceedings as an interested party, among other orders. The parties opted, on 22<sup>nd</sup> October 2015, to dispose of the prayer 2 of the application first. The said prayer is the one the joinder of the applicant as interested Party, with the rest of the prayers in the application to be argued at a later date.
2. The background is that the applicant had purchased a property of the estate known as LR No. 209/8558 (IR 28222). The property is said to have subsequently been transferred to the name of the applicant and charged with a bank to secure a facility. It transpired that the said sale was nullified by the court by an order made on 9<sup>th</sup> May 2014. The applicant's contention is that the said order was made after the sale and affected its interest in the property, yet the applicant was not heard at the hearing of the said application. The applicant asserts that it was a bona fide purchaser for value. It also states that the beneficiaries failed to make an appropriate disclosure to the court regarding the sale.
3. The applicant is asserting that after acquiring the interest the subject of these proceedings by sale, it became a stake holder in the estate of the deceased, and that it is entitled to be placed on record as a party to these proceedings to protect the said interest as well as to place the correct facts concerning the sale to the court.
4. The executor of the will of the deceased and the beneficiaries have filed their responses to the application. The executor, by his affidavit sworn on 26<sup>th</sup> May 2015 does not oppose the application. Moses Kiplangat Saikwa, a beneficiary, filed an affidavit on 27<sup>th</sup> May 2015 which is not executed. The same is therefore not an affidavit and its contents are not of any probative value. He subsequently filed a further affidavit on 17<sup>th</sup> July 2015 raising several issues. The tenor of the further affidavit indicates that he is opposed to the said application. Amos Potendo filed grounds of opposition on 16<sup>th</sup> October 2015 where he opposes the application on the question of consolidation of this cause with another. Esther Saikwa on her part through grounds of opposition and an affidavit both filed on 25<sup>th</sup> September 2015 opposes the application in its entirety.
5. When the matter came up for hearing on 3<sup>rd</sup> November 2015 on the question of the joinder of the applicant, only one respondent opposed the proposed joinder, Amos Potendo, whose case was urged by Mr. Odera Obar. The rest - the executor, Moses Saikwa and Esther Saikwa – voiced no objection to the joinder of the applicant.
6. The objection by Amos Potendo was to the effect that the probate process does not provide for joinder of interested parties to a succession cause, as succession causes are designed to deal only with disputes within the cause as between personal representatives and the beneficiaries. He contended that disputes between the estate and third parties ought to be resolved in separate proceedings properly brought under the provisions of the Civil Procedure Act, Cap 21, Laws of Kenya. He contended that the applicant had quite properly initiated such proceedings at the Environment and Land Court against the executor and it was in the latter proceedings that the applicant should pursue its interests.

7. I agree entirely with the position taken by Amos Potendo. And I equally agree with the authorities cited. Probate proceedings are designed in such a manner as to allow entertainment only of disputes as between personal representatives and beneficiaries, limited to such matters as stated in the Law of Succession Act and the Probate and Administration Rules. Such matters would be on questions on determination of the rightful beneficiaries of the estate, who is entitled to administration of the estate, on whether the estate is being properly administered, among others. If there are contentious questions as between the estate and third parties on any issue, such are to be dealt with in separate proceedings. Such suits would deal with such questions as claims against the estate by third parties, who could be creditors or purchasers of estate property. The Civil Procedure Act has elaborate provisions on how such suits are to be commenced.
8. However, the probate process does allow interested parties to intervene in various ways. There is provision for filing of caveats at the stage of the initiation of the cause and at the point of the confirmation of grant. This is the subject of Rule 15 of the Probate and Administration Rules. This would mean that third parties are not altogether excluded from the probate process.
9. In some instances orders may be made in probate proceedings that are adverse to interests of third parties. If such third parties have no opportunity to come before the court in the probate proceedings, then they are likely to suffer prejudice from orders made which have an adverse effect to their interests without their side of the story being heard. It is in respect of such situations that the probate court has in the recent past acceded to applications for joinder of third parties as interested parties.
10. The court has inherent jurisdiction saved under Rule 73 of the Probate and Administration Rules to make such orders as are designed to prevent abuse of the court process and which are meant to advance the ends of justice. The frontiers of inherent jurisdiction have been extended by Article 159 of the Constitution 2010 and the principle of the overriding objective.
11. I am persuaded that the circumstances of the case before me warrant exercise of the inherent powers of the court to allow the joinder of the applicant to these proceedings to enable it place facts and arguments before the court with respect to the disputed sale. I believe making any orders adverse to the applicant in connection with the said sale without affording it an opportunity to be heard would violate its inherent rights and would be unjust.
12. In the end I do hereby allow the Motion dated 11<sup>th</sup> May 2015 in terms of prayer 2 thereof. Prayers 3 and 4 are to be argued on a date to be given at the registry on priority.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>TH</sup> DAY OF DECEMBER, 2015.**

**W MUSYOKA**

**JUDGE**