



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1871 OF 2007

IN THE MATTER OF THE ESTATE OF FRANCIS MWANGI THUO

RULING

1. This application is brought by Summons dated 19th October, 2011 and is taken under *Sections 83 and 86* of the Law of Succession Act and Rules 72 and 73 of the Probate and Administration Rules and all other enabling provisions of the law. The application is supported by the annexed affidavit of Harjinder Chana the Applicant herein dated 19th October, 2011 and is based on the grounds specified therein. The Applicant seeks orders that-

- a.(Spent)
- b. That the administrators namely Milka Waithera Mwangi, Anne Nyambura Mwangi, Joseph Wainaina Thuo and Peter Gachigi Thuo be forthwith compelled to settle the balance of the debt the deceased owed the Applicant currently outstanding at Kshs. 1,500,000/= together with interest accrued thereon.
- c. That in the alternative and without prejudice to prayer No. 2, the administrator namely Anne Nyambura Mwangi be forthwith compelled to settle the balance of the debt the deceased owed the Applicant currently outstanding at Kshs. 1,500,000/= together with the interest accrued thereon.
- d. That this Honourable Court be pleased to issue any further order that it may deem fit and just in the interest of justice.
- e. That the administrators be compelled to pay the costs of this application.

2. The application is not opposed, and in fact the 1st Administrator Milka Waithera Mwangi filed affidavit sworn on 14th December, 2011. In that affidavit she deposes among others that during confirmation and in attendance of all the beneficiaries of the estate all the assets and liabilities were distributed in a fair and proportionate manner and they have had no issues ever since, and that on her part she settled her 50% share of the estate's liability to Harjinder Chana amounting to Kshs. 1,500,000/=. She further avers that as per the Certificate of Confirmation of Grant issued on 24th February, 2009 the remaining part of Kshs. 1,500,000 is payable by Anne Nyambura Mwangi.

3. Parties herein filed in written submissions by their respective counsel. In his submission, the Applicant argued that the 2nd Administrator, Anne Nyambura Mwangi ought to be compelled to settle the balance of the debt the deceased owed the Applicant currently standing at Kshs. 1,500,000/= together with interest accrued thereon. Further, that according to the Summons for Confirmation of Grant at page 25 items 83 and 84, it is listed that the liability owing to the applicant, Harjinder Chana be distributed in the ration of 50:50 between Framil Limited and the 2nd Administrator.

4. Counsel submitted that the Certificate of Confirmation of Grant dated 24th February 2009 at page 34

items number 83 and 84 it was indicated that the said liability was to be shared in the ration of 50:50 between Framil Limited and the 2nd administrator, that it is not in dispute that Framil Limited has paid their share of the liability and is further supported by the Replying Affidavit filed by the 1st Administrator sworn on the 14th December, 2011.

5. The 1st Administrator in her support for the Applicant's application submitted that she has fully discharged herself and/or her household from the Applicant's debt owed that is 50% of the total debt. It was further their submission that the facts are clearly laid out and that the 2nd Administrator has not even demonstrated as to why she has not responded to the Applicant's application to-date.

6. On their part, the 2nd administrator submitted that in accordance to the Certificate of Confirmation of Grant filed on 14th November 2008, the Administrators of the estate agreed that the debt of Kshs. 3000,000 owed to Harjinder Chana would be equally shared by Framil Limited and Anne Nyambura Mwangi. It was her argument that neither the Applicant nor Milka Waithera Mwangi has disclosed in their respective affidavits the identity, directors, shareholders or owners of Framil Limited.

7. I have considered the application, the affidavits on record and the written submissions by counsel for respective parties. I find that the facts of this case are fairly straightforward. Indeed, it is not disputed that the Applicant herein was owed Kshs. 3,000,000. It is further not disputed that the Applicant has been paid Kshs. 1,500,000 by Framil Limited. A perusal of the said Certificate of Confirmation of Grant filed on 14th November, 2008 reveals that the debt of Kshs. 3000,000 owed to the Applicant herein would be shared equally by Framil Limited and Anne Nyambura Mwangi the 2nd Administrator. The Applicant has in his supporting affidavit at paragraph 14 confirmed that the 50% of his debt has been dutifully settled by the 1st house of the deceased to which he is grateful. He has further confirmed in the said supporting affidavit at paragraph 15 that the other half of his debt amounting to Kshs. 1, 500,000 was to be paid by out by the deceased's 2nd widow, Anne Nyambura Mwangi remains outstanding. I note that the said Anne Nyambura Mwangi did not oppose the application; she neither filed a replying affidavit not grounds of opposition. Indeed, she states in her written submission that-

“In accordance to the Certificate of Confirmation of Grant filed on 14th November 2008, the Administrators of the estate agreed that the debt of Kshs. 3000,000 owed to Harjinder Chana would be equally shared by Framil Limited and Anne Nyambura Mwangi”.

According to the 2nd Administrator, this is one of the agreed facts.

8. For reasons best known to the 2nd Administrator, she questions the fact that the Applicant and the 1st Administrator have not disclosed the identity, directors, shareholders or owners of Framil Limited, yet she does not disclose how such disclosure is relevant in the present case, or how the same would explain her failure to meet her obligations. I note that the 2nd Administrator has not offered any explanation whatsoever as to why the said debt has not been paid. In the absence of such explanation this court can only conclude that she willfully ignored to meet her obligation. She has in her submission concluded that on any amount that the court may find due, the same be payable by installments.

9. It is imperative to note that *Section 83 (d)* of the Law of Succession Act enjoins the 2nd administrator to ascertain and pay out of the estate of the deceased all his debts. In this case the deceased's debts were ascertained, and the Applicant was owed Kshs. 3,000,000.00 and of that Kshs. 1,500,000 has been paid and the 2nd Administrator Anne Nyambura Mwangi is obligated to pay the outstanding balance of Kshs. 1,500,000 which she has ignored to pay for almost 4 years. According to Section 86 of the Law of Succession Act, debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.

10. The 2nd administrator ought to have paid the said sum. She chose not to pay and offered no explanation to that effect. She now seeks this court's discretion that the same be payable by installments.

However, this court can only exercise its jurisdiction as a court of equity, and therefore will uphold principles of equity and justice. The 2nd Administrator Anne Nyambura Mwangi must pay the said sum in full, and cannot expect this court in the circumstances to allow her to pay the amount owing in installments. She has delayed to pay and therefore has unclean hands. The maxim on the principle of equity is expressed as follows:-

“No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault... a court of equity shall not assist a person in extricating himself or herself from circumstances that he or she has created.”

11. Ideally, this claim ought to have been commenced in a civil court. It is a claim against the estate. The property of the estates vests in the administrators by virtue of *Section 79* of the Law of Succession Act. The administrators can sue and be sued over such property, according to *Section 82(a)* of the Law of Succession Act. Such claims should be ventilated against the estate in proceedings taken not in this cause, but in a civil action properly brought under the Civil Procedure Act and the Rules. It is under that law that clear execution procedures have been set out for enforcement of decrees obtained in suits brought under that law. No such procedures are set out in the Law of Succession Act and the Probate and Administration Rules for recovery of debts by third parties against the estate.

12. Moreover, the applicant is not a survivor or heir of the deceased. This court has held previously that third party interests are to be pursued, not through the probate court in a succession case, but in a civil suit brought under the Civil Procedure Act.

13. In view of the foregoing, it is this court's conclusion that this application has been filed in the wrong forum. The application is therefore misconceived and I hereby dismiss it. However, as the applicant appears to me to have a genuine claim, I will make no order against him as to costs. Instead I will direct that each party shall bear their costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE