



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO. 482 OF 2012

IN THE MATTER OF THE ESTATE OF SHEM OKARI ORINA – (DECEASED)

RULING

1. Shem Okari Orina died on 21st November 2009. Representation to his estate was sought on 8th March 2012 by Alice Monyangi Moogi and Samson Omare Orina, who described themselves as widow and brother, respectively, of the deceased. A grant of letters of administration intestate was accordingly made to them on 11th July 2012.
2. The application by way of Summons General dated 15th July 2013 is by the first administrator. She seeks that the respondents surrender to her the deceased's personal documents and effects. The respondent was a brother-in-law of the deceased. He is said to have had come into possession of a briefcase belonging to the deceased during the mourning period as the family was making funeral arrangements for the interment of the remains of the deceased. The brief case is said to have contained documents of a personal nature, such as academic certificates, testimonials, letters of appointment and title deeds. The respondent has declined to surrender the brief case together with its contents to the administrators.
3. The respondent's reply to the application is comprised in his affidavit sworn on 19th September 2013. He concedes to having taken possession of the brief case sometime before the deceased died. It is said to have been given to him by a nephew of the deceased, on the deceased's instructions, for safe custody. He alleges that the deceased's wishes were that the respondent retains custody of the brief case until the children of the deceased by his first wife turned eighteen years on the basis that he did not trust the first administrator so far as the welfare of the children of the first marriage were concerned.
4. There is also another affidavit sworn on 5th November 2013, by Enock Omariba Obino, another brother in law of the deceased. He alleges that the briefcase in question was given by the deceased to his sister for safe custody with instructions that it should not be released to any other person except the deceased's children upon their attaining the age of majority. He alleges that the first administrator has remarried, an averment that has similarly been made by the respondent.
5. It was directed on 30th September 2013 that the application dated 15th July 2013 be disposed of by way of written submissions. The applicant filed her submissions on 15th October 2013. I do not have on the record submissions by the respondent. The applicant cites **Sections 79 and 80** of the Law of Succession Act to assert that the said brief case should be handed over to the administrators.
6. The answer to the application dated 15th July 2013 lies in sections **45, 79 and 80(2)** of the Law of

Succession Act. **Section 45 (1)** provides that:-

“45 (1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall –

(a) be guilty of her offence and liable to a fine...or to a term of imprisonment ... or to both ...;and

(b) be answerable to the rightful executor or administrator...”

Sections 79 and 80 (2) provide as follows:-

“Section 79. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative...”

Section 80 (2). A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.”

7. The property of a dead person can only be handled by a person who is authorized in law to handle it. By virtue of **Section 45** of the Act, that authority stems from a grant of representation or from some provision of the Law of Succession Act or other law. This means that a person who does not hold a grant of representation may handle property of the deceased so long as there is provision in the Law of Succession Act or some other law allowing him to. Apart from holders of a grant of representation persons who may handle estate property are those set out in **Section 46** of the Act – police and administrative officers. Any person outside their two categories must have a grant of representation in order for them to handle estate property. It is an offence, created under **Section 45 (2) (c)** of Act, for a non-holder of a grant or a non- police or administrative officer to handle estate property.

8. The holding of a grant of representation, whether of probate or letters, has the effect of vesting the estate property in the grant holder. Legally the grant holder has title to the property in question. It is the holder who should have custody of estate property, including all documents of title. It is the holder who can sue or be sued over estate property. Similarly, he can enter into contracts on behalf of the estate and can enforce such contracts on behalf of the estate. Non-grant holders do not have such powers and duties.

9. For the purposes of the instant case, the respondent or the sister of the deceased are neither holders of a grant of representation to the estate nor police or administrators acting under **Section 46** of the Law of Succession Act. They therefore have no authority to handle any property belonging to the deceased. The handling of any such property by the respondent and sister of the deceased amount to intermeddling, and the two commit an offence under **Section 45 (2)** of the Act for as long as they hold on to such property. To clothe themselves with authority to handle the subject property, they might have moved the court once the deceased did for a grant of representation. They might have received the brief case lawfully from the deceased, but once he died **Section 45(1)** of the Act came into force and they were obliged to obtain a grant of representation to enable them handle the brief lawfully or otherwise surrender the brief case to the persons who had authority in law in handle it.

10. Representation to this estate was made to the applicant and her co-administrator. By virtue of their office, the estate property vested in them as administrators with effect from 11th July 2012 when the grant was made to them. They acquired the authority to handle estate property for the said property vested in them in accordance with **Section 79** of the Act. They became entitled from their date of appointment to have custody and possession of all assets which made up the estate, including any documents of title. This means that from 11th July 2012, any persons holding on to any assets of the deceased on any title to such assets, were obliged to hand them over to the administrators. The first administrators is therefore

within her rights and duties as administrator to make the demands that she is making in the instant application.

11. The deponents of the two replying affidavits have raised several issues. One, they say that it was the deceased's will or wish that they retain the briefcase until his children turn eighteen (18) years of age. The answer to this is that the said wish cannot override the very clear provisions of the law. The said wishes could only be given effect if they amounted to a will. It is not alleged that the wishes amounted to a will, and in any event if that is what is being asserted then the deponents ought to have moved the court appropriately. I have noted that the children that the deceased is alleged to have intended to protect by handing over the brief case to the deponents of the said affidavits are named in the petition as survivors of the deceased.

12. Two, they claim that the two administrators are now co-habiting as husband and wife. Put differently, they say that the first widow has since remarried. This is not a matter that would disentitle the administrators to their office as such. The remarriage of the widow is only relevant at the point of distribution. If the deponent of the two affidavits felt that the two were not qualified to administer the estate they should have exercised their option under **Sections 68 and 69** of the Law of Succession Act and filed objections to the grant being made to them. They still have the option of moving the court of the revocation for the grant.

13. In view everything that I have said above, I have come to the conclusion that the application dated 15th July 2013 is merited and I shall make the following final orders:-

- (a) That the respondent shall produce in court the briefcase the subject of these proceedings in court on 11th June 2014;
- (b) That the contents of the said briefcase shall be ascertained and verified by all the parties to this cause, before the briefcase is handed over to the administrators; and
- (c) That the matter shall be mentioned on 11th June 2014 at 2.30p.m in that behalf.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF May 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Kinyua advocate for the interested party.