



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 285 OF 2009.

IN THE MATTER OF THE ESTATE OF MUTHAMI GITHINJI – DECEASED.

BETWEEN

WANGARI GICHUKI.....OBJECTOR/APPLICANT

VERSUS

DANIEL WANJIGO MUCHEMI.....PETITIONER/RESPONDENT

R U L I N G

The objector/applicant through a Notice of Motion dated 14th January, 2014 pursuant to Section 1A, 1B, (1), 3A and 63 of the Civil Procedure Act and Order 40 Rules 1(a) and 8 Rule 3 and Rule 5 of the Civil Procedure Rules sought orders of injunction to issue to restrain the petitioner/respondent and in particular Intex Construction Company Limited, their agents, servants, employees, representatives, relatives from entering, excavating, felling trees, digging trenches or in anyway interfering with the applicant's enjoyment and peaceful occupation and utilization of land parcel S.Tharaka/Tunyai "A"/157 pending hearing and determination of this cause. The applicant also sought that the OCS Tunyai and provincial administration officers Tharaka South to enforce the court's order if granted. The applicant prayed for costs. The petitioner/respondent upon being served filed a replying affidavit dated 20th January, 2014 and a Notice of Preliminary objection dated the same day.

The court gave direction that the Notice of preliminary objection be heard first. The petitioner's/respondent notice of preliminary objection raised six points of law which I will consider in this ruling.

The counsel for the objector/applicant on her part did not file any response in opposition to the Notice of preliminary objection, she however filed list of authorities in opposition. When the preliminary objection was being argued Mr. C. Mbaabu learned Advocate, appeared for the petitioner /respondent whereas Miss Kiome learned Advocate appeared for objector/applicant. Mr. C. Mbaabu in his arguments combined grounds NOs 1, 2 and 3 of the preliminary objection and argued them together submitting that the applicant has no capacity to seek an injunction in respect of parcel of land belonging to a deceased person herein for want of letters of administration whether limited as set out in the fifth schedule or temporary grant or confirmed grant. He relied on **HCSC NO.223 of 2008(Meru)**.

He further submitted that the said application is premised on Civil Procedure Rules contrary to Rule 63 of the Probate and Administration Rules which limits the provisions of the Civil Procedure applicable to the

Probate and Administration matters. He urged that the Law of Succession Act being a special legislation is a complete code and only its provisions ought to be applied in the probate and Administration matters. In that regard he relied on the case of **SHAH V SHAH (NO.2) (2002) EKLIR 607 and Nairobi HCCC III of (2004)(OS), Francis Kamau Mbugua & Another V James Kinyanjui Mbugua.** In view of the above authorities he submitted that the application is legally flawed and incurable ab initio.

On grounds Nos 4, 5 and 6 of the preliminary objection which he combined and argued together he argued that this court has no jurisdiction to grant an order of injunction as sought in the application dated 14th July, 2014 as the application affects entities who are not parties to the cause as any orders issued would amount to condemning them unheard thereby denying them a right to a fair hearing to which they are entitled under Article 50(1) of the Constitution.

He submitted that the application is an abuse of the court process and should be dismissed. On authorities served upon the petitioner/respondent's counsel he submitted that they are from court of concurrent jurisdiction with this court and therefore not binding upon this court. That judges in those cases were faced with issues of technicalities of procedure and want of form and that is why they found upon such technicalities. He argued that the preliminary objection in this matter is purely on points of law on lack of capacity to sue and lack of jurisdiction to issue injunctive orders in Probate and Administration matters as opposed to seeking orders of injunction which are meant to preserve the estate of the deceased. He further submitted that Article 159(2),(d) of the Constitution enjoin the court to do substantial justice devoid of any technicalities of procedure when discharging its mandate and function.

That on loci standi he submitted that the objector has raised an issue that she has not been provided for as a beneficiary consequently she filed an application for revocation of the suit. He submitted a third party cannot state excavating diminished the value of the estate. He contended the objector cannot move the court without grant of letters of administration. On Rule 73 of the Probate and Administration Rules he submitted that the three authorities relied upon by the counsel for the objector are not applicable in the circumstances of the preliminary point of law. He submitted that the Court of Appeal in Civil Appeal No.6 of 2010 at page 5,6 and 7 stated that a party must follow and adhere to Rules of a matter before a court. He contended that the applicant has failed to comply with the law of Succession Act and as such she cannot hide and seek refuge under the guise of perceived technicalities which do not exist.

Miss Kiome, learned Advocate in her response to the preliminary objection relied on her three authorities arguing that the court has inherent powers to make such orders as may be necessary for the ends of justice. she argued that the application is not for injunction orders but it is for preservation of the deceased estate. She urged the applicant as an objector need not seek letters of administration to prosecute her current application. The counsel therefore prayed that the orders sought be granted notwithstanding the provisions of Rule 63 of the Probate and Administration Rules.

In the case of the estate of **Isaka Muthembwa Kithome P&A 539 of 2007** under clause 9 Hon. Mr. Justice Isaac Lenaola stated:-

“with or without forum this court is obligated to decide all questions before it to meet the ends of justice and without undue regard to technicalities.”

In HCSC 2226 of 2008 Lucy Wanjiru Kibaba & Another V Lucy Wanjiru Muchene(2013) eklr Hon. B. G. Kariuki, as he then was, stated that technicalities of procedure in succession matter are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance with a view to do justice to the parties.

On prayer No.2, 3 and 4 of the objector's application Miss Kiome, learned Counsel submitted that the orders sought against the parties, fall under description of agents and persons claiming through the petitioner. She relied on the case of **Re Estate of Major Hudson Wafula(deceased)2005 eklr through Ann Amimo and Manchester Wafula and Halima Mucheke Wafula S.C 169 of 2003.**

Miss Kiome, learned Advocate on the authorities relied upon by the petitioner/respondent, embarked on

distinguishing them and pointed out as follows:-

That the authorities and the decisions were made before the new Constitution came into force and as such they do not capture the scenario created by Article 10(2) and 159(2) (d) of the Constitution. In the case of **HUNKER TRADING COMPANY LTD V ELF OIL KENYA LIMITED Application No.6/2010** Miss Kiome, learned Advocate submitted that the case is distinguishable as it dealt with civil matters rather than Succession matters and urged this court to disregard the authority. She submitted that Probate and Administration Rules provides how an interested party can come on record under Section 47 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The learned Counsel concluded by praying for the preliminary objection to be dismissed and application be allowed to proceed on its own merits.

Mr. C. Mbaabu learned Advocate in reply submitted that the counsel for the objector/applicant has not pointed out one apparent alleged procedural technicality and want of forum. He submitted that the preliminary objection does not concern itself with any procedural technicality or want of forum such as notice of motion instead of summons. He submitted that the applicant is not an objector but an intended objector urging that she is supposed to seek courts leave under Rule 17(1) of the Probate and Administration Rules since grant was confirmed on 4/11/2011. He further submitted that Article 159(2), (d) do not assist the applicant for want of leave nor do Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. He concluded by stating that one needs grant to challenge or seek revocation. He further indicated the application is not based on Section 45 of the Law of Succession Act nor is it complaining of intermeddling with the deceased estate.

The petitioner in this cause was issued with temporary grant intestate to the estate of Muthami Githinji on 3rd September, 2010 and confirmed grant on 4th October, 2011. The objector/applicant filed an application against the petitioner on 5th November, 2012 pursuant to S.76(a),(b),(c) of the Law of Succession Act and Rule 73 of the Probate and Administration Rules and Article 10(2) and Article 159(2),(a), (b) and (d) of the Constitution of Kenya, Order 41 Rule 1,2,3 and Civil Procedure Rules and Section 68 of Land Registered Act No.3 of 2012. The objector/applicant subsequently filed the Notice of Motion dated 14th January, 2014. The objector/applicant described herself as wife and beneficiary to the deceased estate whereas she described the petitioner/respondent as a stranger and as having no relation to her though he had described himself in his petition for grant of letters of administration as brother to the deceased.

The petitioner raised a preliminary point of law that the applicant/objector has no locus standi to sue on behalf of the estate of the deceased person without requisite letters of administration of such estate. The objector is wife to the deceased whose estate is subject of this cause. The petitioner has so far obtained letters of administration intestate and confirmed grant excluding the objector. The objector has filed an application for revocation of grant.

The question for consideration is whether the objector requires grant of letters of administration to file an application for revocation of grant and the current application seeking injunctions orders. The relevant rule under the Probate and Administration Rules for seeking revocation of grant is Rule 44 and Section 76 of the Law of Succession Act.

Section 76(1) of the Law of Succession Act provides:-

76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion.....”

Rule 44 of the Probate and Administration Rules provides:-

“44. (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and,

where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.....”.

In view of section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules I do not agree with the Counsel for the petitioner that an objector who is seeking to have confirmed grant revoked needs to be armed with a grant to seek revocation under Section 76 of the Law of Succession Act.

On the 2nd preliminary objection 2nd point of law **Rule 63 of the Probate and Administration Rules** it provides as follows:-

“63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X , X I, XV, X VIII, X XV, XLIV and X LIX, together with the High Court (P practice and P procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”

The instant application is headed as Notice of Motion and is premised on Section 1A, 1B, (1),3A, and 63(c), Order 40 Rules 1(a) Rule 5 and Order 8, Rule 5 of Civil Procedure Rules. The said Sections and Orders are not among the orders contemplated under Rule 63 of the Probate and Administration Rules and such orders sought under the aforesaid orders and sections are not amenable in succession matters. It is therefore evident from the aforesaid provisions that such provisions of the Civil Procedure Act do not apply in Succession Matters save as expressly provided under the law of Succession Act and the probate and Administration Rules. The application is therefore not properly headed as it refers to “Notice of Motion” instead of “summons” and is rather based on the wrong sections and orders. The application is not properly drawn nor is it brought under the right provisions of the Law of Succession Act and Rules under Probate and Administration Rules. The court in succession matters however under Section 47 of the Law of Succession Act has jurisdiction to entertain any dispute under the Law of Succession Act without due regard to technicalities. I agree with **Hon. Mr. Justice Lenaola in RE ESTATE OF ISAKA MUTHEMBWA KITHOME(Supra)** where he stated that Forms are a technical matter and that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate. I hold that the failure of the applicant herein to follow the right form and refer to the correct section and Rules cannot be a basis to deny her a hearing and determination of her application on merits.

I note the objection raised in this cause is want of form and reference to correct provision of the law which can be amended to correct the errors and this being a matter concerning the interest of a beneficiary the want of form and failure to quote the correct provision of the Law of Succession Act or Rules cannot be a basis for striking out an application seeking preservation of the estate of the deceased from intermeddlers.

Section 73 of the Probate and Administration Rules provides:-

“Nothing in these rules shall in any way affect the inherent power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court.”

Further Article 159(2),(d) of the Constitution enjoins this court to administer justice without due regard to technicalities.

On grounds that the court has no jurisdiction to grant orders of injunction the court was referred to Rule 63 of the Probate and Administration Rules. Under the said Rule the court is not supposed to issue orders of injunction in Succession matters, however it would be drastic measure for this court to strike out the application which can be amended to seek proper prayers. That this being a succession matter and there being an application for revocation of grant of letters of administration it would be against the provision

of Rule 73 of Probate and Administration Rules to strike the application and failure to give the objector an opportunity to amend the application to seek conservatory orders would not meet the ends of justice.

On the ground No.5 of the preliminary objection it is stated that the application is partly directed on an entity which is not a party in the Succession Cause however, it has been pointed out that the party is sought to be restrained from intermeddling with deceased estate by virtue of being an agent of the petitioner(see ground No.6) of the application and paragraph 6 of the supportive affidavit. From the aforesaid application I find that the application is properly against the petitioner and his agent. On ground No. 3 and 6 of the preliminary objection I find the two grounds to be without basis as the application is properly before the court.

On the authorities relied upon by the petitioner I find the same to be unapplicable in the instant application since the applicant has not purported to bring the instant application as an administrator of the estate of the deceased but as an objector who has capacity to bring the action by virtue of Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules without grant of letters of Administration. I find the authorities relied upon by objector applicable as they dealt with the issue of form which is the case in the instant application.

For the above reasons and having come to the above conclusion I find the preliminary objection filed by the petitioner to be without merits and reject the same. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF MAY, 2013.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

1. Miss Kiome for objector /applicant
2. Mr. C. Mbaabu for petitioner/respondent.

J. A. MAKAU

JUDGE