



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 96 OF 2000

IN THE MATTER OF THE ESTATE OF THE LATE RAHAB WANJIRU EVANS

CHRISTINE WANGARI GACHIGI.....1ST ADMINISTRATOR

ELIZABETH WANJIRA EVANS.....2ND ADMINISTRATOR

PETER GACHEGE NJOGU.....3RD ADMINISTRATOR

MARY WANJIKU GACHIGI.....4TH ADMINISTRATOR

VERSUS

ELIZABETH WAMBUI.....1ST BENEFICIARY

MARY NYAMBURA.....2ND BENEFICIARY

MARGARET WANJIRU.....4TH BENEFICIARY

SALOME NJOKI.....5TH BENEFICIARY

ANTHONY GACHIGI.....6TH BENEFICIARY

ZAINABU WANJIRU GACHIGI.....7TH BENEFICIARY

JOSEPH GACHIGI ZAMBETAKIS.....8TH BENEFICIARY

JENNIFER WANJIRU ZAMBETAKIS.....9TH BENEFICIARY

JOHN IRUNGU ZAMBETAKIS.....10TH BENEFICIARY

RULING

1. This Ruling concerns two applications consolidated for hearing by the court on 13th June 2014. The first application is a Summons for determination of administrator's liability for costs in suits filed on behalf of the estate dated 7th April 2014. The Application has been filed by the First Administrator and is brought under the provisions of Sections 47, 79, 80, 82, 83 and 92 of the Law of Succession Act, (*Cap 160 Laws of Kenya*) (*hereinafter referred to as the Act*) and Rules 59 and 73 of the Probate and Administration Rules (*hereinafter referred to as the Rules*). The

Applicant sought the following orders-

- (1) *that this matter be certified as urgent and the same be heard ex-parte in the first instance and service thereof be dispensed with;*
- (2) *that the Honourable court be pleased to issue a temporary order staying the taxation of the bills of costs filed herein in succession cause 96 of 2000 and dated 19th August 2013 by M/s Were & Oonge Advocates, 30th July 2013 by Musembi Ndolo Advocates, 19th August 2013 by Githu Muigai & Company Advocates and those filed in J.R NO.103B by Were & Oonge Advocates and B.M. Mathenge Advocates pending the hearing and determination of this application inter-partes;*
- (3) *that the Honourable Court be pleased to order that the litigation costs incurred and/or ordered against the First Administrator in suits or cases filed on behalf or in respect of the Estate while in execution of her obligations and duties as an Administrator be borne by the Estate of the Late Rahab Wanjira Evans and not by the First Administrator in her personal capacity;*
- (4) *that the Honourable Court be pleased to order that all the litigation costs incurred by the First Administrator are administration expenses payable by the Estate of the Late Rahab Wanjira Evans; and*
- (5) *that the costs of this application be in the cause.*

2. The second application dated 8th May 2014 is a Summons for setting aside prayer (b) of the above application which was granted by this court *ex-parte* on 5th May 2014. This application brought by Jimmy Aggrey Simiyu, Counsel for the 2nd Administrator has been overtaken by events as the orders sought to be discharged were temporary in nature and will automatically lapse once the principal application for determination of the issue of who is to bear the of costs of litigation is determined.

3. Therefore, the application which remains for consideration is one dated 7th April 2014. It was supported by the Affidavit of the First Administrator (*Applicant*) sworn on 7th April 2014. In response, the Replying Affidavit by Githui John for the First and 10th beneficiaries sworn on 2nd May 2014, Grounds of Opposition dated 2nd May 2014 by the Fourth Administrator and a Replying Affidavit sworn by the 1st beneficiary on 8th May 2014.

4. This cause relates to the estate of the late Rahab Wanjiru Evans who died intestate and was survived by 17 beneficiaries. She left a vast estate consisting of various properties which were the subject of a total of 18 suits between the beneficiaries themselves and third parties. These were -

(i) Nakuru Civil Appeal No. 221 of 2007.

(ii) Machakos HCCC NO. 17 OF 2003 (Formerly Machakos 77 of 2002) in which the Applicant sought eviction of squatters from one of the deceased's properties.

(iii) J.R. 103B of 2013- the Applicant sought to quash the decision of the City Council of Nairobi to erect a building on L.R. NO. 209/11540.

(iv) J.R. NO. 136 OF 2013- the suit was to quash the decision of the Business Premises Rent Tribunal to reinstate tenants in the property L.R. NO. 209/11540.

(v) Nakuru HCCC NO. 28 of 2012 (*formerly Nairobi HCCC NO. 84 of 2008*) to recover moneys due to the estate following an illegal lease by the 2nd Administrator to a third party and revocation of an illegal transfer of L.R. NAKURU MUNICIPALITY/BLOCK 4/258 to the 2nd Administrator.

- (vi) HCCC NO. 602 OF 2009 the Applicant was an interested party in a suit by the Second Administrator for recovery of parking fees from the City Council of Nairobi.
- (vii) NAIROBI HCCC NO. 258 of 2011 it was a suit against Kenya Commercial Bank for release of title.
- (viii) NAKURU HCCC NO. 10 of 2008-against Kenya Commercial Bank Ltd to declare the interest that had accrued on various sums in the deceased's account. The Applicant was enjoined as an interested party.
- (ix) HCCC NO. 504 OF 2002 against the Nairobi City Council for recovery of Kshs 42,284,700 fees due to the estate from the Council's operation of the public parking.
- (x) Civil Application No. 233 of 2007 (UR 44 of 2007) - it was an application for contempt of court against some of the beneficiaries and administrators for meddling with the estate.
- (xi) NAKURU HCCC No. 227 of 2002
- (xii) NAKURU HCCC No. 581 of 1992
- (xiii) NAKURU CMCC No. 2190 of 2003 between the Applicant and Daniel Ndeke Gatimu for the sum of Kshs. 372,017.90 and interest which was alleged to have been unlawfully obtained from the deceased's bank account in alleged satisfaction of a decree. Culminated to the Civil Appeal No. 30 of 2004
- (xiv) HCC J.R. NO. 106 OF 2003 against the Commissioner of Lands, the Minister for Local Government and the Nairobi City Council wherein the Applicant challenged the decision of the Ministry of Local Government to reposes the deceased's parcel of land known as L.R. 209/11540 and cancellation of the title issued to the deceased.
- (xv) BPRT No. 666 of 2012 being an application for eviction of a third party from L.R. No. 209/11540
- (xvi) NAKURU CMCC No. 1862 of 2005
- (xvii) NAIROBI HCCC NO. 2782 of 2001- a succession cause filed in Nairobi by the Second Administrator
- (xviii) An application in this cause for removal of administrators and an application for contempt of court

5. Some of these suits have been concluded while the others are yet to be determined. The parties to whom costs were awarded in the concluded suits have commenced the process of taxing and executing their costs.

6. The Applicant, one of the administrators to whom a Grant of Letters of Administration was issued by this court on 15th January 2002, alleges that they are seeking payment from her in her personal capacity and not as the administrator of the estate of the deceased. She maintains that she filed and defended the various suits in her capacity as the administrator of the estate and for the sole purpose of protecting and collecting the deceased's estate for distribution. For this reason she seeks a declaration that the costs in all suits filed on behalf of or in relation to the estate be borne by the estate and an order that she incurred all litigation costs in her capacity as administrator and she should be indemnified.

6. The Respondents raised similar grounds in opposition to the application. They contended that this court lacks jurisdiction to determine the question of payment of costs between the Applicant and third parties as this is a question that is best suited to be determined by the presiding judicial officer at his discretion. The Counsel for the 1st -10th Beneficiaries in his affidavit cited several cases, whose orders he particularly opined that this court cannot vary. The first case is in respect of Civil Application NO. 233 of 2007 which is still pending for determination in the Court of

Appeal and in which there subsists an order that the costs shall be determined in the appeal. The second was CMCC No. 581 of 1998 in which no taxation proceedings have been filed and as there was no judgment or decree capable of execution in that case. The third application was one dated 25th October 2012 filed in this cause for committal of the administrators and beneficiaries to civil jail. Counsel regarded this application as self serving and not for the benefit of the estate. In any event, the judicial officer who heard the application ordered that the costs be paid by the Applicant and this court cannot alter this finding.

7. In the grounds of opposition by the 4th Administrator it was contended that the suits are frivolous, vexatious, malicious and not for the benefit of the estate and the Applicant ought to be penalized personally for costs. The First Beneficiary also viewed the various applications filed as vexatious and unnecessary and without the authority of all the beneficiaries.

SUBMISSIONS

8. It was submitted that the Applicant has filed the numerous suits for the sole purpose of protecting the estate from wastage and meddling and not for the personal gain of the Applicant. The fact that some were dismissed is not material and the court should only consider the motive behind the actions, to preserve the estate. In that case, the costs should be borne by the estate.
9. Counsel for the 4th Respondent submitted that the application is an abuse of the court process. This court has no jurisdiction to determine the issue of costs which has already been determined by other courts of concurrent jurisdiction.
10. Mr. Githui for the 1st -10th beneficiaries also submitted that the issue of costs is one that is reserved for the trial court under Section 27 of the Civil Procedure Act, (*Cap 21 Laws of Kenya*). It cannot be deferred to another court. Therefore if the trial court was of the view that the costs should be paid by the estate of the deceased, it ought to have made an order to that effect. Such costs could have been deducted from the value of the estate to determine the net estate value. Only an administrator who incurs costs while defending the estate is entitled to indemnity and he must show that he is entitled to this right. He too urged the court to dismiss the application.

THE ISSUES FOR DETERMINATION

11. From the pleadings and submissions of the parties, the two issues that emerge for determination are-
 - (a) whether this court has jurisdiction to determine the application
 - (b) whether the Applicant is entitled to indemnity for the litigation costs incurred

THE JURISDICTION OF THE COURT TO DETERMINE THE QUESTION OF WHETHER THE COSTS INCURRED BY THE APPLICANT SHOULD BE BORNE BY THE ESTATE

13. It was argued extensively by all the Respondents that this court lacks jurisdiction to determine the question of payment of costs incurred in other suits. This argument was predicated on the provisions of Section 27 of the Civil Procedure Act, Cap 21 which provides as follows on costs-

27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

14. It was therefore contended by the Respondents that this court lacks jurisdiction to determine who is to pay the costs. This was an issue solely to be determined by the court before which the application or suit is heard.
15. The issue raised by the parties is in regard to this court's jurisdiction to determine whether the Applicant is entitled to indemnity for the costs incurred in litigation conducted on behalf of the estate. This questions the subject matter jurisdiction of this court, defined in the **Black's Law Dictionary, 9th Edition** as *the jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of person or status of things*.
16. The Law of Succession Act, is the law that governs the distribution and administration of the estate of a deceased person. It provides for the beneficiaries of his estate and the manner in which the same is to be divided among them. The Act also provides for the appointment of an administrator of the estate in whom it vests the property and places upon him duties of administration and confers upon him the powers necessary to discharge such duties. Therefore any questions touching on the distribution or administration of the property of the estate under the Act must be determined by the court before which the succession cause has been filed.
17. On the other hand, any claims which survive the deceased under other law other than the Act, against or by third parties may, and are defended or prosecuted by the appointed administrator in exercise of his powers under the Act. In that case the court which is considering the rights and obligations of a deceased *vis a vis* the third parties has unfettered jurisdiction to determine which party bears the costs of the litigation. However, that court cannot then determine whether the costs are payable by the estate or the administrator personally. In doing so, the court will be questioning the acts of an administrator under the Law of Succession Act an issue that is reserved solely for the court determining the issue of administration of the estate.
18. It is this court then that has the jurisdiction to look into whether the administrator properly incurred any costs in exercise of the powers vested in him and then proceed to make a determination of whether the same should be deducted from his legacy or should be deducted from the estate of the deceased in determining the net intestate estate available for distribution to the beneficiaries. The powers to scrutinize the exercise of the administrator's powers and determine any issues raised by the beneficiaries against him are vested in the court before which the succession cause has been filed. Therefore the challenge of this court's jurisdiction has no merit and is dismissed.

WHETHER THE APPLICANT IS ENTITLED TO INDEMNITY FOR THE COSTS INCURRED IN THE VARIOUS SUITS.

19. The Applicant alleges that the costs which are the subject of this application were incurred in the various suits she filed as one of the administrators of the estate of the deceased pursuant to the grant of letters of administration issued by this court.
20. On their part, the Respondents contended that the Applicant was not entitled to any indemnity for the costs incurred in the numerous suits filed in regard to the estate of the deceased. They regarded them as vexatious, frivolous and an abuse of the court process for which the Applicant should personally bear the costs. They further argued that the Applicant did not seek the approval of other beneficiaries and acted on her own accord.
21. As stated earlier, the Law of Succession Act clearly provides at Section 79 that 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 83 of the Law of Succession Act provides for the duties of the administrator, which include, the duty to *get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death*. Free property has been defined to mean property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. To this end, Section 82 (a) vests in the administrator the power to *enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate*.
22. The general principle according to **HALSBURY'S LAWS OF ENGLAND, 17TH EDITION** is that the administrative and testamentary costs incurred by the administrator in discharging his

duties are payable from the estate. It provides as follows-

432. The general principle- The general principle is that the estate must bear the expenses incident to the proper performance of the duties of the personal representative as personal representative....

433. The costs of administration- The general costs of administering the estate are testamentary expenses, for this term is not confined to the will and indeed it applies to an intestacy. The estate must therefore bear the cost of obtaining the grant, collecting and preserving the assets, discharging the debts and distributing the balance.

23. Further where an administrator incurs costs, he is entitled to be indemnified by the estate under Section 92 of the Law of Succession Act , which states-

92. (1) Any person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.

24. The authors **HALSBURY'S LAWS OF ENGLAND** (*supra*) write as follows at page 236 para 437 on the right of indemnity-

437. The personal representative is entitled to be indemnified out of the estate for all the proper expenses incurred in relation to it, without any special provision to that effect. The charges and expenses include the cost of probate proceedings, and of claims relating to the estate, which were brought or defended with leave of court, or which, though no leave had been obtained, it was proper to bring or defend.....

A personal representative who has improperly brought or defended proceedings will be disallowed as against the estate both his solicitor's bill of costs in the proceeding as and the costs he has had to pay his opponent.

25. In my view, a cost becomes an administrative or testamentary expense and for which the administrator is entitled to be indemnified if it is incurred by him or her in the course of discharging his or her duties as provided for under the Act and within the scope of powers vested in him or her. Therefore the administrator must at the time have been acting as a representative of the deceased and exercising his powers with the intent to preserve, protect or collect the assets of the deceased. Any costs incurred in an action undertaken in pursuit of the personal interests of the administrator are not covered under the said Section 92 of the Act.

26. Further such action must be a proper exercise of the powers of the administrator. He owes the beneficiaries a duty of care to exercise his powers properly with the sole intention of protecting the estate and their interests. In determining this issue, the court does not question the merits or otherwise of the suits filed as that is the mandate of the court before which the suit has been filed. The concern of this court is whether it was an action which a prudent administrator would have undertaken regardless of whether it was successful or not.

27. For these reasons prayer (4) of the application which seeks an order that all litigation costs incurred by the Applicant are administrative expenses payable by the estate of the deceased cannot be granted. The court must look at whether these costs were properly incurred by the administrator acting for the benefit of the estate.

28. I find that the Applicant is entitled to be indemnified for all costs incurred in all suits prosecuted against third parties for the benefit of the estate and in her capacity as the administrator. The First Beneficiary's objection that the beneficiaries were not consulted before any action was undertaken has no merit. She does not dispute that she was aware of their existence but took no steps either in the court in which they had been filed or in this court to challenge the Applicant. There is no evidence that the Applicant acted negligently. She cannot now be heard to say that they were improperly filed.

29. With regard to the succession causes, it is the court that is determining the cause that has jurisdiction to determine the question of costs. Generally the costs of the administrator are again recovered from the estate, but that remains the unfettered jurisdiction of the court. In this case, Kimaru, J. held in his judgment delivered in this cause that each party will bear their costs of the suit. However there has been raised against the Applicant bill of costs relating to an application that had been filed earlier for an order of contempt and committal to civil jail of the administrators and beneficiaries. This application was after full hearing, dismissed and the Applicant was condemned to costs.
30. As stated herein above, this court, determining the question of contempt as raised in the application was applying the provisions of the Law of Succession Act and was aware of the Applicant's right to indemnity. Nonetheless it found that in the circumstances of the application, the Applicant should bear the costs. As such it cannot then revisit this issue as that would amount to sitting as an appellate court against its own decision.
31. For the above reasons I find that the application herein has merit. I allow prayer (3) of the application only in regard to cases prosecuted by the Applicant against third parties and in the interest of the estate. In regard to the succession causes, the costs shall be paid as ordered by the court hearing the application or main suit. The Applicant is awarded the costs of this application.
32. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 14th day of November 2014

M. J. ANYARA EMUKULE

JUDGE