



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 840 OF 1988

IN THE MATTER OF THE ESTATE OF FREDA MUSIMBI MUDOGA – (DECEASED)

RULING

1. The Summons General dated 12th August 2013 is brought under *Section 47* of the Law of Succession Act. It seeks in the main, injunctive orders and an order for restoration to the applicants of property distrained by auctioneers.
2. The applicants are residents in premises belonging to the deceased. They state that they are in occupation of the premises not as tenants but relatives of the deceased and have been in such occupation since 2002. They state that although they had no tenancy agreements with the administrator/respondent, the latter caused auctioneers to distrain their property to recover purported rent arrears. They argue that an administrator is a mere trustee of the property and cannot act as a landlord without the consent of the persons residing in the premises. They assert that the levy of distress for rent was unlawful.
3. The administrator/respondent has replied to the application. Her affidavit was sworn on 3rd October 2013. She asserts that the application is bad in law as it has been moved by persons who have no *locus* to seek the orders in the application for they are neither dependants nor beneficiaries of estate. She states that she has power in law to ensure distribution of the estate of the deceased in accord with the orders made at the confirmation of the grant. Her case is that as the applicants are not beneficiaries they have no other capacity to utilize the subject property except as tenants. They have been in occupation of estate property without paying rent. When they refused to pay rent she moved the court in Milimani CMC Misc. Application No. 696 of 2013 where she obtained a court order to facilitate distress for rent. She contends that her acts were lawful as against intermeddlers. She has attached a copy of the order obtained in Milimani CMC Misc. Application No. 696 of 2013 and the proclamations by the auctioneers.
4. The applicants filed a further affidavit, sworn on 24th October 2013, in response to the administrator's reply. They assert that they have *locus* to file the application for they reside in the premises as nephews of the deceased. They argue that administrator is not the registered proprietor of the said property and therefore she has no authority to instruct auctioneers to levy distress. They further argue that there is no tenancy agreement that would constitute them tenants in the said premises. They deny that they are intermeddlers for they are children of one of the sisters-in-law of the deceased who is herself a beneficiary of the estate, Febe Kasiemeka Indumwa.
5. Both sides have filed written submissions to urge their respective positions. The administrator's submissions were filed on 19th May 2014, while those by the applicants were filed on 22nd May 2014.
6. The deceased person, whose estate is the subject of these proceedings, died on 7th March 1986. She died single and without children. She was survived by several siblings, among them the administrator/respondent herein and the father of the applicants, William Indumwa Mudoga. The father

of the applicants died on 13th May 2009, and was survived by his widow, Febe Kasiemeka Sabwa and several children, including the two applicants herein. The deceased died possessed of several assets, including the property the subject of the instant application.

7. On 24th May 2011, representation was granted to the current administrator, Dorcas Aisha Kasandi, although previously it had been granted to other persons, among them Erastus Mudoga Lugondi, David Isanya Mudoga and William Indumwa Mudoga who had subsequently died.

8. The administrator/respondent sought confirmation of the grant *vide* her summons dated 14th October 2011. She listed six (6) individuals as the survivors of the deceased and beneficiaries of the estate. Those listed included Andrew Ahuga Mwenesi, Febe Kasiemeka Indumwa, Christopher Mudoga Mudasia, Dorcas Aisha Kasandi, Joyce Nyandiko Navade and Belisi Mmboga Isanyia. Five of the said persons, except for Febe Kasiemeka Indumwa, executed a consent on 14th October 2011, to the proposed distribution. It was proposed all five assets be distributed equally among the six (6) individuals. The application was granted on 14th December 2011 in those terms and a certificate of confirmation of grant was duly issued.

9. I note from the record that there is pending in this cause a summons by the administrator dated 23rd October 2012, premised on rule 49 of the Probate and Administration Rules, seeking orders that the applicants in the instant application be ordered to vacate the subject property and that their mother, Febe Kasiemeka Indumwa, be ordered to sign certain documents to facilitate the distribution of the estate as per the certificate of confirmation of grant dated 30th November 2011.

10. There is also pending an application dated 23rd October 2012 by the mother of the applicants, Febe Kasiemeka Indumwa, seeking the review of the confirmation orders of 30th November 2011 and the revocation of the grant herein made to the administrator on 24th May 2011.

11. The application I am called upon to determine seeks restraining orders and restoration of distrained property as earlier stated. It is premised on Section 47 of the Law of Succession Act. Is there jurisdiction in Section 47 of the Act for this court to grant injunctive orders in a probate matter? The said provision states:-

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

12. *Section 47* has been interpreted, wrongly in my view, as conferring inherent jurisdiction, in a manner akin to *Section 3A* of Civil Procedure Act, to the probate court. To my mind *Section 47* does no more than declare the High Court to be the court for the purpose of the Act. It is the court with the original jurisdiction to operationalise the provisions of the Act. Reference in the Act “*to the court*” is a reference to the High Court. It will be noted that there is a proviso to *Section 47* to the effect that the original jurisdiction of the High Court may be ceded to resident magistrates by the Chief Justice in respect of the situations the subject of *Section 48* of the Act.

13. *Section 47* merely states that the High Court may pronounce the decrees and make the orders that are envisaged in the various provisions of the Act. That is to say that the High Court has jurisdiction to pronounce decrees and make orders under Sections 26,45,53,54,69,70,71,74,75 and 76 of the Act. *Section 47* is therefore a general provision which merely clarifies the jurisdiction of the High Court with respect to decree and orders that may be made by it under the Act. No orders are grantable under the said provision. Certainly, the provision cannot be a basis for grant of injunctive or preservative orders. In my view an application mounted on *Section 47* of the Act is without legs to stand on and is misconceived and an abuse of the process of the court.

14. An issue was raised by the applicants that the respondent has no legal basis to treat them as tenants. The respondent is the personal representative of the deceased by dint of her appointment on 24th May 2011 as the administrator of the intestate estate of the deceased. By virtue of that appointment the property of the deceased vested in her as personal representative pursuant to Section 79 of the Law of Succession Act. For avoidance of doubt the said provision states as follows:-

“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.”

15. The effect of Section 79 is that it constitutes the personal representative the legal owner of the property of the deceased pending distribution. The title to such property vests in the personal representative, who is legally entitled to be registered owner thereof. Even if the property is not actually transferred to the name of the personal representative it still remains vested in him by virtue of Section 79. He can deal with the property as if he is the owner thereof. He has the statutory power of sale and therefore he can sell it and pass a good title to the buyer. He can enter into all sorts of legal contracts with respect to it – whether of sale, mortgage, lease, surrender, among others. He can sue or be sued over the property. He can sue trespassers and third parties who commit acts of trespass on the property. He can sue to enforce contracts that touch on the property. Likewise he can be sued over torts which arise from and touch the property and over contracts to which the property may be subject.

16. As the respondent is the administrator and the personal representative of the deceased the subject of these proceedings, the property of the deceased which makes up the estate of the deceased vests in her, including the property the subject of the application dated 12th August 2013. She holds the legal title to the said property. She is able to deal with it as if she was the owner thereof and to do all those things that I have set out in paragraph 15 above. She can sue over the property. She can levy distress with respect to it and instruct auctioneers and court brokers for that purpose. Since the property in question vests in her, she can determine who occupies the same and on what terms prior to its distribution to the heirs or beneficiaries entitled to it.

17. Are the applicants’ tenants in respect of the said property? As stated above the property vests in the respondent in her capacity as administrator of the estate of the deceased. The applicants are not the personal representatives of the deceased, and therefore the property does not vest in them. They have no title to it, which they can enforce as against the respondent. They can only occupy the property at the behest of and with the consent of the person who holds title to it, and that is the administrator. Occupation of the property without her consent constitutes them trespassers. It is within her discretion as the legal owner to require them to pay rent for the premises and in that sense they would become tenants. The respondent appears to have exercised the discretion to treat them as tenants and to require them to pay rent for the estate property they occupy. She is legally within her rights as administrator to act as such.

18. The applicants appear to assert that they are entitled to occupy the premises free of charge given that they are relatives of the deceased, by virtue of being her nephews. The filial relationship between the deceased and the applicants does not override the legal relationship between the administrator and the property, nor does it oust the administrator’s rights and powers over the property. The administrator’s right to the property overrides that of any relative of the deceased.

19. Section 45 of the Act is relevant, it states as follows:-

“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 an offence and liable to a fine... or to a term of imprisonment... or

both such fine and imprisonment; and

(b) be amenable to the rightful executor or administrator to the extent of the assets which he has intermeddled...”

20. The effect of *Section 45* is that estate property should only be handled by a person who is authorized by the law to deal with it. The authority to deal with estate property derives from the Law of Succession Act or some other written law or from a grant of representation.

21. The applicants are in possession of estate property, which is part of the free property of the deceased. The question is whether they have authority to be in possession of the free property of the deceased. In the first place they do not hold a grant of representation to the estate, for that is held by the respondent. They therefore do not have authority derived from a grant of representation to possess the property. They do not claim to possess it under any provision of the Law of Succession Act, nor by dint of any other written law. In short, they are in contravention of *Section 45* of the Law of Succession Act. They are for all purposes intermeddlers and they are liable to prosecution under *Section 45(2)* of the Act. They are also liable to account to the respondent for their intermeddling, and it would appear that the respondent has required them to account by paying rent for the period that they have been in unauthorised occupation of the said premises.

22. I have already ruled that the property in question vested in the respondent automatically upon her appointment as administrator on 24th May 2011. I have already stated that she is as such entitled to exercise all the rights and powers of the owner. I have also ruled that the applicants are intermeddlers. They are in possession of the free property of a deceased person without authority. A legal owner of a property cannot be restrained from exercising his rights of owner over his property, neither can trespassers stop a legal owner from exercising his rights and power over his property. Yet in this case, trespassers and intermeddlers are asking the court to make orders to restrain an owner from exercising rights and powers over property that legally vests in her.

23. The applicants assert that they are beneficiaries, or at least children of a beneficiary, and therefore by virtue of that position they have *locus standi* to bring action against an administrator to stop her from charging rent in respect of estate property that they occupy. The grant made to the respondent was confirmed on 14th December 2011. (I will here digress and state that the certificate dated 30th November 2011 is a false document to the extent that it purports that the grant herein was confirmed on 30th November 2011. The said certificate ought to be returned to the registry for cancellation and thereafter a true certificate of confirmation ought to be issued reflecting the confirmation orders of 14th December 2011). The persons listed as survivors, beneficiaries and heirs are six (6) in number. The six (6) do not include the applicants. The applicants are therefore not heirs of the deceased and are not entitled to a share in the estate. Their mother, Febe Kasiemeka Indumwa, is listed as a survivor or heir, but that of itself does not grant her children heirs or survivors too to the estate. The said children have no claim whatsoever to the property.

24. The applicants argue that their mother has sought revocation of the orders made on 30th November 2011 confirming the grant made on 24th May 2011. The said application is dated 23rd October 2012. The application is still pending, no orders of any sort have been made on it. The pendency of the application does not in anyway interfere with the rights and powers of the respondent as administrator, nor does it confer any authority, right or power on the applicants. In any event the said application seeks reversal of orders that do not in fact exist.

25. The sum of everything that I have said above is that the application before me, dated 12th August 2013, is wholly without merit. It exists for only one purpose, that of being dismissed. I hereby dismiss the same with costs to the respondent. The interim orders made on 13th August 2013, and extended severally thereafter, are hereby discharged. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF December 2014.

W. MUSYOKA

JUDGE

No appearance of the advocate for the respondent.

In the presence of Mr. Wageni for Mr. Muturi advocate for the applicant.