



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 2346 of 2008

IN THE MATTER OF THE ESTATE OF MUIGAI KAMAU (DECEASED)

AND

WILSON KAMAU MUIGAI.....APPLICANT

VERSUS

NJERI KAMAU.....1ST RESPONDENT

KAMAU MUIGAI.....2ND RESPONDENT

RULING

The applicants came to court by way of Summons dated 7th September 2013 praying in the main for an order prohibiting the respondents from transferring, charging, selling, alienating, or any dealing with the assets making up the estate of the deceased pending the hearing and determination of the summons for revocation. The applicants also seeks to have the respondents compelled to account for their dealings with the assets of the deceased. It also asks that costs of the application be provided for. The application is premised on Rules 49 and 73 of the Probate and Administration Rules and it is supported by the affidavit of Wilson Kamau Muigai.

The applicant alleges that the respondents are transferring the suit properties to their names. He also alleges that Dagoretti/Waithaka/173 has been subdivided into portions that are being secretly disposed of to third parties. The affidavit purports to annex a copy of a mutation form to support this allegation, yet the said annexure is not attached to the affidavit. Allegations such as these ought to be supported with documentary evidence. It is also alleged that the deceased operated various bank accounts; the respondents are said to have accessed and operated the said accounts. The implication is that moneys have been withdrawn from these accounts as the applicant is asking for accounts with respect to these accounts. The applicant is apprehensive that he and his part of the family are likely to be disinherited.

Injunctions and other orders meant to restrain or prohibit certain acts are not provided for under the Law of Succession Act and the Probate and Administration Rules. Section 45 of the Law of Succession Act is often cited by parties seeking restraining orders in succession causes. Yet section 45 merely criminalises acts that amount to intermeddling. It does not provide a civil remedy against intermeddling. Section 47 of the Law of Succession Act is another provision that is often cited. It sets out the jurisdiction of the High Court. It is often construed in the same way as section 3A of the Civil Procedure Act, as saving the inherent powers of the Probate court. However the provision says no more than that the High Court may make orders and pronounce decrees that it has power to under the Law of Succession Act. It does not say that the probate court can make orders and pronounce decrees in respect of matters that have not been

provided for in the Law of Succession Act.

Rule 63 of the Probate and Administration Rules has imported some provisions of the Civil Procedure Rules into probate practice. The provisions imported do not include the rules in the Civil Procedure Rules which avail the equitable remedy of injunction. If it was intended that such remedy would be available in the probate process then the Rules Committee would have adopted the relevant rule on injunctions from the Civil Procedure Rules.

In probate matters where administrators obtain grant and have the same confirmed paving way for the distribution of the estate, such as in the instant one, what remedy does a person who has filed an application for the revocation of the grant to restrain dealings in the estate property by the grant holders that are likely to render the revocation application nugatory. That appears to be the challenge that the applicant is throwing before the court.

The administrators herein obtained representation to the estate on 31st March 2009. They had the grant confirmed on 2nd November 2010. On 7th February 2013, the applicant moved to court alleging that the grant was obtained behind his back and without his being consulted and included, yet he and his mother's family were survivors of the deceased. He wants the grant revoked and his side of the family taken into consideration in the administration. He fears that the assets of the estate may be alienated before the revocation application is heard, and that his side of the family may get nothing from the estate should that happen before the revocation application is heard.

The probate court is largely a court of equity. It is inconceivable that such court of equity can leave a party with a genuine claim without a remedy. The applicant alleges to be a son of the deceased and therefore a person entitled to a share in the deceased's estate. He has filed papers where he seeks to prove this allegation. That application is pending. If the application is allowed, he will be entitled to a share in the estate. The respondents, as administrators, have a confirmed grant. It gives them power to distribute the estate. If the estate is distributed before the revocation application is disposed of, should it be successful, the applicant will be exposed to prejudice as there would be nothing for him in the estate to share. A court of equity ought to intervene in fairness to ensure that the applicant's possible interests in the estate are not frustrated.

The applicant has cited rule 73 of the Probate and Administration Rules. The rule saves the inherent powers of the court to prevent abuse of the court process and to meet the ends of justice. Justice and fairness would demand that the estate be preserved pending the outcome of the revocation application, otherwise the court would act in vain should it grant the revocation application after the estate has been completely alienated.

I am persuaded that this is a proper case for the grant of the orders preserving the estate pending the determination of the Summons for Revocation or Annulment of Grant dated 7th February 2013. The administrators are hereby ordered to preserve the assets set out in the Summons dated 7th February 2013 pending the hearing and disposal of the revocation application of even date. For the avoidance of doubt, the assets to be preserved are:

- a) Dagoretti/Waithaka/173, Loitokitok/Ol Karia/228 and Plots Nos. 50, 89, 91 and 104 Emali Trading Centre;
- b) Shares in the Industrial and Commercial Development Corporation Ltd (ICDC),Safaricom Ltd, Standard Chartered Bank Ltd and Kengen Ltd; and
- c) Funds held in the bank accounts at Equity Bank Ltd (Kawangware Branch), CFC Bank Ltd (Chiromo Branch) and National Bank Ltd (A/C 0124302786000).

The applicant is also asking for the rendering of accounts with respect to the said bank accounts. I understand him to be saying that the respondents have or likely to have withdrawn and expended funds

from the said accounts. This is an order I cannot make before the revocation application is determined. The applicant has first to prove that he is a child of the deceased and therefore entitled to a share in the estate. It is only after that that he would have locus to demand an account from the administrators of the estate.

Should the exigencies of the administration of the estate demand disposal of assets or the doing of something that has been restrained by this order; the administrators shall be at liberty to apply. There will be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF APRIL, 2013.

W.M. Musyoka
Judge