



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 361 of 2011

**IN THE MATTER OF THE ESTATE OF:
DOROTHY NKIROTE
MARETE.....(DECEASED)**

JOHN MARETE KIREMA1ST PETITIONER/RESPONDENT

JOEL MURITHI MAKEMBO2ND PETITIONER/RESPONDENT

VERSUS

GLADYS KARIMI M'MUTHAMIA.....OBJECTOR/APPLICANT

HELLEN MUGITO MARANGU1ST RESPONDENT

WILFRED MARANGU2ND RESPONDENT

CHARLES KITHINJI MUTHAMIA3RD RESPONDENT

R U L I N G

The 1st applicant/petitioner JOHN MARETE KIREMA through an application dated 4th August, 2011 brought under Section 45 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeks the following orders:-

- 1.That the respondent herein stop, ceases and refrains from intermeddling with the estate of the deceased.*
- 2.That the respondents be ordered to give an account of all the proceeds that has accrued from the deceased's business known as TRUINE INVESTMENTS from the date of death of the deceased(22/4/2011) to date.*
- 3.That the respondents be ordered to return all the household goods sized by them form the 1st applicant's matrimonial home.*
- 4.That the respondents be ordered to return and hand over the possession of the motor vehicle registration No.KAZ 693W.*

The application is based on the grounds on the face of the application namely;

a. The respondents have been intermeddling with the estate of the deceased.

b. The respondents are wasting the estate of the deceased and dealing with it unlawfully.

c. Further grounds are as contained in the supporting affidavit of the 1st applicant filed together with this summons.

The application is further supported by annexed affidavit of the applicant/petitioner which is undated and annexures thereto.

The application on the other hand is opposed. The 1st respondent HELLEN MUGITO MARANGU swore a replying affidavit dated 10th October, 2011 on her behalf and that of her co-respondents.

In the instant petition the applicant/petitioner together with his brother Joel Murithi Makembo petitioned for grant of letters of administration in respect of the estate of DOROTHY NKIROTE MARETE, wife to the applicant/petitioner and sister to 1st and 2nd respondent and sister-in-law to the 3rd respondent. That before grant of letters of administration were issued GLADYS KARIMI M'MUTHAMIA, mother to the deceased herein filed an application dated 10th October, 2011 brought under S.68 of the Law of Succession Act and under Rule 17 of the Probate and Administration Rules seeking to be granted leave to file her objection to the grant of letters of administration out of time. This court heard the application and on 7th February, 2012 granted GLADYS KARIMI M'MUTHAMIA leave to file objection to grant of letters of administration out of time within the next 21 days from the date of court's ruling. The court struck out the name of the 2nd applicant/petitioner from the list of the petitioner's awaiting the 1st petitioner's proposal of a person to be appointed by court as joint administrator failure whereof the court on its own motion to appoint additional administrators as it shall deem fit. The objector GLADYS KARIMI M'MUTHAMIA filed her objection to making of grant on 21/2/2012 which is still pending hearing and which has not been set down for hearing.

In the instant case it can be observed that apart from petitioning for grant of letters no grant of letters has been issued to date to the petitioner on any party to this cause.

The applicant/petitioner affidavit of support is not dated and it is not clear when the same was sworn as the jurat part has no date. The undated affidavit cannot be said to be an affidavit in support and the Chamber4 summon which is not accompanied by an affidavit cannot succeed.

Section 5 of the Oaths and Statutory Declaration Act(Cap.15) provides:

“5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

I shall however proceed to consider submissions by both Counsel in support and opposition of the application herein.

When the application came up for hearing both counsel made oral submissions. Mr. Murango Mwenda, learned Advocate, appeared for the applicant/petitioner and Mr. Gikunda Anampiu for the respondents.

Mr. Murango Mwenda in support of the Application argued that the applicant was seeking for orders to restrain the respondent's from intermeddling with the deceased estate and for return of household goods carried away from the matrimonial home and return of family M/V No.KAZ 693W and for the accounts

in regard to the proceeds accrued from the business of Dry cleaners known as Truine Investments at Nkubu. The counsel purportedly relied on purported affidavit of the petitioner together with all the annexures thereto. He added that the petitioner was lawfully married to the deceased under monogamous system of marriage in a church on 10/8/2002 and averred that they had attached certificate of marriage as annexure "JMK2". He submitted that the marriage was subsisting at the time of death of the deceased and the parties were living together as man and wife and there was only one issue of the marriage one Bless Wonders Mwende, who is in custody of the petitioner/applicant. The applicant's counsel contended that upon the deceased death the respondents invaded the applicant's matrimonial home and took away all personal effects of the deceased and impounded the deceased motor vehicle which the counsel contends was being used by the respondents to the exclusion of the applicant.

He further submitted that the applicant and the child of the deceased cannot access the house. He contended that annexure "JMK6" sets out what was carried away. He concluded by submitting that though all the properties were registered in the name of the deceased they were all acquired during the time of the existence of the marriage. He urged the court to presume the properties form part of the matrimonial properties to which the applicant is entitled to enjoyment even before the grant of letters of administration. The counsel referred to case of:-**VIRGINIA EDITH WAMBOI OTIENO –V- JOASH OCHIENG OUGO AND OMOTO SIRANGA(1982-88)1 KAR 1049** relied upon by the respondents and submitted that the case is distinguishable in that WAMBUI OTIENO had filed a civil suit seeking injunctive orders and court found she did not have letters of administration. He submitted what is before court is a petition and the present summons cannot be termed to be an action as it is brought within a cause that is still in existence to protect the property of the deceased person under Section 45 of the Law of Succession Act(Cap.160). The Counsel urged that under Section 45 and 46 of the Law of Succession Act anyone can come up and take steps to protect the property of the deceased person whenever it is in danger. The counsel submitted on second authority relied upon by the respondent, that is to say in the case of **CHARLES MBURUGU M'IRAMBU –V- ISABELLA KAIRUTHI KATHURIMA HCSC NO.431 OF 2008** as bad law because according to the counsel the court did not take into account the declared difference between a cause and that of a civil case. He urged that in a cause one need not have letters of administration to bring up an action.

On the part of the respondents Mr. Gikunda Anampiu learned Advocate, opposed the application. He relied on replying affidavit of HELLEN M'MARANGU dated 10th October, 2011. He urged that the applicant's application is incompetent as the orders sought are not clear especially prayer No.3 and 4 as the orders do not indicate where the properties should be returned. He urged the motor vehicle is in possession of the objector who is not one of the respondents in the present application. He submitted the deceased during her lifetime left the motor vehicle with her mother the objector and that is where she used to stay. He contended that there is an explanation as to what happened to the properties left in the deceased house and a report was made to police after the house was broken into and properties of the deceased stolen.

The respondent submitted that the date of alleged taking of properties is not disclosed and further no evidence had been tendered to demonstrate the existence of the alleged properties. The respondents stated that the respondents had averred in their affidavit that the applicant had deserted the deceased for many years and was residing in Nairobi whereas the deceased was residing at Nkubu. That the applicant did not know what the deceased had in the house and merely relied on guesswork. That the deceased following her sickness was relying on the respondent's for her support and the applicant was never involved. The respondents averred that the applicant was not involved in the acquisition of the deceased properties. That the deceased prior to her death had made a written will annexed and marked "HMM2". She further deponed that the deceased house after her death was broken into, report was made to police, watchman arrested but to date the stolen items have not been recovered. The respondent's denied having taken possession of the questioned or disputed properties. On the Dry Cleaning business the respondents averred that the same does not belong to the deceased as she had sold the same before her death to assist herself with medication and that as regards the motor vehicle the deceased had left the same with her mother and the same is parked at her mother's home and does not even move contrary to the assertion by the applicant. The deceased it is alleged in her will had directed the vehicle be sold to meet her medical expenses. The respondents annexed current license to show that the purported Dry Cleaner is licensed to a

third respondent.

The respondent submitted that there was an issue with the applicant's marriage to the deceased and that the matter before court is not dealing with matrimonial properties but is under the Law of Succession Act otherwise a separate suit ought to have been filed. The counsel further submitted that the property in issue is in the name of the deceased and is not in danger of being intermeddled with by anyone. He urged the respondents are close relatives of the deceased and that the deceased properties are safe and taken care of. He submitted that the applicant failed to prove the alleged properties and that he is entitled to the same. Mr. G. Anampiu in support of his arguments relied on the cases of:-

1. ***Charles Mburugu M'Irambu – V – Isabella Kairuthi Kathurima HCSC No.431 of 2008 in which case Hon. M.J.A Emukule, J,*** upheld a preliminary objection that the petitioner lacked capacity to bring the application for want of granting letters of administration.

2. ***Virginia Edith Wambui Otieno – V- Joash Ochieng Ougo & Omoto Siranga(1982-88) 1KAR 1049*** in which case court of appeal; observed that the administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of inception.

Having analyzed the applicant's case and that of the respondent's and after considering the submissions and the pleadings, the issues that arise are whether the respondents have demonstrated that the applicant's application is incompetent, that the applicant do not have locus standi to be before this court on his application. Further as argued by parties whether the deceased properties are in danger of intermeddling and whether the court can on its own motion grant orders sought.

The issue on whether the application is incompetent can be dealt with by looking at the pleadings. I have pointed out that the applicant's application which is supposed to be supported with an affidavit, has a document referred to as "affidavit supporting summons" which document is not dated. The question is, is this document an affidavit and can it be relied upon as applicant's evidence.

Section 5 of the Oaths and Statutory Declaration Act provides:-

"5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

The section is crafted in such a way that it is mandatory for a commissioner before whom any affidavit is taken to State truly in the jurat or attestation at what place and on what date the oath or affidavit was taken or made. My understanding of the Section is that in absence of compliance with the said Section the purported affidavit cannot be taken into consideration. There is no evidence in support of the summon. In the instant case failure to comply with Section 5 of the Oaths and Statutory Declarations Act is fatal to the applicant's application. The summons is not supported by any affidavit and is of no evidential value. It is in such circumstance incompetent as there is no affidavit in support. The submissions by Mr. Murango Mwenda, learned Counsel for the applicant are based on non-existing affidavit is evidence from bar and the court cannot rely on the same. On this ground I find the applicant's application to be without merits and incompetent. The respondents have demonstrated the applicant's application to be incompetent.

On second issue as to whether the applicant has locus standi to be before this court on this application, I have considered the applicant's counsel submissions that this is a cause in a petition cause and not a suit hence it is properly before court and the applicant do not need grant of letters of administration to pursue this matter. I am with all due respect not persuaded by that line of argument.

Section 2(1) of the Law of Succession Act (Cap.160) provides:-

"2. Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of

this Act and to the administration of estates of those persons.”

Section 3(1) of the Law of Succession Act defines amongst others, an “Administrator” as a person to whom a grant of letters of administration has been made under this Act. It is a fact and admitted by both parties that in the present case that apart from filing of petition for grant of letters of administration intestate and objection to making of the grant no grant has been made and hence there is no administrator for the estate of DOROTHY NKIROTE MARETE.

A look at Section 3(1) also defines “personal representative” as the executor or administrator of the deceased person while the “representation” is defined as “the probate of a will or the grant of letters of administration.

Section 82(a) of the Law of Succession Act provides:-

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

(a) 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;

Sections 79-95 of the Law of Succession Act fall under the subheading in the Act-called “Powers and duties of personnel representatives”. We are however in this matter concerned with Section 79 which provides that the executor or administrator to whom letters of representation have been granted shall be the personal representative of the deceased for all purposes of the grant, and subject to any limitation imposed by the grant, all property of the deceased shall vest in him as personal representative. On the other hand Section 80(1) provides that a grant of probate shall establish the will as from the date of death and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his/their duties as such.

It is therefore as reading from Section 79(the executor or administrator to whom representation has been given) and Section 80 (2) (a) (grant of letters of administration takes effect only as from the date of the grant) and Section 82(the power to sue and other powers are conferred upon an executor or executors, or an administrator to whom representation has been made) clearly demonstrates and show that an intended administrator or a person who has made a petition to be appointed as administrator is not a personal representative of the deceased person and therefore has no locus standi to bring any action independent or within the petition until a grant of letters of representation has been made to him or her as case may be. I therefor do not agree as this is a petition cause and not a civil suit as submitted by the counsel for the applicant, he does not require grant of letters of administration to pursue the application under Section 45 of the Law of Succession Act.

In light of the above I find that this court is bound by the decision of **VIRGINIA EDITH WAMBUI OTIENO –V- JOASH OUGO AND ANO**(supra).

The other issue is whether the deceased property are in danger of being intermeddled with.

Section 45 of the Law of Succession Act provides:

“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 not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

In the instant application the applicant did not adduce evidence as to so referred to as household goods and when they were purportedly taken and if so by who?

The respondents in their unchallenged affidavit averred that the deceased house was broken into, report was made to police and the watchman was arrested. That none of the items have been recovered. The burden of proof lies with the applicant. This has not been discharged. The identity of the goods has not been disclosed and when they were taken. The court should not be left to speculate on the nature of the goods. On the issue of the vehicle the respondents averment that the vehicle was left with the mother to the deceased and the deceased had made a will disposing of her properties has not been controverted. The vehicle is said to be in possession of the objector who is not party to this application. On the drycleaner, no evidence was exhibited to show that at the time of death of the deceased herein was a property of the deceased. It is averred that the deceased disposed of the drycleaner business during her lifetime to a third party. This once again remains uncontroverted.

In absence of applicant’s affidavit challenging the respondents averment I believe the respondents that the motor vehicle and business was not in possession of the deceased at the time of her death but to the third parties to this application.

I have considered Section 45 of the Law of Succession Act, and I have no doubt that the Section prohibits the taking away of possession of property of a deceased person contrary to the said provision of the Act. This implies by taking away, the person who is taking possession of the said properties at the time of the deceased death. A person who is in possession of the said properties at deceased property at the time of the deceased death cannot be accused of taking possession or intermeddling with the deceased estate as his possession do not in any way interfere with the status quo as of the time of the deceased death. The Section in question prohibits disposal of the deceased estate contrary to the clearly spelled out provisions and talks of the free property. It is a crime for anyone to intermeddle with the deceased property and makes person intermeddling liable to account to the executor or the administrator.

In the instant application I find and hold that the applicant has failed to prove that the deceased property at the time of her death were not in possession of the people the respondents averred were in possession of the same with knowledge and authority of the deceased. Applicant has further failed to identify the deceased goods and this court should not be left to speculate. The applicant also failed to prove that the deceased property are in danger of being intermeddled with.

Section 47 of the Law of Succession Act grants High Court jurisdiction over matters brought under this Act. It provides:-

“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.”

Rule 73 of the Probate and Administration Rules also provides:-

“73. Saving of inherent powers of court.

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Under the above-mentioned provisions it is clear that this court has jurisdiction to entertain and determine any dispute under this Act and pronounce such decrees and make such orders as may be expedient.

It is further provided that nothing in the rules shall limit or otherwise affect the inherent powers of court to make such orders as any be necessary for ends of justice or to prevent abuse of the process of court. My understanding of section 45 of the Law of Succession Act is that when the court finds the deceased property is in danger of being intermeddled with it can on its own motion issue appropriate orders to preserve the deceased estate pending regularization of any process that needs to be regularized but in the instant case I find no evidence of the deceased estate being in danger of being intermeddled with.

Having come to the conclusion as indicated hereinabove in my ruling I find no merits in the applicant's application and the application dated 4th August, 2011 is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 15th DAY OF APRIL, 2013

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Murango Mwenda for applicant
2. Mr. Gikunda Anampiu for the respondents.

J. A. MAKAU

JUDGE