**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Miscellaneous Succession Cause 10 of 2011**

**IN THE MATTER OF THE ESTATE OF FRANCIS KIPKORIR SANG (DECEASED)**

**ALICE CHERONO SOWEK……..….1ST APPLICANT**

**VICTOR KIPKOECH SANG…….2ND APPLICANT**

**VERSUS**

**AGNES CHEROTICH SITONIK……..……RESPONDENT**

**RULING**

The late Francis Kipkorir Sang died on 28th September, 2011 and was according to a copy of the eulogy in the pleadings at the time of his death the Internal Audit Manager with the National Cereals and Produce Board.

It appears to me that following his death, his widow Agnes Cherotich Sitonik, named in this application as the respondent, was in the process of receiving his dues from his employer when the applicants, Alice Cherono Sowek and Victor Kipkoech Sang brought the instant originating summons for orders that:

i) the respondent be restrained from obtaining or in any way transferring to herself or to any other person any proceeds or property in the name of the deceased and in particular the provident fund or any other proceeds from the deceased person's former employer;

ii) the respondent be permanently restrained from intermeddling with the estate of the deceased until the grant of probate is obtained.

It is the applicants' contention that they are respectively the 1st widow and son of the deceased; that being the 1st widow and a son of the deceased who were supported by the deceased in his lifetime, they are entitled to the estate; that that relationship notwithstanding, the respondent has barred them from the estate; that the 2nd applicant is in dire need of school fees but cannot obtain help from the estate as the

respondent has taken all the benefits of the deceased even before obtaining a grant of probate. The applicants aver that they are apprehensive that they may be disinherited by the respondent.

In response, the respondent in a strongly-worded affidavit has argued that the application is fraudulent, moot, speculative, misconceived and is an abuse of the court process; that the court lacks jurisdiction to entertain it; that the applicants are busy bodies, strangers and opportunists.

The respondent swears further that she is the only lawful widow of the deceased with whom they had three children; that she has not meddled with the estate and was only preparing to obtain a grant for the estate. Indeed, according to her, it is the applicants who have invaded the applicants' matrimonial home and purported to conduct a posthumous marriage between the 1st applicant and the deceased by the graveside and thereafter proceeded to subdivide the land into two portions. The 1st respondent in her supplementary affidavit has vehemently denied the foregoing averments terming them as insults, scandalous, irrelevant and oppressive.

Learned counsel for the respondent, in his oral submissions maintained that **Order 37 rules 1(d) (e)** and **(g)** and **2** of the **Civil Procedure Rules** upon which the application is premised can only be invoked where an administrator or executor is in place; that the matters in this application can only be canvassed in a succession cause; that **Orders 37** and **40** of the **Civil Procedure Rules** are not applicable in disputes under the **Law of Succession Act.**

Counsel has also challenged the jurisdiction of this court arguing that the deceased died in Nairobi, while the respondent is a resident of Nairobi; the dues the payment of which is being sought to be stopped is to be paid in Nairobi and other properties are in Bomet – yet the application is filed in Nakuru and not Nairobi or Kericho High Courts. Learned counsel has backed his arguments with five authorities which I have taken into account in this ruling.

No doubt the question whether the 1st applicant was a widow and the 2nd applicant a son of the deceased is a question that can only be determined at the trial in a succession cause. Suffice, however, to state that in an interlocutory application, the court can only grant the reliefs sought if the applicants have demonstrated *prima facie*, the existence of the alleged relationship with the deceased.

There are therefore, to my mind, two broad issues for determination at this stage, namely whether the application is competent and whether the applicants have demonstrated a *prima facie* case.

Starting with the latter and bearing in mind the caution I have expressed above, that at this stage no definite conclusions of either law or fact ought to be made, it is apparent from the averments and annextures to the pleadings that *prima facie* the deceased contributed to the education and generally to the support of the 2nd applicant. The deceased attended the 2nd applicant's school functions and signed as his father. There are photographs taken during such occasions. There are copies of bank pay-in-slip in favour of the 2nd applicant's school. In addition, the 2nd applicant's birth certificate, imunisation card issued upon birth of a child and baptism certificate, all reflect the name of the deceased as his father.

In contract, the 1st applicant has not placed any *prima facie* evidence whatsoever to support her claim that she is the first widow, apart from a piece of paper headed statement signed by Japhet Sang, who has stated that he is a brother of the deceased and that the 1st applicant was married to the deceased under the Kipsigis customary law. That statement is not made under oath and is not equivalent to an affidavit.

The two letters to the former employer of the deceased, one addressed by the 2nd applicant himself and the other by his lawyers are clear and betray the claims by the 1st applicant. Those letters are written specifically by or on behalf of the 2nd applicant as a dependant of the deceased and in them there is no mention at all of the 1st applicant. In further contrast, the respondent has exhibited a marriage certificate and therefore at this stage it can be concluded that the 1st applicant has failed to prove her dependency on the deceased while the 2nd applicant has done so.

Turning to the first question, whether the application is competent, which question will determine whether the application fails or succeeds as it raises the question of jurisdiction, I reiterate that the application is brought under the provisions **Order 37 rules 1(d)(e)** and **(g)** and **2(a)** of the **Civil Procedure Rules.** It is also based on **Sections 29(a)** and **45(1)** and **(2)** of the **Law of Succession Act.**

**Order 37(1)** aforesaid provides in the relevant part that:

**"1. The executors or administrators of a deceased person……. or any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of a deceased person …… may take out as of course, an originating summons, …….as may be the summons be specified and as circumstances of the case may require, that is to say, the determination, without administration of the estate…….., of any of the following questions; ……**

**(d) the payment into court of any money in the hands of the executor, administrators or trustees;**

**(e) directing the executors, administrators or trustees to do or abstain from doing, any particular act in their character as executors, administrators or trustees……**

**(g) the determination of any question arising directly out of the administration of the estate or trust."**

(Emphasis supplied)

The above provision would apply respectively to the respondent and the applicants only if they are executors, administrators or trustees and only if the dispute arose out of the administration of the estate. The applicants have not claimed that the respondent was a trustee because so far she is not in possession of the estate or any part of the estate.

The terms administrator and executor or simply personal representative (**S.3**) are terms of art. In terms of **Section 3** of the **Law of Succession Act**, the term administrator is used to refer to a person to whom a grant of letters of administration has been made under the **Law of Succession Act**, while executor means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided.

Administration of an estate by necessary implication is a process in which the estate of a deceased person devolves to his heirs or dependants through either an administrator or executor.

Clearly, from this, none of the parties (the applicants and the respondent) is an administrator(s), the deceased having died intestate. Secondly by dint of **Section 82** of the **Law of Succession Act**, only personal representatives can enforce by suit or otherwise all causes of action which survive the deceased or arise out of his death for his estate. In other words, for the applicants to seek to deal with the estate in any manner including bringing this application to preserve the estate, they must prove that they have been appointed personal representatives of the deceased.

See **Wambui Otieno** V. **Joash Ougo & Another** (1987) KLR 407 and **Trouistik Union International & Another** V. **Mbeyu & Another**, (2208) 1KLR G and F 730.

In the celebrated case of **Wambui Otieno** (supra), the law was explained thus:

**"If a person like the appellant acts before the grant she will be a volunteer. In fact the appellant was prevented from acting. She has not gained letters of administration…… While she may be the preferred choice in Section 66 of the Law of Succession Act she has not yet received her grant and consequently cannot lawfully act in that predicament. She cannot legally claim the right to bury the body of her husband as his personal representative."**

Finally on the question of competency of the application, it is not in doubt that the **Law of Succession Act** is a self-regulating legislation complete with its rules of procedure. However, **rule 63** of the **Probate and Administration Rules** imports specific provisions of the **Civil Procedure Rules** to the **Law of Succession Act. Order 39**(today **40**) is not one of those imported provisions. But it is now well established that by virtue of **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules,** the court in exercise of its inherent jurisdiction can issue restraining orders, not being injunction under **Order 40** of the **Civil Procedure Rules.**

In conclusion, although the 2nd applicant has established a *prima facie* case, that the deceased provided support to him before his death, he has moved the court prematurely without first obtaining a limited grant. In the result, the application fails and is dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 6th day of June, 2012.**

**W. OUKO**
**JUDGE**