



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 10 OF 2008

MARGARET WANJIRU MBURU.....1ST PLAINTIFF/RESPONDENT

ANTHONY GACHINGI.....2ND PLAINTIFF/RESPONDENT

JOSEPH GACHINGI ZAMBETAKIS.....3RD PLAINTIFF/RESPONDENT

PETER GACHINGI NJOGU.....4TH PLAINTIFF/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

AND

ELIZABETH WANJIRA EVANS

***(Administrator of the Estate of Rahab Wanjiku Evans)*.....1ST INTERESTED PARTY**

CHRISTINE WANGARI GACHEGE.....2ND INTERESTED PARTY

RULING

By an Application dated 13th October 2011 and filed in this court on 14th October 2011, the 2nd Interested Party, Christine Wangari Gachege (*hereinafter referred to as the Applicant*) seeks the following orders -

- (1) That for reasons of urgency, service of this Application be dispensed with and the same be heard ex-parte in the first instance,
- (2) That this Honourable Court be pleased to order that Christine Wangari Gachege to be joined as the 2nd Interested Party,
- (3) That this Honourable Court be pleased to order that there be a stay of execution of the consent order entered herein on the 28th September 2011 pending the hearing and determination of this Application,
- (4) That the consent order entered herein on the 28th September 2011 be set aside, varied and/or discharged,

(5) That this Honourable Court be pleased to order that the Plaintiffs/Respondent and the 1st Interested Party/Respondent and each of them be restrained from inter-meddling or in any way interfering with the Estate of the Late Rahab Wanjiru Evans until the hearing and determination of Civil Appeal No. 16 of 2007 in the Court of Appeal,

(6) The costs of this Application be provided for.

The dispute herein relates to the Estate of Rahab Wanjiru Evans (*the deceased*) who died intestate in Nakuru on 16th February 2000. A grant of letter of administration for her Estate was issued on 15th January 2002 to **Christine Wangari Gachege** (*before referred to as the Applicant*), **Peter Gachigi Njogu** (*hereinafter referred to as the 4th Respondent*), **Elizabeth Wanjira Evans** (*hereinafter referred to as the 1st Interested Party*) and **Mary Wanjiku Gachigi** who is not a party to these proceedings. Margaret Wanjiru Mburu (*1st Respondent*) and Joseph Gachigi Zambetakis (*3rd Respondent*) were the grand children of the deceased and Anthony Gachigi (*2nd Respondent*) was a child of the deceased. By a judgment delivered on 10th July 2007, the court distributed the property of the deceased and being dissatisfied with that judgment the Applicant herein filed an appeal against the same being Appeal No. 16 of 2007 and thereafter obtained a stay of execution of the judgment on 25th April, 2008.

While the appeal was pending for hearing and determination, the 1st, 2nd, 3rd and 4th Respondents filed suit against Kenya Commercial Bank (*the defendant*) for recovery of outstanding interest on the sum of Kshs 20,000,000/= which the deceased had deposited in a fixed deposit account and Kshs 6,493,950/= in current account number 045-200-580-539 which she maintained with the defendant bank.

By a consent dated 22nd July 2011 and filed in this court on 25th July 2011, the 1st Interested Party was enjoined as a party in the matter. On 28th September 2011, there was filed in this court a consent between counsel for the Plaintiffs, the Defendant and the 1st Interested Party whose terms were, *inter alia*, that judgment be entered in favour of the Estate of the deceased for an all inclusive sum of Kshs 7,400,000/= in full and final settlement of all claims in this suit, that the decretal sum be paid into an interest earning account in the names of the firms of counsel for the plaintiffs (*1st to 4th Respondents*) and for the 1st Interested Party and that upon payment of the sum, the matter will stand settled and none of the administrators of the Estate of the deceased shall have any claim against the Defendant in relation to the fixed deposit account or the interest that has accrued thereon.

The 1st and 3rd prayers of the suit have already been dispensed with by the order issued on 14th October 2011. The Applicant now seeks to be enjoined as a party to the suit being an administrator to have the said orders set aside and an order barring the Respondents from inter-meddling with the estate of the deceased pending the hearing and determination of the Appeal No. 16 of 2007. Her Application is supported by the Affidavit sworn by her (*Christine Wangari Chege*) on 13/10/2011, the Supplementary Affidavit sworn on 30/11/2011, the written submissions and a list of authorities both dated 23/12/2011. The 1st, 2nd and 3rd Respondents filed grounds of opposition dated 25th October 2011 and the 1st Interested Party filed a Replying Affidavit sworn by Elizabeth Wanjira Evans on 19/03/2012. The Application was argued before court on 2/07/2012.

It is the Applicant's case that she ought to be enjoined as party to this suit as she is one of the Administrators of the estate of the deceased and therefore a proper party to the suit. Counsel for the Applicant relied on Order 1 Rules 1 and 10(2) of the Civil Procedure Rules. The counsel for the Applicant submitted that the suit herein was filed secretly and without the knowledge of the 3 other administrators and other beneficiaries. She stated that as per Section 82(a) of the Law of Succession Act, the suit ought to have been brought by the Administrator of the Estate. She further stated that Section 83(b) places a statutory duty on the Administrators to collect debts owed by the estate and consequently, the Applicant is a proper person to be enjoined in the proceedings to enable the court come to a fair conclusion.

Section 83(b) provides that a Personal Representative has 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. Section 82(a) empowers the Personal Representative 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. The dispute in this matter is in relation to interest owed to the Estate of the deceased by the Defendant. It is clear from the above provision that the only persons who may bring the suit herein are the administrators of the estate.

The Respondents have further alleged that since at the time of the hearing of the Application the Applicant had not yet been enjoined as a party to the suit, she could not pray for other orders until she was enjoined. This argument is, with respect not sustainable. Under Order 3 rule 5(1) of the Civil Procedure Rules, a claimant may unite in the same suit or application several causes of action. I do not see any prejudice has been occasioned upon the Respondents by the Applicant including other prayers in her application seeking to be enjoined as a party in these proceedings and as such I find that this objection has no merit. I therefore find and hold that the Applicant being an Administrator of the Estate of the deceased is a proper party to the suit and as such ought to be enjoined in these proceedings.

The Applicant also seeks to set aside the consent dated 28th September 2011 as the same was entered into without her knowledge or consent as the other Administrator of the Estate of the Deceased. It was the Applicant's counsel's submission that since the suit was clandestinely filed, then the consent order obtained or procured therefrom is also fraudulent and ought to be set aside. Counsel for the Applicant relied on the case of **FLORA N. WASIKE VS DESTIMO WAMBOKO [1982-1988] 1KAR 625** and that of **KENYA COMMERCIAL BANK VS SPECIALIZED ENGINEERING COMPANY LIMITED [1982] KLR 485**.

Counsel for the 1st, 2nd and 3rd Respondents submitted that the court vide its judgment dated 10/07/2007, distributed the net intestate Estate of the deceased. He further averred that the distribution never created any trust and that therefore the Applicant could only canvass her rights as a beneficiary. In addition, in the absence of a trust the distribution of the deceased's estate cannot go on in perpetuity.

Counsel for the 1st Interested Party submitted that the grounds for setting aside a consent can only be raised by a party to the consent, that the consent sought to be set aside did not seek to distribute the sum claimed from the defendant and that after the same was released, it would have been distributed between all the beneficiaries and that the consent was clear in its terms, that the consent was in essence to recover the money from the Defendant Bank.

The defendant did not file any documents in opposition to the Applicant's application. Miss Gichuki for the defendant nevertheless opposed the same on the ground that the Applicant had come before court with unclean hands and was therefore not entitled to the orders sought. The Applicant had participated in the distribution of the estate in total disregard of the court order staying execution. She prayed for the Application to be dismissed with costs.

The consent subject matter hereof relates to the Estate of the deceased to which the Applicant is an Administrator and a beneficiary. The terms thereof bind her and all other beneficiaries. She therefore has a right to challenge the terms of that consent not having been involved in the negotiations and therefore not having agreed to the terms thereof as she is one of the people with the legal right to act on behalf of the Estate.

The Law of Succession Act at Section 79 provides that the Administrator to whom Letters of Grant have been issued shall be the legal 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 the legal representative. As already stated, the Administrator is the only person vested with the duty to collect all free property belonging to a deceased person and the statutory right to bring suit for recovery of any property forming part of the Estate. The beneficiaries have no such right.

Section 83(I) provides that the Administrator has the duty to complete administration of the Estate and that is when his role as an administrator of the Estate ceases. In the present case, the distribution of

the Estate of the deceased has not been completed because there is a stay of execution of the judgment of the court providing for the mode of distribution and also because it is clear that all the assets of the deceased had not been collected. I do not agree with the submissions of Counsel for the 1st, 2nd and 3rd Respondents that the suit herein could only be filed by the Respondents as beneficiaries because no continuing trust had been created. Whereas I agree that there may have been no continuing trust as envisaged under Section 41 of the Law of Succession Act – (*in the case of minors*), it was still incumbent upon the Respondents to inform all the Administrators of the claim against the Defendant, and only proceed with the clear mandate of all the Administrators of the Estate (*as they were all alive, and willing to act*) or if any of the Administrators or if all of them if more than one as in this case, refused to act or otherwise failed in their statutory and fiduciary duty. Consequently, Peter Gachingi Njogu one of the Administrator could not proceed alone with the three beneficiaries, without first informing his co-Administrator.

Clearly therefore his was a clandestine act with the three beneficiaries, who had no capacity to act as Administrators without substitution of the duly appointed Administrators. Since the act of the 4th Respondent (*who was one of the Administrators*) cannot be separated from that of the three beneficiaries, I must hold that he, alone, along with the beneficiaries had no legal right to file suit herein and consequently, the consent dated 28/09/2011 is set aside as a contract made by parties who had no capacity to enter into it.

It has been submitted by counsel for the 1st to 3rd Respondents and the 1st Interested Party that the Applicant failed and or delayed to bring action to recover the interest that is owing to the Estate and it is her indolence that led the Respondents to file the present suit. If the Respondents felt aggrieved by this delay they ought to have applied for the grant to be revoked under Section 76 of the Law of Succession Act on the ground that the administrators had failed, after due notice and without reasonable cause, to proceed diligently with the administration of the estate, namely to file suit to recover the moneys owed to the estate.

Indeed, the Law of Succession Act contemplates such instances. Section 94 of the Law of Succession Act provides that when a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned. As already stated, the beneficiaries had no legal authority to do any act on behalf of the estate of the Deceased and delay in bringing an action for recover of the assets of the Deceased did not confer upon them such a right.

The 1st, 2nd and 3rd Respondents contend that the stay orders granted by the Court of Appeal in Civil Application No. 233 of 2007 do not bar them from bringing the present suit. The order issued by the Court of Appeal on 25th April 2008 provided - "*We hereby grant an order for the stay of execution of the superior court's judgment delivered on 10th July 2007.*" I agree with the submissions of the Respondents that those orders do not bar the filing of the suit herein for purposes of collection of assets of the deceased. It only bars the distribution of the same. But that has to be done by the duly appointed Legal Representatives of the Estate and not otherwise.

The order prohibiting inter-meddling with the Estate of a deceased person is a conservatory order meant to preserve the estate from wastage and damage. In the present case, it is evident that there has been interference with this estate without involving all the beneficiaries and the administrators. It would therefore be just and in the interest of all the beneficiaries to issue an order barring parties from further interfering with the Estate until the appeal is heard and determined.

I would therefore allow the application on terms that -

- (a) the Applicant be joined as a party (*prayer 2*),
- (b) the Consent Order made on 28/09/2011 is set aside (*prayer 4*),

(c) there shall be no inter-meddling with the estate of the deceased (*prayer 5*).

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE