REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KAKAMENGA

Succession Cause 421 of 2008

IN THE MATTER OF THE ESTATE OF

JOSEPH SHIMENGA ANGULUSHI ………………………DECEASED

BETWEEN

FRANCIS SHIMENGA

FAUSTUS J. ANGATIA …………………………PETITIONERS

EMMANUEL S. MULINDI

VERSUS

JOSEPHAT DESSLIS MWOREH ……………………. OBJECTOR

RULING

This court has been moved by way of a Notice of Motion pursuant to section 45 of the Law of Succession Act, as read together with rule 73 of the Probate and Administration rules.

Through this application, the petitioners seek orders for the punishment of the objector, on the grounds that he has intermeddled with the estate of the deceased. They also seek an order to restrain the objector from further interfering with the land which constitutes the estate of the late John Shimenga Angalushi.

It is the petitioners contention that if the orders sought are granted the estate of the deceased shall be preserved until the succession cause herein is heard and determined.

When the objector was served with application, he filed a Notice of Preliminary Objection. By the said notice, the objector contends as follows;

"***1. That the law firm representing the petitioners herein has no legal capacity to act for them in relation to this cause.***

2. That the said Notice of motion is invalid in law."

This ruling is in relation to the preliminary objection.

When canvassing the objection Mr. Chegenye, learned advocate for the objector pointed out that the affidavit in support of the petition herein was commissioned by the lawyers who are representing the petitioner. In the light of that fact, the said lawyers are said to have no capacity to act for the petitioners.

In the event that the said lawyers were allowed to continue acting for the petitioners, that would, in the opinion of the objector, contravene the provisions of section 4[1] of the Oaths and Statutory Declarations Act.

Mr. Getanda advocate did appear before me in his capacity as the advocate representing the petitioners. Similarly the same said Mr. Getanda is the advocate who commissioned the petition; the affidavit of justification of proposed administrator; the Guarantee by personal sureties; and the affidavit in support of the petition.

In the opinion of the objector, there has arisen a conflict of interest, because Mr. Getanda was privy to the evidence on the affidavits.

Indeed, the objector holds the view that there was a possibility that Mr. Getanda could be called as a witness, and that if that were to happen, Mr. Getanda would then be barred from acting for the petitioner.

Secondly, the objector submitted that the application was invalid because all applications ought to be brought by way of summons, caveat or petition, except where it is specifically provided that an application may be brought by motion. In this case, the objector says that there was no such specific provision, and that therefore, by virtue of rule 59(1) to (6), the application should have been brought by either summons, caveat or petition.

As it was brought by way of motion, the objector submits that the application is invalid.

In support of that submission, the objector cited the decision of my learned sister, Wendo, J., ***IN THE MATTER OF THE ESTATE OF JOHN MUTUA MUSYOKI AND GEORGE MUSYOKI MUTUA – PETITIONER, (MACHAKOS) P&A NO.243 OF 2003.***

In answer to the preliminary objection, the petitioners' advocate, Mr. Getanda submitted that the same was so misconceived that it constituted an abuse of the process of the court.

It was pointed out that whereas the documents filed at the outset of this succession cause, were commissioned on 7th August 2008, the firm of Onsando Getanda & Company Advocates first came on record on 26th January 2009.

The petitioners also submitted that there was no conflict of interest as their advocate had no beneficial interest in the estate of the deceased. The said advocate was simply discharging his professional duty, said the petitioners.

Finally, the petitioners invited this court to look at the substance of the matter, rather than the form. In doing so, the petitioner said that their wishes were to protect the estate from the intermeddling activities of the objector.

Having given due consideration to the application, I do first take note of the fact that when an affidavit is commissioned by a Commissioner for Oaths, that does not and cannot, of itself, make the said Commissioner for Oaths privy to the evidence contained in the affidavit. I say so because there is no legal requirement for a Commissioner for Oaths to familiarize himself with the contents of the affidavit that he was commissioning.

In administering an oath or in taking an affidavit, as he empowered to do, pursuant to section 4(1) of the Oaths and Statutory Declarations Act, the Commissioner for Oaths is simply required to satisfy himself that the person named as the deponent and the person before him are the same and that the said person is, outwardly, in a fit state to understand what he is doing. Having so satisfied himself, the Commissioner for Oaths may proceed to administer the oath or to take the affidavit.

In effect, the Commissioner for Oaths will oversee the deponent appending his signature or his thumb-print to the document.

In the event, I find and hold that a Commissioner for Oaths is not, by virtue of his commissioning an affidavit, privy to the evidence contained in the affidavit. Ordinarily, he would have no time to peruse the affidavit before the deponent executes it.

But even if the Commissioner for Oaths had the time to read the said affidavit, he is not required, by law, to do so. In those circumstances, the commissioner for oaths is only likely to become a witness to the question as to whether or not the affidavit was commissioned by him.

I am therefore, not at all persuaded by the objector's contention that Mr. Getanda advocate was likely to be called as a witness in this case, on the grounds that he was privy to the evidence contained in the affidavit which he commissioned. There is nothing to show that at the time of commissioning, Mr. Getanda advocate became privy to the evidence contained in the affidavit. But should the objector have proof of the fact that Mr. Getanda did become privy to the contents of the affidavit which he commissioned, then that would not be an issue to be raised by way of a preliminary objection. It would be a matter to first be proved, through evidence.

That must nonetheless not be construed to mean that section 4(1) can be disregarded.

But before I delve into that provision, I also wish to state that I failed to appreciate the alleged conflict of interest between the petitioners and their advocate. I say so because an advocate is supposed to represent the legal interests of his client. Therefore, if the said advocate was aware of the evidence to be adduced by his client, there cannot be a conflict of interest. If anything, an advocate can only be able to give effective professional representation to his client, if his client will have disclosed his whole case to the said advocate.

If a client withholds any evidence from his advocate then he will have only himself to blame when the advocate prepares himself on the basis of such evidence, and is later surprised, by the other party, when further evidence is disclosed, whilst the case is ongoing.

It is only when an advocate has been given full instructions that he can be expected and also required to give wholesome legal advice.

The proviso to section 4(1) of the Oaths and Statutory Declarations Act, however, stipulates that;

" ***a commissioner for oaths shall not exercise any of the powers given by the section in any proceedings or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate , or in which he is interested''.***

I understand that proviso to bar a commissioner for oaths, who is acting as an advocate for a particular client, from administering an oath or taking any affidavit in the matter in which he was acting as an advocate.

In this case, Mr. Getanda advocate was not the advocate for the petitioners, as at the date when he commissioned the petition, the Guarantee and the affidavits. In the circumstances, the proviso to section 4(1) did not apply to him, in the literal sense.

However, I do not think that that proviso was intended to apply only in the literal sense. I think that the intention was to have a distinction between the advocate acting for a party and the Commissioner for Oaths who commissions the affidavits of such a party. If that were not the intention, it would be at all too easy for the commissioner for oaths to go around the proviso, by commissioning the affidavit for his client, and thereafter, coming on record as the advocate for the said client, shortly after the affidavit had been filed in court. In the event that that happened, the proviso would be rendered meaningless, in my considered view. And, I do not think that the drafters intended it to be without meaning.

In the event, I find that Mr. Getanda advocate ought not to have come on record as the advocate for the petitioners, and also to have appeared in court on their behalf, after he had commissioned their

affidavits, the petition and the Guarantees. In effect, I uphold the preliminary objection, to that extent.

As regards the second limb of the preliminary objection, I need only set out herein the provisions of Rule 59(1) of the Probate and Administration Rules. It provides as follows:

"***Save where otherwise provided in these Rules every application to the court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate".***

The said rule is couched in mandatory terms. Therefore, the petitioners cannot seek to go around it by inviting the court to give consideration only to the substance. If I were to accept the petitioners invitation, I would have flouted the mandatory provisions of Rule 59(1). I therefore decline the petitioners invitation.

Instead, I do apply the words of Wendo J. in **Probate and Administration Cause No.242 of 2003 (at Machakos High Court)**, wherein the learned Judge held that the application before her was defective, as it was brought by way of a Notice of Motion.

In the result, the preliminary objection is upheld. The Notice of Motion dated 25th February 2009 is struck out, with costs to the objector.

Nonetheless, I wish to reiterate the following words which I first stated on 2nd March 2009;

"***The parties are reminded that intermeddling with the estate of a deceased person constitutes a criminal offence. The act of allocating to oneself or to any other person, parcels of land curved out from the estate; and then denying others access onto or the use of such property, may well constitute intermeddling".***

Dated, signed and delivered at Kakamega this 30th day of April, 2009

FRED A. OCHIENG

JUDGE