



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 1870 OF 2005

IN THE MATTER OF THE ESTATE OF JOSEPH KIARIE – DECEASED

RULING

The Petitioner Jane Njeri Ngaruiya had filed the petition on 7th July, 2005. Although she has also named Rose Wambui Kiarie as the Co-petitioner, the latter did not sign the forms of the petition but filed a Notice and grounds of objection of the making of the grant dated 9th August, 2005. The record is silent but I do note that the grant of Representation to the said Jane Njeri Ngaruiya was issued on 24th November, 2005.

Thereafter the said Rose Wambui Kiarie filed a summons for revocation of 13th January, 2006. The said Jane Njeri then filed her replying affidavit sworn on 16th March, 2006.

On 27th March, 2006, Hon. Kubo J. gave direction that the matter to proceed by affidavit evidence.

Pending hearing of this objection proceedings, Rose filed a summons dated 25th January, 2008 seeking various orders specified hereinbelow when she came to claim that Jane has already withdrawn a sum of KShs.429,080 from the deceased's account No. KRUI 10981 0 held at Kenya Post Office Savings Bank Limited, Post Bank, head office branch.

It was found out that Jane has asked for withdrawal of that sum and was allowed to do so by 'the Bank'.

The prayers sought are as under:

“2. That this Honourable Court be pleased to Order the Managing Director, Kenya Post Office Savings Bank Ltd – Post Bank, Head office Branch to restore a sum of KShs.429,080 into the deceased's account No. KRUI 10981 0 and forthwith desist from interfering and or intermeddling with the said account and funds therein pending Orders of this Honourable court on the mode of distribution upon confirmation of the grant thereof.

3. That this Honourable court be pleased to issue Orders prohibiting ay dealings and or transactions in relation to the deceased's parcels of land namely;

a) LR. No. Kiambu/Municipality/Block (Kiamumbi)/614

b) LR. No. Kiambu/Municipality/Block (Kiamumbi)/904

c) LR. No. Kiambu/Municipality/Block (Kiamumbi)/2795

d) LR. No. Kiambu/Municipality/Block (Kiamumbi)/1886

e) L.R. No.14225/177

f) L.R. No.14225/147

till further order of this honourable court upon distribution of the estate thereof.

4. That cost of this application be provided for.

Jane has filed a replying affidavit sworn on 18th February, 2008. She has denied any fraud, negligence or disrespect either on her part or on the part of 'the Bank'.

The bank also has filed replying affidavit sworn by one Mercy Njeri Kagiri Mbijire, the Company secretary of the bank on 13th February, 2008.

The bank has agreed that the deceased had an account and that a sum of Shs.429,180/20 held in his account was paid to Jane on production of the grant of Letters of Administration issued to her in this case. She also produced to them a Death Certificate of the deceased and police Abstract for loss of the deceased's passbook for the said account.

I shall like to quote paragraph 10 of the said affidavit.

"10. That the Respondent after exercising due diligence in the matter by perusing the court file and confirming that the said letter of administration had been issued by the court and verily believed that the said Jane Njeri was the duly appointed Administrator of the deceased estate entitled to collect the assets of the estate."

It further denied intermeddling with the estate and suggested that the estate's recourse is against Jane and not the Bank.

Jane filed further affidavit sworn on 26th February, 2008 and averred that pursuant to the grant of representation to her, she proceeded to identify and collect all the assets of the deceased estate available for distribution. Without stating which other assets she collected she agreed that she had withdrawn the sum of Shs.429,000/- from the Bank in July, 2007 in her capacity as the then sole Administratrix of the estate and in paragraph 6 of the said affidavit she has also stated how she has used the said sum namely,

a) Purchase of Plot No.19 Githurai – KShs.165,000

b) Legal fees (Ngugi Waithuki Advocates) - Shs.56,000

c) School fees for Francis Kiarie - Shs.12,650

d) House Rent - Shs.48,000

e) Driving school fees for Daniel Kimani - Shs.8,890

f) Disbursed to Daniel Kimani for

Subsistence - Shs.20,000

g) Disbursed to Andrew Ngaruiya

for subsistence

- Shs.20,000

Total

- KShs.293,430

None of the aforesaid affidavits mentions about the summons for revocation of grant filed by Rose which avers that Jane is an imposter or not the wife.

Jane has also not made any justification as an administratrix to make the above payments. The purchase of the plot in (a) is in the names of Andrew Ngaruiya her son. There is no receipt for the legal fees of Shs.50,000. There is also no justified expense on other items by her. She has deposited Shs.100,000 in the court after she had no other options but to do so. Still there is balance of unaccounted sum.

Mr. Mwangi, the learned counsel for Rose, contended that the Bank, by releasing the money to Jane without confirmation of the grant, has intermeddled with the estate and should be held responsible for such action and be directed to transfer back the money in the deceased's account held by it.

He also reiterated, what I have already observed, that despite the citation, Jane could obtain the grant in her sole name. In any event, Jane during the hearing gave her consent to revoke the grant in her sole name and to substitute the same with a fresh one in their joint names. Thus while hearing this application, I had disposed off in part the summons for revocation dated 13th January, 2006.

Mr. Mwangi, thereupon and on undertaking given by Jane that she would not deal with any other properties mentioned in prayer No.3 of the present application applied to withdraw the said prayer and which application was granted.

Mr. Mwangi, in respect of prayer No.2, relied on provisions of sections 45, 55 and 71 of the Laws of Succession Act. According to him the Bank should follow Jane to recover the money paid to her but should refund the money to the deceased's account beforehand.

Mr. Onguto in response contended that the Bank gave the money to Jane not for distribution but for collection which are two different aspects under the Act. The money was paid to Jane not as beneficiary but as an Administratrix for ultimate distribution.

The Bank is not obligated to follow the money given to the Administratrix and is not responsible for her action or for payment to her.

After the payment Jane disclosed that she had used money and thus as per the direction of the court to account for the same, she filed the further affidavit and gave details, which the court has specified hereinbefore.

Mr. Kimotho appearing for Jane, reiterated that she had a duty to collect the property vested in her as a sole Administratrix under Section 79 and 80. He suggested that if allowed she would sell the property and deposit the sale proceeds along with Shs.100,000 and, without any remorse shown from or on behalf of Jane, stated that the remainder be treated as an advance given to her pending the determination of the issue whether she is a wife or not.

Mr. Mwangi in rejoinder stated that the money in a Bank does not amount to an asset to be collected. The Administrator is not authorized to utilize any of the assets for her own use unless authorized by the court.

He sounded a warning that if the Bank is absolved in this matter, then the court is giving green light to the Bank to share out the asset to the Administrator who only holds a grant of representation. He stressed that it cannot be handed out until confirmation of the grant. He relied on some cases where the Administrator or beneficiary came to the court to be authorized to get some money from the Bank or held by someone as an asset of the estate. They were distinguished by the other counsel as irrelevant as none

of them talked about collection.

No one can deny that as a matter of practice and procedure, the courts are flooded with applications for leave to take out money for school fees, medical expense or some emergency and the courts invariably asks the Banks to give out specified sums to specified persons or institution including the Administrators or executors. It may be pedantic to state that the Administrator or executor are not the owners or proprietors of the assets of the estate and do not have any authority to distribute the assets to any beneficiary including himself or herself if he or she happened to be a beneficiary. They are in similar position as a trustee who holds the properties for the benefit and eventually the distribution to the beneficiaries as ordered by the court.

It is true that the Act, either advisedly or otherwise, has left many gaps in the process of Administration and that is why the courts have to make permitted inroads considering the paramount object of the Act Vis-à-vis the position of the Administrators or executors as regards their duties and obligations and sometime as is in this case, third parties.

Section 55 of the Act prohibits distribution of the estate by stipulating that:

“1. No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71.

2. The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death, whether the income arises in respect of a period wholly or partly before or after the date of death.”

Net estate is defined in Section 2 of the Act – viz: “net estate” means the estate of the deceased person after payment of reasonable funeral expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any”.

In this case, there is no doubt that Jane has gone ahead and distributed the net estate in the sum of KShs.429,000. Her averment of the payment of legal fees is not substantiated, thus she has expended the said sum in total disregard of the law and her action becomes unpardonable when she withdrew the said sum in full view of the objection proceedings filed by Rose whom she had from the beginning, acknowledged as a co-wife. Rose on the other side does not acknowledge her as such. Her actions after **the alleged actions of collection**” make them undoubtedly unlawful and worthy of all disrespect and abhorrence.

In view of the circumstances of this case, I would reject the contention raised that Jane was acting within her duties and rights as an administratrix under sections 82 and 83 of the Act. Her intention to get the money in the Bank, long after the issuance of the grant and after filing of the summons for revocation, cannot be held lawful, under any extent of stretching the provisions of Section 83 (b) namely; **“to get in all the property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death”**.

I shall have no hesitation to find that the withdrawal of Shs.429,000 and users thereof by Jane is nothing but breach of her duty as an administratrix and is in contravention of her duties and rights as Administratrix and in my view, she has lost the faith of the court to continue as such in this case. I shall thus remove her as an administratrix despite the directions made on 25th February, 2008 and I review the same accordingly by making Rose a sole administratrix of the estate of the deceased herein. I make this order in exercise of inherent power granted under Rule 73 of the Probate and Administration Rules.

She has on her own volition paid back Shs.100,000 and the certificate of share for the plot transferred in the names of her son, and taking into consideration that gesture, I shall not make any punitim orders against her at this juncture.

Now coming to the prayers sought against the Bank, I have considered the averments made in the affidavit mentioned hereinbefore and also the submissions made.

It is averred that the Bank has given out the money after due diligence and after perusing the court file. I shall pause here and note that if the averment of perusing the court file is true, then how the Bank failed to notice the summons for objections made by Rose and date for hearing thereof fixed on 7th November, 2007? The money was paid in July, 2007 in full view of the aforesaid facts. The Bank also did not explain why Jane was coming after about two years of issuance of the grant to her on 24th November, 2005. It has failed to note the reasons for revocation of the grant by Rose. The act of the Bank is similar to the act of an ostrich which hides its face to avoid looking at the outside circumstances, which could be risky or hazardous. The contention that it gave money to Jane, for collection of the assets as provided in Section 83 of the Act is a lame excuse or an after thought, which deserves to be frowned upon.

The act, in my view, has provided for protection against such eventuality in the provisions of section 45(1) which stipulates:

“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.”

The Bank, which boasts of due diligence and looking to the circumstances of this case, has defaulted in his responsibility of care to be taken of a free property of the deceased. This is my honest and considered view considering all the facts on record.

In the premises, I find that the Bank, as a person in charge of the asset of the deceased in fiduciary capacity has contravened Section 45 by handing over the money and thereby disposing the same from its end.

As the applicant has not asked for any penitentiary remedy, I shall find that the Bank is answerable to the applicant to the extent of remainder of Shs.429,000 dispensed to Jane. I direct that the balance of the money not refunded by Jane be paid back to the estate by the Bank.

I shall not make any order on the costs due to peculiar circumstances of this matter.

Orders accordingly.

Dated and signed at Nairobi this 22nd day of July, 2008.

K.H. RAWAL

JUDGE

22.7.08