REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 232 OF 2008

AFRICAN SAFARIS CLUB...PLAINTIFF

VERSUS

KOIKAI OLOITIPTIP & TWO OTHERS...........DEFENDANTS

RULING

The proceedings herein were initiated by way of a plaint dated 8th day of December, 2006. The Plaintiff is described as African Safari Club Limited, whereas the defendants are described as Koiai Oloitiptip, Lameyian Oloitiptip and Marchet Auctioneers(K) Limited as the 1st, 2nd and 3rd defendants respectively. The cause of action is found in paragraphs 4,5,6,7 and 8 of the said plaint. In a summary form the plaintiff's cause of action against the defendants is as follows:-

(i) The plaintiff is a tenant of property known as Kimana/Nkando/358.

(ii) The recovery interest in the said property is vested in the estate of the late Stanley Oloitiptip.

(iii) The said tenancy centered a covenant for quiet enjoyment ton the part of the estate.

(iv) The 1st and 2nd defendants acting through the 3rd defendant wrongfully entered the premises and distained for rent upon varies equipments and furniture belonging to the plaintiff and other property belonging to the plaintiff and other property belonging to the 3rd parties.

(v) The alleged rent arrears is alleged to have been due as at 30 November 2006.

(vi) The Plaintiff contends that the alleged distress was illegal because there was no rent arrears.

(b) In accordance with a court order given by the High Court Nairobi. In the succession cause No. 2535 of 2005 can cause no 2536 of 2005 issued on 25th February, 2006, the rent was payable to one Kasaine Oloitiptip and not the defendants.

(c) That rent had in fact been paid to one Kasaine Olitiptip.

(vii) By virtue of what is staled in number vi above, the said action on the part of the defendant was nothing but an act of trespass. The suit was initially filed in Mombasa of Chief Magistrate out as number 3959/06.

Simultaneously filed with the suit was on interim application dated and filed the same date of 8th December, 2006. It sought the following prayers:-

(1) spent

(2) that an injunction do issue restraining the defendants either by themselves, their agents or servants or otherwise howsoever from levying distress upon the plaintiffs goods or from carrying away the plaintiffs goods upon a distress for rent or in any manner whatsoever interfering with the plaintiffs quiet enjoyment of the property known as Kimana/Nkando/358 pending the hearing and determination of the suit.

(3) That in the mean time pending the hearing and determination of this application, that there be a temporary injunction restraining the defendants either by themselves, their agents or servants or otherwise howsoever from levying distress upon the plaintiffs' goods or from carrying away the plaintiffs goods upon distress for rent or in any manner whatsoever interfering with the plaintiffs quite enjoyment of the property known as Kimana/Nkondo/358.

(4) That costs of the application be provided for.

Service into the defendants was effected by way of Advertisement in the Daily Nation issue of Wednesday December, 20,2006.

In response to that substituted service by advertisement which was pursuant to a Court Order given on 18th December, 2006 one Koireil Oloitiptip filed a replying affidavit sworn on 15th January 2007 and filed on 16th January 2007. The paragraph relevant to this ruling are, numbers 12, 13, 14, 15, 16, 17, 18,19 and 20. A summary of the same are:-

(i) The plaintiff/applicant had entered into an illegal tenancy agreement with one Kasaina Oloitiptip.

(ii) The limited grant which had been issued to one Kasaine Oloitiptip had been cancelled by Aluoch J. as she then was (now JA).

(iii) That the respondents include of deponement who had been authorized by the co-administrators to depone the replying Affidavit had been appointed administrators of the estate of the deceased.

(iv) The cancelled limited grant to the Kasaina Oloitiptip is annexture KO1 where as the one for the 4 new administrators is annexture KO2.

(v) The new administrators as listed in KO2 ARE:-

(a). Koirial Oloitiptip

(b). Munyentet Oloitiptip

(c). Lemayian Oloitiptip

(d). Daniel Shinini

(vi). Hitherto the new administrators were afraid he received money as rent in pursuance to an agreement of tenancy entered into by the plaintiffs and one Kasaine Oloitiptip but had now been advised by their Counsel on record to accept the same on a without prejudice.

(vi) All outstanding rent should be paid to the Administrators Advocates.

(vii) They had no objection to the Plaintiffs occupancy of the said premises but were desirous of

formalizing the said agreement legally in their capacity as the legally appointed Administrators of the said Estate.

The injunctive orders sought were granted on 8.2.2002 by the lower court. The salient features of the same are:-

(1) That an examination of the documentation displayed before the Court revealed that the Plaintiff had paid rent to one Kasaine proved by presence of a bundle of copies of cheques exhibited.

(2) That the said money paid to Kosaine was for the benefit of the estate of Oloitiptip.

(3) That it appears there is a dispute concerning the said money received by one Kosaine on behalf of the estate of Oloitiptip.

(4) That according to the court it is Kosaine Oloititip who was receiving money on behalf of the estate who should account for that money to the estate.

(5) As far as the court was concerned there was no justification for the distress for rent and on that account granted the plaintiff applicant the restraint orders sought.

The court has perused the record and noted that summons to enter appearance have never been taken out and served on to the defendants what has been happening is that the current applicant Koikai Oloitiptip on behalf of himself and other defendants in his capacity was one of the administrators of the estate of the late Stanley Oloitiptip seeking various reliefs, culminating in the application subject of this ruling. It was brought under certificate of urgency. It is dated 5th day of June 2008 and filed on 6th day of June 2008. It seeks five prayers. These are:-

(1) Spent

(2) That within fourteen days the African Safari Club to make payment to the Administrators/defendants the rent dues for the period between the 15th March 2005 to the 20th February 2007.

(3) That the funds deposited in Court to be made available to the administrators/Defendants immediately

(4) That arrangements between African Safari Club and Mr. Kasaine Oloitiptip is ultra vires therefore the administrators to evaluate the terms of the tenancy to recover any loses and to enter into a legitimate agreement with African Safaris Club .

(5) That costs be paid by the Plaintiff.

The application is supported by grounds in the body of the application supporting affidavit, further affidavits and skeleton and arguments. It is worth nothing that the supporting affidavit is joint in that it is sworn by one Lemayian Oloitiptip and Minyentet Oloitiptip. In addition to the supporting affidavit there is a supplementary affidavit, sworn by Kolel Oloitiptip on 14th day of July 2008 and filed the same date and a further supplementary affidavit sworn by Koikai Oloitiptip sworn on the 17th day of September, 2008 and filed on the same date.

On the side of the respondent there is a replying affidavit by Jacqueline Odero on behalf of the plaintiff. It is sworn on the first day of July, 2008 and filed on the 3rd day of July,2008. There is also another replying affidavit sworn by one Kasaine Shepashina Oloitiptip sworn on the 28th day of June 2008 and file don 30th day of June 2008. These are also parties calling themselves as interested parties who have counsel on record. This counsel is none other than Messrs Kandie Mutai Mude iz, and Co. Advocates. The first notice of appointment is dated 14th July 2008 and yet notice of preliminary objection had been

date 26th day of June 2008 and filed on 30th Jun3 2008. Of interest is that the said preliminary objection is meant to object to an application which is not identified. For purposes of the record the grounds of objection are as follows:-

(1) That the application is Res judicata

(2) That the Court lacks jurisdiction to hear and determine a family succession dispute in view of provisions of the law of succession.

(3) The applicants are vexatious and have abused the court process after fling several suits.

(4) That there is an order by the Hon. Lady Justice Kaplana Rawal to have the matter determination of whatever dopondents Koikai is one of the beneficially entitled to any of the proceeds of the estate.

(5) That the defendants have approached the court with unclean hands.

The applicant and plaintiff filed skeleton arguments. The other participatory relied on points of law on record is also measures in order and Ondiek advocate recorded as appearing for the administration but the court has not forced any notice of appointment in the record for this form.

The parties relied on the written skeleton agreement in the case of the applicant/defendant and plaintiff issued and submissions in court. the points stated by the applicant in ……….are as follows:-

(i). The suit land is property of the deceased.

(ii). The plaintiff leased the same through one Kasaine Oloitiptip but the plaintiff has never produced the original document that legitimize the tenancy.

(iii). Their complaint is that. The plaintiff has continued making payment to Kaseina despite the court order stopping the said payments.

(iv). The plaintiff disregarded the first letters tidiness' issued on 8/12/2005 on the basis of which in this for rent was levied and instead of paying rent to the administration the plaintiff filed this suit.

(v). The suiting mentioned by bad faith evidenced by the fact that summons to enter appearance as well as the interim application were served through advertisement and the defendant bone to remain of it 24 hours before the orders of information were confirmed pending the hearing of the main suit.

(vi). They mention that the suit was instituted wrongly in court without jurisdiction and all this was meant to frustrate the cause of justice.

(vii). They still contend that the agreement does not hold as Mr. Kasaine had no authority to enter into the said tenancy agreement.

(viii). As stated earlier on the plaintiff despite a court order baring him from doing so continues to make payments to Mr. Kasaine.

(ix). At first they as admonitory were reluctant to honour the agreement entered into between the plaintiff and one Mr. Kaseine but here now been advised that payment into court can be competed on a without prejudice basis hence the application for the release of the same so that the same can be paid to the bona fide.

(x). They do not intend to terminate the tenancy but only wish to formally the agreement .

(xi). They have rightfully come to court to seek the money sought become they, the live defendant have now been confirmed as the administration of the estate of the deceased.

(xii). The court was urged to ignore the deponement of the Kasaine because he is not one of the administration.

(b) he has been writing he affairs of the estate for the last 20 years or so without accounting for my proceeds to the beneficiaries .

(c) the basis of authority for him to write affairs of the estate was letters of administration call grounds bona which was later conceded but despite the conciliation he continued and still continues to intermeddle in the affairs of the estate.

The stand of MR. Ondiek is that since the exercise of the plaintiff for not paying money to the estate was that they did not Vance who to pay to, that exercise can no long or stand as the administration have now been identified. The money should therefore be released to them for the benefit of the beneficiaries.

The court is enforced to invoke its inherent provisions and agrees on suspendence to alienate the suffering of the beneficiaries which has gone on for long time.

Mr. Mitel on behalf of the interested parties submitted that the application has been overtaken by events because when the application was filed the administration were different.

(2) the application goes continues to the provision section 66 of the law of succession Act which stipulate that priority should be given to the widows.

(3) they contend that the administration should not be given those funds because they are pensions of no man and might misuse the said funds so that they do not reach the beneficiaries.

(4) it is their stand that the interested party one Kasaine had authority to receive the said funds from the plaintiff on behalf of the estate under an order made in HCCC PRA number 2536/05, which order was made on 21/2/2006 and it is still in force to date.

(5) since the matter came to court money was ordered to be deposited in court and since the insurance of the said order the interested party never received any money on behalf of the estate.

(6) they also maintain that there is an issue as to whether the first applicant herein is a beneficiary of the estate of the deceased or not.

(7) Kasaine who has come to court as an interested party in the elder son of the deceased and he has been using his own funds to improve the property of the deceased.

On the basis of the above they urge the court to dismiss the application as being incompetent and the plaintiff should continue depositing money into court until the issue of distribution is sorted out in the summon proceedings.

Counsels for the plaintiff on the hand stressed the following points:

1. the application is in competent because it is not based in one substantive suit fixed by the applicant.

2. as far as they are concerned they have been paying rent promptly and in the same views misapplied it an issue for another for which does not involve the plaintiff.

3. the plaintiff is not interested in knowing who is entitled to the use of the said money. They are to ensure that payment is made.

4. The plaintiff has a valid case which has been performed giving birth to benefit ought to be received. Then plaintiff spent money on renovation and is really and willing to pay the same as directed.

In response in and case for the administrator submitted that the court should act in favour of the matters of the case beneficiary and so the orders sought are proper and they should be claimed.

The cases were registered to the court- namely the case of Mary Rono versus Jane Rono and William Rono Eldoret CA no 66 of 2002 decided on 29th day of April 2005. it dealt with distribution of 9 deceased estate in equal basis between the widows and sons and daughters of the deceased such equal distribution was said to be in line with the constitution of this country as well as international laws.

Also the case of Isabella Gichugu Mathaka and Rita Mueni Mathaka versus Eric Muthui Mathaka Nairobi CA no 304 of 2002. the appellant were widows and daughters of the deceased where as the Respondent was a son of the deceased. The agreement raised was that the respondent had argued that him as the son of the deceased was the one who was rightfully entitled to the grant. Along the line it is noted at page 7 of the judgement that Aluoch Jas she then was now JA had CA have own motion remarked the grant under section 76. At page 8 line 4 from the bottom the CA observed this:-

" for the foregoing it is clear that a grant may be recorded either by applicant or an interested party or on the courts own motion. But even when reaction I buy court upon its own motion there must be evidence that the proceedings to abscond the grant were defective in subsistence as that the grant were obtained forcefully by making of false statement or by concealment of same thing material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of laws or that the person named in the grant has failed to apply for confirmation or to proceed differently with the administration of the estate. The grant may also be revoked if it an be shown of the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be received.

On the court assessment of the facts herein, there are matters of commence and to both side 1 which do not seek to be in contest these are:-

(1) That the subject matter of the application are rental proceeds from a rental property Maina Kimana/Nondo/350.

(2) The premises has alleged been leased by the plaintiff. African Safari Club.

(3) The said property belonged to one Stanley Oloitipip and by notice of that both sides are in agreement in that if the property as well as the proceeds therefore are property belonging to the estate of the deceased.

(4) The case for the said premises though not exhibited upon to have seen entered into between the plaintiff and one Kaisane Shapashine Oliotiptip. The said Kaisane did so under authority of a limited grant and calling a bona which had been issued in Nairobi succession case number 459 of 1986,issued on 16th July 1986. the said limited grant as per the content of annexture KS03 to the replying affidavit of Kaisane was canceled upon the court being made by one Robert Minyandet Oloitiptip on 15th March 2005

(5) On 8th December 2005 another letter of administration to the said estate. This time for administration were appointed and these are:-

(1) Koikeai Oloitiptip

(2) Munyentet Oloitiptip

(3) Comayen Oloitiptip

(4) Daniel Shinini Oloitiptip

(6) from the deponement and submissions as soon as this new grant was issued in succession cause NO.2536 of 2005 the new administration moved in to distrain for rent. The grant is annexed as KO2 to the supplementary affidavit of the applicant sworn on 14th day of July 2008. it is the distrain for rent is what forced the plaintiff to come to court and seek the relief sought.

(7) It is a common ground that as a result of these being a dispute as to when the rightful person to receive the said proceeds of money that and or was in that the money be deposited into court.

(8) It is common ground as to submitted by the plaintiff counsel that since them the plaintiff has been difficultly depositing money into court, no particular figure to the court by either side. However scheming through the record yields documentation annexed to the written application filed simultaneously with the plaint records payments made by the plaintiff to the Kasaine S. Oloitiptip set out tendency as here under:-

1. 16.5. 2006 172109 220,500.00
2. 14.6 2006 19044 220,500.00
3. 2nd August 2006 192931 110,250.00
4. 4th August 2006 192946 110,250.00
5. 8th Sep. 2006 199573 110,250.00
6. 15th sep.2006 1999594 110,250.00
7. 3rd Nov. 2006 004151 110,250.00
8. 7th Nov. 2006 19990 110,250.00

1,102,250.00

(9) paragraph 3 of Kasaine Shapashinas Oloitiptips replying affidavit sworn on 20th June 208 and filed on 30th June depones that the family is in dire need of funds and a resolution has been parted that funds be returned to them. However there is deponement that the received part of the rental proceeds from the suit property and have the same has been applied.

(10) Scheming through the file also reads that deposits were made in court set out redundancy as follows:-

a. 20.3.07 B471431 114,260.00

b. 11.4.07 B471514 114,213.00

c. 22.5.07 B471592 114,263.00

d. 25.6.07 B471690 114,263.00

e. 3.9.07 B471912 230,026.00

f. 1.10.07 B455541 114,263.00

g. 25.10.07 B455601 114,263.00

h. 8. 1.07 B455731 230,026.00

Total Ksh. 1,145,577

This court not in a position to know whether the amount so far deposited as per the above receipts and the one paid to Kasaine is the total amount that is due to the estate or not.

(11) It is also common ground that the administration of the estate here now charged by notice of an order made by the family court Division in HCCC proof of 2536of 2005 on the 4th day of September 2008. The new administrations have been named as:-

(a) Mohamed Koikai Oloitiptip

(b) James Sayiankes Oloitiptip.

The latest variation in the grant is annexed to the further supplementary affidavits of Kaikai Oloitiptip sworn on 17th September 2008 and filed on 18th September 2008.

(12) As noted earlier on the application subject of the ruling is the one dated 5th day of June 2008 and filed on 6th June 2008. it is filed by Koikai Oloitiptip and Lamiae Oloitiptip in their capacity as administration and defendant. It is to be noted that these two applicant were among the 4 administration names in the grant issued on 8th December 2005. that position has now changed as per the latest grant issued on 4/9/2008 whereby there is an additional names of Mohamed Kokai Oloitiptip and yet the further affidavit does not bone deponement to the effect that Mohamed Koikai Oloitiptip is one and the same person as Koikai Oloitiptip the applicant. There is an introduction of one James Sayianke Oloitiptip who was not one of the administrations. He is not party to the application under consideration. He has not sworn an affidavit to the effect that he in agreement with the other two.

(13) as mentioned earlier that there is no dispute that the funds sought to be released to the applicant amount to be for distribution to the beneficiaries of the estate.

Against the afore set out common grounds is an application to release the said funds. But before dealing with its merits a few issues of technicalities or use in the agreement is noted in the records which need to be dealt with first. These are:-

(i). The form of Ondiek and Ondiek has presented itself to this court and participated in the arguments on the application as counsels for the administrations the record does not specify which administration he was appearing for, since Koikai seemed to be taking on behalf of hung of and the co applicant as well. It was therefore necessary for a notice of change of appointments of advocates to be filed by the said counsel in order for the court to know that include the said form is registered on the record and secondly for whom. In the absence of that all the representations made by the said Ondiek of Ondiek and Ondiek advocate has to be disregarded as being null and void for failure to place themselves properly on record.

(ii). Then there is the form of Kondiek Mutai Mude (2) and company advocates the courts attention was dawn to the proceedings of 28/8/2007 whereby this form had applied when the lower court was still said of the matter that they be claimed to join the proceedings as interested parties. T is alleged that the enjoining order were made the same date. This court has however not filed any notice of appointment of advocate on record by the said form nor filing of any pleadings on the basis of which they an file responses to any application herein.

(iii). Next is line is the applicant to the application under review. It is on record that services to the said appointments effected by way of advertisement in the daily nation of Wednesday December 20, 2006. Despite complainant of having been given a short notice one Koikai Oloitiptip entered appearance dated 20th February 2007 and filed the same date. The address is indicated as being c/o Ondiek and Ondiek advocate case else.

Lameyian OLoitiptip entered appearance in similar style having entered appearance in person the counsel

mentioned namely Ondiek and Ondiek advocate was required to comply with the provisions of order III rule 8 CPR. This reads:-

"*order III rule 8 where a party after having sued or defended in person apposing advocate to act in the cause of matter on his behalf, he shall give notice of the appointment and the provision of the order relating to the notice of scheme of advocate shall apply to a notice of appointment of an advocate with the necessary notification"* this rule is further fortification of the courts stand that the firm of Moses Ondiek and Ondiek is not properly on the record.

Step filing of the said memorandum of appearance, the defendants were at liberty to participate substantively in the said proceedings this memo of appearance was and still is to enable the defendant move a step further in their participation in the proceedings steps are those prescribed in order VIII rule 1 (2) CPR and IX rule I. These reads:-

" order VIII rule 1 (2) where of defendant has been served with a summons to appear he shall in less same other or further order be made by the court file his defence within fifteen days after he was entered on appearance with suit and same it in the plaintiff within seven days from the date of the filing of the defence.

For reasons in version to the court no defence was filed by the defendant fifteen days from the date of service upon them of the summons to enter appearance and set these were under the supervision if is able counsel having failed to take action under order VIII rule 1 (2) the only option left to the defendants is to apply for leave to file a defence out of time or to fail back on to the order IX procedures.

The orders IX procedures on the other hand provide " order IX rule 1. A defendant may appear at any time sequential judgement and may file a defence at any time before interlocutory judgement is entered at any time before find judgement"

By virtue of this provision since no interlocutory judgement or any other form of judgement has been entered against the defendant, they are at liberty to comply by filing a defence.

The question is that arises for the determination of this court is whether the applicant can present the application subject of this ruling anchored on their memorandum of appearance only.

As submitted by counsel for the plaintiff the appearance were meant to enable the defendants/applicants to give status quo in the matter. What was under consideration then was an uniform application filed by the plaintiff which was anchored on the plaintiff filed. The invitation of the defendants to participate in that interim application was governed by the provision of order 50 rule 16 CPR where by the defendant was only obligates to put in a replying affidavit to respond to that application. That intention become spent when the interim application would imposed at and orders made in respects of the same.

It therefore follows that in order for the defendants to be enable to take any procedural steps in the matter, they were obligated to comply with the rules by filing of defence and counter claim. The defence would have conferred the plaintiff claim against them. Where as the counter claim would have in rolled them as rightful claimant to the rental procedures on behalf of the estate and other benefit owes to the estate on their company as administration this would also have enabled them to disclose the court of would be beneficiary and also specify that the action taken by them was for the benefit of beneficiary of the estate. Then in the basis of the counter claim they would be able to present an application to seek the release of the said funds for the benefit of beneficiary who are named in the absence of any pleading on the basis of which the applicant application is enclosed, the same is wrongly and therefore cannot be a sorted of substantive relief to the applicant. It has therefore fainted the question for determination is whether the faulting of the said application to leave the applicant as well as the other beneficiaries residence and therefore qualify to be sending from the seat of justice empty handed. This court was called upon to take cognition of the flight

of the silent suffers and even if no relief is available form this court nonetheless this court can provide, guidelines and or directions on the way forward to resolve the matter in the process a ……… the suffering of the beneficiaries.

In determining what action to take in view of the fact that the application has been faulted on a point of technicality, thus court has to bear in mind what was stated earlier on that the proceedings herein are civil but the action it is being called upon to do is succession in nature. To resolve this, this court is inclined to borrow the reasoning in its own ruling delivered on the 20th day of April,2007 in the case of **YUSUF CHERUIYOT VERSUS SAMUEL MALAKWEN CHERUYOT AND ANOTHER, NAIROBI HCCC NO. 3358 OF 1989.**

At page 4 of the aid ruling lien 7 from the bottom this court made the following observations:-

It is against the afore mentioned background information that the plaintiffs current counsel filed a chamber summon under Section 98, law of succession Act Cap.160 Laws of Kenya and all enabling provisions of the law seeking orders that proceedings in this suit be continued under the provisions of the law, of succession Act, Cap.160 Laws of Kenya.

At page 8 of the same ruling lien 9 from the top the court went on:-

"*Having been presented by way of a plaint there is no doubt that the proceedings are governed by the civil procedures Act cap.21 Laws of Kenya. A perusal of the Act plus rules made there under does not yield any rule which empowers this court to convert proceedings commenced under this Act to be those supposed to be commenced under this Act to be those supposed to be commenced under the law of succession Act. This court is alive to the provisions of Section 3 and 3A of the same Act. They state:- Section 3 in the absence of any specific provisions to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special forms of procedures prescribed by or under any other law for the time being in force.*

3A nothing in this Act shall limit or otherwise affect the inherent power of the Court to make full orders as may be necessary for the ends of justice or to prevent abuse of the due process of the court.

Applying these two provisions to be facts herein it is clear that section 3 enjoins this court to take cognizance of procedures under any other written law. Any other written law in this matter is the law of succession Act Cap.160 Laws of Kenya. The implication is that where such a procedure exists to cover what the civil procedure Act cannot cover, then that other procedure is to be applied. Section 3A on the other hand directs the Court to provisions of the law procedure Act. It is a serving clause. It applies where the court is confronted with a particular situation not centered for by the civil procedure Act. Therefore a proper construction of Section 3 and 3A of the Civil Procedure Act in the light of the preliminary objection herein is that both oust their courts power to import provisions of the law of succession Act into these proceedings; likewise expert the provisions of the civil procedure Act into the law of succession Act."

At page 12 lien 5 from the bottom the Court went on:-

"It is clear from the reading of both the eight and ninth schedules that the civil procedure Act and rules made there under is not among the written section 2 (2), 98 and 99 of Cap.160".

Applying this courts above reasoning in the cited own case to this ruling, this court makes a finding that even if they defendants/applicants application had not been faulted on a point of technicality it would have been inappropriate to order the release of funds tainted with succession, procedures, meant for the benefit of succession proceedings beneficiaries, to be released and distributed in civil proceedings. This is so because in view of the failure to oust the beneficiaries and state the figure of the amount involved would have necessitated the court calling for an inventory of the list of beneficiaries and the amount indicated for the benefit of each of them. In doing so the court would have imported succession case law procedures into civil case law procedure proceedings. This court not being devoid of tools to ensure that

it makes effective orders, which orders are carried into effect would have opted to make orders that go to determine the issues in controversy between the parties in the first instance. And secondly to make orders that would serve the purpose for which they were meant to serve which in the circumstances of this case would have been to ensure that the released funds reach the beneficiaries. The court would therefore have looked for an avenue through which these can be achieved and enforced effectively such known procedures are these provided for the law of succession Act. The court would have without any hesitation ordered that the application presented in the civil suit be declined and the parties be directed to take action in the succession case.

This court has been informed there exists Nairobi HCCC NO. 2536 of 2003 dealing with the issue of beneficiaries and distribution and this is the most appropriate avenue through which the funds sought for herein can be deposited and distributed.

The faulting of the application notwithstanding the court on its own motion can give directions, that the said funds be applied for distribution in the succession proceedings.

These procedures set out clearly in rule 45 of the probate and administration rule 5. These provide quick remedy for an aggrieved party in two instances namely:-

(i) where a grant has been issued but not confirmed.

(ii) Where no application for a grant has been made.

Herein a grant is in place and so all that is required is for the Administrators to follow the procedure on rule 45 of the probate and Administration rules. For purposes of the record this are:

(i) Present on application by way of chamber summons in Probate and Administration 2536/2004 informing number 106.

(ii) Present the application to the registry where the cause has been filed.

(iii) Saw the application on all those who appear to be entitled to the estate.

(iv) Support the application by an affidavit inform number 15.

(v) Indicate that the grant has not been confirmed.

(vi) Indicate the name of the deceased and state whether the estate is testate or interstate.

(vii) State relationship of the applicant to the deceased.

(viii) State the grounds upon which the application has been made.

(ix) Give the particulars of other deponents.

(x) Give information as regards whether any gist intrudes was even made and to whom issued.

(xi) Nature, situation and among of the deceased property.

(xii) Present or future capital or income of the applicant t derived or about to be derived from any source.

(xiii) Specify existing and future needs of the applicant.

(xiv) Indicate whether the deceased had during his life time ever made any advancement of a gift to the applicant.

(xv) Indicate the general circumstances of the case including the deceased's reasons for not making provision for the applicant.

There are in built safety valves in built in the said rule in that:-

(a) The court is at liberty to direct persons to whom the proceedings such person in the circumstances of this case would be the plaintiff herein to provide an inventory and details of money deposited in court.

(b) Provide the lease indicating the rental income per a month in order to determine whether rally the rentals money due to the estate has been deposited in court.

(c) It may even order one Kaseine to account to the estate what he had received from the Plaintiff and show cause why the same should not be availed for distribution to the beneficiaries.

The second safety value provided in the rules is that there is a requirement that the application be heard without undue delay.

The 3rd safety value provided is that the court is at liberty to have regard to any evidence presented to it by the applicant as well as any other evidence which may be adduced. This would provide a wider latitude to the court to deal with issues such as those presented herein regarding the just ability of the current applicants to handle the funds sought to be released. The court will have an opportunity to hear the beneficiaries either personally or through their representatives as regards the adequacy of the portion of the proposed distribution to them. The Court will also be in a position to deal with the issue of who are the uncontested beneficiaries and the contested beneficiaries.

In view of the above the court is satisfied that the succession course provides a better forum for the release of the funds sought to be released as opposed to ordering the said funds to be released herein.

For the reason given in the assessment, the defendant/applicants application dated 5th June 2008 and filed on 6th June 2008 has been refused and is hereby struck out because:-

1. In the absence of the defendants filing a defence and counter claim, there is no base upon which that application can be anchored.

2. From the reasoning advanced in the assessment, since the money sought to be released belongs to an estate and is meant to be released to the Administrators for an ward transmission to the beneficiaries the best forum for making such orders is the succession cause file number 25336/2005. It matters not that the deposit orders were not made in the succession course file. When so made the said orders will be effective in that the funds will now be placed under the control of the succession court for distribution.

3. There exists an avenue in the rule 45 of the Probate and Administration rules which makes provisions for application of previsions of a depondent which the applicants can avail themselves of.

4. The proceedings in this file being civil in nature, the court cannot import succession procedures into them in order to provide a relief to the applicant. The best it can do is to direct them to take measures in the succession file.

5. The plaintiff will have costs of the struck out application.

DATED, READ AND DELIVERED AT NAIROBI THIS 17TH OCTOBER, 2008.

R.N. NAMBUYE

JUDGE