



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 642 of 2006

IN THE MATTER OF THE ESTATE OF PHILIP KIMAIYO KANDIE (DECEASED)

AND

IN THE MATTER OF STELLA TOMLINSONAPPLICANT/OBJECTOR

RULING

The application before the court is brought by the Objector, Stella Tomlinson. It is dated 27. 4. 2006 and seeks several reliefs thereon indicated. The only relief ventilated is (b) thereon and states:-

That the administrators be and are hereby ordered to release the amount of Kshs.4.5 million made up of stakeholders deposit fees of Kshs.450,000/= and Kshs.4,050,000/= being final purchase price- paid to and received by the firm of Kandie Kimutai & Co. Advocates.

Since the other reliefs sought in the said application were not agitated even being mentioned by the applicant, the court took the position that such were abandoned. This ruling will accordingly concentrate on the above one prayer.

The facts behind this application as court understands them are as follows:-

The applicant, Stella Tomlinson, sold her property to one Kathurima M'noti through the legal firm of Kandie Kimutai & Co. Advocates. By the 2. 2. 2006, the said Kandie Kimutai & Co. Advocates had received two payments amounting to Kshs.4,500,000/=, being the purchase price for and on behalf of the applicant. Mr. Phillip Kandie the managing partner of the firm, unfortunately meanwhile, died in an accident. This was about 24 days after receipt of the said purchase price. At the time of Phillip Kandie's death his firm had not released the said funds to the applicant as it ought to have done eventually.

Meanwhile the firm of Kamotho Maiyo & Mbatia Advocates was on 31. 3. 2006 appointed by this court, for the limited purpose of winding-up the business of Kandie Kimutai & Co. Advocates. The firm is in the process of doing the winding up and has not completed the process.

In the meantime the applicant filed this application on 28. 4. 2006. Her main prayer as earlier pointed out is that the firm of Kamotho Maiyo & Mbatia Advocates, while in the process of winding the firm of Kandie Kimutai & Co. Advocates, should be ordered to forthwith pay to her the sum of shs.4.5 million which as pointed out earlier, was received by Kandie Kimutai & Co. just 24 days before the late Philip Kandie met his accidental death.

Mr. Thiong'o representing the applicant, argued that the sum of Kshs.4.5. million which was the purchase price for her Karen piece of land, was received very soon before the late Kandie's death and that it went

straight to his client's account where it lies up to the present moment. For that reason, she added, the said amount was specific and would be traced, directly to the client's account of Kandie Kimutai & Co. Advocates where, it was not mixed with any funds being received generally from other clients. Her claim, she further argued, was fortified by the fact that there was no evidence that any other client's funds were deposited in that specific account after the Kshs.4.5 million was received on her behalf. She concluded that this court should, for the above reasons, order a release to her of the said sum of Kshs.4.5 million from the client's account of the firm of Kandie Kimutai & Co. Advocates without waiting for Kamotho Maiyo & Mbatia Advocates to complete the winding-up.

Mr. Muchigi on behalf the estate of Kandie Kimutai & Co. Advocates responded by first pointing out that his firm's duties are by law limited to, inter alia,

(i). Establishing who owes fees to the firm of Kandie Kimutai & Co. Advocates and pursuing recovery thereof.

(ii). Establishing the clients who are owed money by Kandie Kimutai & Co. vis a vis the money in client's Accounts with a view to pay them and discharge the firm if the funds in the accounts are equal or more than the firm owes clients. If however, the clients are owed more than is in the accounts, to call the creditors meeting so as to agree on a fair scheme of settlement.

(iii). If there are any financial obligations requiring a settlement, then to settle the same, if that can be done from the legal fees recovered, before releasing the difference, if any, to the Estate of late Philip Kandie.

(iv) To finally prepare a final report of account to be filed in this Court.

Mr. Muchigi opposed this application which he termed premature. He also called it misconceived and an abuse of court processes and an abuse of probate and administration rules. He said that the applicant failed to show that the sum of Kshs.4.5 million paid to the firm of Kandie Kimutai & Co. Advocates was in fact paid to the firm's client's Account at Trans-National Bank Ltd where eventually and presently a sum of Kshs.2,946,838/55 exists. Mr. Muchigi therefore dismissed the claim that the sum of Kshs.4.5 million went to the said account and that the sum of Kshs.2.9 million now lying there is part and parcel of the Kshs.4.9 aforesaid or that no other funds from other clients had not been deposited in the same account. He accordingly urged this court to reject the application on the above reasons alone.

I have carefully considered the arguments above. While there is no doubt, and it is not denied, that the firm of Kandie Kimutai & Co. received a total sum of Kshs.4.5 million by 2. 2. 2006 for and on behalf of the applicant, there is no evidence and the applicant produced none, that the said funds were deposited in the client's Account of Kandie Kimutai & Co. at Trans-National Bank Ltd. Indeed all the applicant could say, is that a sum of Kshs.2.9 million was found in that account as declared by the firm of Kamotho Maiyo & Mbatia Advocates. Mr. Thiong'o admitted that he relied on facts released by Kamotho Maiyo & Mbatia Advocates. He could not even say when the said sum of Kshs.2.9 million was deposited there or whether it never came from several clients or even whether any of the applicant's funds did not go into the said account. Furthermore the applicant failed to say how the sum of Kshs.4.5 million received on her behalf reduced to Kshs.2.9 million found in the deceased's firm's client account. This lack of explanation would suggest that the Kshs.2.9 million is likely to be a different sum of money other than the Kshs.4.5 million. In conclusion therefore, there is no adequate evidence upon which this court would, on the balance of probability, declare the sum of Kshs.2.9 million in the deceased's client account to be part of the Kshs.4.5 million received for and on behalf of the applicant.

For the above reason alone, this application must fail.

The applicant was, however, very aggrieved by the conduct of the firm of Kamotho Maiyo & Mbatia Advocate's slow pace in bringing their winding-up process to a completion. A year was pointed out by Mr. Thiong'o to be a long period. In particular Mr. Thiong'o expressed the feeling that the firm of Kamotho Maiyo & Mbatia is not candid and is not releasing relevant information to those like the

applicant whose funds were locked in by the death of the deceased. The court sympathizes with the applicant who has reason to be anxious. It is accordingly very necessary that the firm of Kamotho Maiyo & Mbatia should act with speed and where necessary, issue a preliminary report to this court. The following orders accordingly commend themselves to the court:-

ORDERS

1. The applicant's application dated 27. 4. 2006 is hereby dismissed with costs to the respondent.
2. The applicant is at liberty to apply to this court if the firm of Kamotho Maiyo & Co. Advocates have not filed an interim report or released relevant information within 60 days.

Dated and delivered at Nairobi this 28. 2. 2007 day of February, 2007.

D. A. ONYANCHA

JUDGE