



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 580 of 1991

IN THE MATTER OF THE ESTATE OF CHARLES PETER ANGWENYI (DECEASED)

PETER SIRO NYARIKI ANGWENYI.....APPLICANT

VERSUS

SUSAN NJERI ANGWENYI RESPONDENT

RULING

By summons dated 30.10.06 stated to be brought under sections 83 (f), (g), (h) and (i), 94 and 95 of the Law of Succession Act, Cap.160 and rules 49, 58 and 59 of the Probate and Administration Rules, the applicant prayed for orders that:-

1. This application be certified urgent and that service thereof be dispensed with in the first instance.
2. Pending the hearing and final determination of this application, the executrix be restrained by injunction from dealing with the estate in any manner whatsoever.
3. Susan Njeri Angwenyi, the executrix of the estate of the said Charles Peter Angwenyi (Deceased), be ordered to provide full and detailed accounts, including income and expenditure of the estate of the deceased.
4. The said executrix Susan Njeri Angwenyi be ordered to distribute the assets of respective beneficiaries as per the last Will and Testament of Charles Peter Angwenyi (deceased).
5. In default, the beneficiary peter Siro Nyariki Angwenyi be at liberty to make an application under section 76 (d) (ii) and (iii) of the Law of Succession Act and rule 44 (1) and (2) of the Probate and Administration Rules.
6. Also, in default, the said executrix of the estate of the deceased be condemned to criminal action under and by virtue of the provisions of section 45 (2) of the Law of Succession Act.
7. The costs of this application be provided for.

The grounds upon which the application is based are:-

- (i) That the executrix has refused and/or failed to distribute the estate as per the Last Will and Testament of the deceased despite several notices to do so.

- (ii) That the executrix has refused and/or failed to produce full and detailed accounts of the income and expenditure of the estate of the deceased.
- (iii) That there is no need and/or requirement of a continued trust.
- (iv) That all the beneficiaries are of majority age and capable of managing and holding property.
- (v) That the executrix has illegally sold some properties bequeathed to the beneficiaries without the consent and/or knowledge of the said beneficiaries.
- (vi) That the executrix has caused division among the beneficiaries who are the deceased's children and has created acrimony.

The application is supported by the applicant's affidavit sworn on 30.10.06 and further affidavit sworn on 14.11.06.

On 09.11.06 the respondent filed grounds of opposition of the same date which may be stated broadly as under:-

1. None of the sections and rules cited in the summons empower the court to grant any injunctive orders as sought in prayer 2 of the application.
2. No material or allegation of willful or reckless neglect as required under sections 94 and 95 have been placed before the court to warrant any criminal action as provided for in those sections.
3. The applicant deliberately failed to make full disclosure of all material facts.
4. Any disposal of property of the estate has been made under the powers vested in the executor and trustee by the Will and the proceeds thereof have been applied for the welfare and education of the children as provided under the provision of the Will.
5. There has been no allegation that either the respondent has misappropriated any assets of the estate; or that the respondent failed or neglected to provide for the welfare, education and support of the children of the deceased to-date; and that, therefore, there is no basis for any orders as prayed in paragraphs 2,4, and 5 of the application.
6. The application is brought *mala fides* and maliciously.
7. The applicant has failed to disclose that he has unlawfully placed a caution against Nairobi/Block 91/219; furthermore to injunct the respondent, the two siblings remaining in college will have no support whatsoever.

Over and above the aforesaid grounds of opposition, the respondent did on 10.11.06 file a replying affidavit sworn the same date in reply to the applicant's summons dated 30.10.06.

This matter first came up before me on 13.03.07 for *inter-partes* hearing of the summons dated 30.10.06 whereat the applicant was represented by learned counsel, Mr C.O. Kenyariri while the respondent was represented by learned counsel, Mr J. OKwach.

Applicant's counsel reiterated the prayers in the application, the grounds upon which the application is based and the supporting affidavit evidence furnished by the applicant. He pointed out that the grant of probate was issued on 09.07.91 to the respondent and Lawrence George Sagini. The court record shows that the grant was confirmed on 04.12.92; that Lawrence George Sagini died on 03.08.95; that by summons dated 07.12.02 the respondent applied for the late Sagini to be removed from being her co-administrator and that she be made sole administrator of the deceased's estate; and that the grant was duly amended on 18.12.02 to leave the respondent as sole administrator as prayed by her.

The applicant sought injunction vide prayer 2 against the respondent on the basis that the respondent has mismanaged the estate. Applicant cited the following incidents to support his claim:-

- a) That the respondent as administrator of the deceased's estate sold a prime property of the deceased in Nairobi, being Plot L.R. No.13876/5 Karen, Nairobi to Humphrey O. Ogot and Maurice O. Oketch vide sale agreement made on 28.12.04 (Annexure PSNA '2') which the respondent drew up herself without using a lawyer.
- b) That the same prime property at (a) above is also the subject of another sale agreement purportedly made between Anne Nyaboke Angwenyi, Peter Siro Nyariki Angwenyi (applicant herein), Nicholas Gichana Angwenyi and Betty Beatrice Moraa Angwenyi plus Susan Njeri Angwenyi (respondent herein) as trustee of the aforesaid on the one hand and Abednago Ndolo Makau and Joyce Nduku Ndolo on the other.
- c) That by transfer made on 27.08.04 the respondent as trustee for Ann Nyaboke Angwenyi, Peter Siro Nyariki Angwenyi (applicant herein), Nicholas Gichana Angwenyi and Betty Beatrice Moraa Angwenyi transferred Title No. I.R. 85160 to George Gachohi Chege.
- d) That by transfer dated 28.08.01 the respondent as registered trustee for Anne Nyaboka Angwenyi, Peter Siro Nyariki Angwenyi (applicant herein), Nicholas Gichana Angwenyi and Betty Beatrice Moraa Angwenyi transferred Title No. I.R. 85162 to Monicah Wairimu Mwangi.
- e) That by transfer dated 05.09.01 the respondent as trustee for Anne Nyaboke Angwenyi, Peter Siro Nyariki Angwenyi (applicant herein), Nicholas Gichana Angwenyi and Betty Beatrice Moraa Angwenyi transferred Title No. I.R. 85163 to Japheth Ratemo Getugi.

It was the applicant's case that the respondent never consulted him about the disposal of the above properties which constitute part of the deceased's estate. The applicant seems to have been particularly incensed by the disposal of the prime property at (a) above without his being consulted or informed about the disposal. According to an affidavit sworn on 29.07.92 by the respondent and Lawrence George Sagini, Anne Nyaboke Angwenyi was aged 20 years then while Peter Siro Nyariki Angwenyi was aged 17 years, Nicholas Gichana Osoro Angwenyi was aged 12 years and Betty Beatrice Moraa Angwenyi was aged 11 years. These four seem to be the only surviving children of the deceased and respondent. The applicant emerges as the second born and the first boy and he seems to have been upset about being left in the dark about the disposal of his late father's aforesaid properties.

Applicant's counsel informed this court that on 21.11.06 the parties appeared before Rawal, J who directed that the *status quo* be maintained until this matter is determined and also that the respondent provides accounts in terms of prayer 3 in the application now under consideration but that no accounts have been furnished by the respondent as directed by the court.

Applicant's counsel also informed the court that Chemai Limited manages Chemai Tea Estate; that the applicant is a director in Chemai Limited; yet that after Rawal, J directed *status quo* to be maintained, respondent instructed the caretaker at Chemai Tea Estate not to allow the applicant near the estate.

Another borne of contention between the applicant and respondent relates to one Baba Ronnie also known as Malit. In relation to the said Mr Malit, applicant's counsel drew attention to the respondent's letter of 03.09.02 to Nico (Nicholas), who is her son. At page 2 of that letter the respondent made reference to Baba Ronnie a.k.a. Malit and complained that the applicant displayed cruelty towards him which he did not deserve. It was the applicant's case that the respondent has re-married this man, Baba Ronnie a.k.a. Malit; that the applicant is above 21 years of age; and that the applicant should have his share under the Will of his father the deceased herein immediately.

Applicant's counsel referred next to the applicant's letter of 05.05.06 (Annexure PSNA '4') to his mother the respondent. In that letter the applicant complained about the respondent taking his sister Betty to the airport alone with non-family members like Mr Malit (Baba Ronnie) and Julie, leaving the

applicant behind and uninformed that Betty was traveling abroad. The applicant accused the respondent of fuelling disharmony between different members of her family, e.g. between Betty and himself. In the same letter, the applicant complained of being asked by the respondent to furnish his birth certificate for purposes of updating bank records relating to Mwangwenyi Limited without telling him about the nature of the company or who its shareholders and directors are. Additionally, the applicant complained about the respondent keeping him in the dark regarding the deceased's Will, under which the applicant said he was told he is a stakeholder. The applicant, apparently in anger, remarked in the letter that inheritance of earthly possessions is useless without inheritance of a correct moral value system and code to help the inheritor realize the full and just potential of the earthly possessions given by God. The applicant implied that the respondent was deviating from the deceased's moral legacy in the way she has handled her family affairs and was emphatic that all is not well with the respondent's mode of handling her family affairs.

Applicant's counsel proceeded to draw attention to the applicant's letter of 25.09.06 to his mother the respondent vide which he sent a copy of the deceased's Will, which copy he said he had come across and pointed out to the respondent that the document (Will) negated her previous assertions that the deceased left nothing for him. Vide that letter the applicant called upon the respondent to convene a meeting with him and his siblings to have the Will read as they are all majors but that the respondent neither responded to nor acted on his request.

Finally, applicant's counsel re-visited the respondent's letter of 03.09.02 alluded to earlier to draw attention to the fact the said letter by the respondent to the applicant's younger brother Nicholas in the U.S. spoke negatively about the applicant. Among other things, the respondent seemed to take offence that the applicant threatened Baba Ronnie (Malit) with utterances that since he, applicant is the first son of Angwenyi, Baba Ronnie 'has no right to interfere with me, my children, or my friends.' The respondent described the applicant's 'threats' to Baba Ronnie a.k.a. Malit as absurd, adding that the applicant was out of his mind and that since the applicant knew she, respondent will not change her mind about her way of managing the family affairs, the applicant has taken to making utterances aimed at hurting her. The respondent added in her said letter:

'Because that has failed to hurt or make me unhappy, he (applicant) is now attacking Baba Ronnie. He has become so insolent with him, it is unbelievable and embarrassing. Malit does not deserve such cruelty. He has been very kind to us and has been there for us when we needed him. He also needs me, especially now that his daughter Millicent is very ill. Where are Peter's ethics and humanity? It leaves me to wonder, where I went wrong in the upbringing of my son.'

Applicant's counsel submitted that since the beneficiaries under the trust are of majority age, the trust should come to an end; that under the law of trust, once beneficiaries attain majority age, equity dictates that they can revoke the trust; and that this is what the applicant seeks under the summons dated 30.10.06. Counsel drew attention to section 29 (a) of the Law of Succession Act to the effect that 'dependant' under Part III of the Act includes children of the deceased whether or not maintained by the deceased immediately prior to his death. Applicant's counsel referred the court to:-

- a) Sardar Khan –vs- Gulam Fatuma & the Public Trustee [1931] XIII Law Reports of Kenya 36 to make the basic point that where, as in the application now before this court, allegations of maladministration of a deceased's estate are made, the court should in addressing the issue keep in view the real object of the law, which is the due and proper administration of the estate and the interest of the parties beneficially entitled thereto.
- b) Isabella Gichugu Matheka & Rita Mueni Matheka –vs- Eric Muthui Matheka, Court of Appeal Civil Appeal No.304 of 2002 to make the basic point that a court may revoke a grant, *inter alia*, where there is evidence that the person named in the grant has failed to proceed diligently with the administration of the estate; and that the grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account or administration as may be required.
- c) Myddleton –vs- Rushout, The English Law Reports Vol. CLXI Ecclesiastical, Admiralty, and

Probate & Divorce I 973 to make the point that an executor is bound to exhibit an inventory and account at the suit of a party having an interest in the property for which he is executor. It is to be noted that in the present case there is a Will appointing the respondent and the late Lawrence George Sagini to be executors and trustees of the Will.

Applicant's counsel urged this court to grant the orders prayed for.

In response, respondent's counsel essentially opposed the summons dated 30.10.06 and relied on the grounds of opposition dated 09.11.06 and the respondent's replying affidavit sworn on 10.11.06. Respondent's case was that the applicant's prayer 2 for injunction pending hearing of the application is an equitable remedy which cannot apply if there is a contested Will whose terms are precise. According to respondent's counsel, since prayer 3 seeks an order for respondent to provide accounts and prayer 4 seeks distribution of the estate, prayer 4 contradicts prayer 3 in that if the accounts are provided and are in order, there would be no reason for distribution of the estate as sought vide prayer 4. It was respondent's case that prayer 5 for applicant to be granted liberty to apply under section 76 (d) (ii) and (iii) of the Law of succession Act and rule 44 (1) and (2) of the Probate and Administration Rules for revocation of the grant if respondent defaults in distributing the estate cannot be granted because section 76 prescribes criteria to be shown before revocation or annulment can be granted and that these criteria have not been met. As for prayer 6 for respondent's condemnation to sanctions under section 45 of the Act, applicant's counsel submitted that sanctions under section 45 are of a criminal nature where the standard of proof is higher and that such sanctions are inappropriate under the present application. Respondent's counsel also submitted that section 29 alluded to by applicant's counsel deals with dependency and is inapplicable as no dependency issue arises here. I am constrained to interpose here that applicant's counsel made specific reference to section 29 (a) to make the basic point that the applicant is deemed to be a dependant of the deceased whether or not maintained by the deceased immediately prior to the deceased's death and that he, applicant as deceased's son has a beneficial interest in the deceased's estate.

Respondent's counsel made the point that the application did not claim and the supporting affidavit did not depone that the Will stated that upon the applicant attaining majority, the Will was to be revoked. Respondent's counsel challenged applicant's counsel's proposition that equity dictates that upon attaining majority age, the applicant can revoke the Will.

Respondent's counsel took issue with applicant's counsel's statement that the respondent has re-married and should, therefore, distribute the deceased's estate, which would bring the trust to an end. It was respondent's counsel's contention that the statement about the respondent's re-marriage is not in the applicant's grounds for the present application or in his supporting affidavit; that the act of re-marriage is a question of law and fact which has to be proved; that the fact of respondent's re-marriage has not been proved; and that this court should ignore the claim that the respondent has re-married,

Another issue taken up by respondent's counsel was that the applicant is the elder of the two sons of the deceased; that the respondent was confirmed as sole executrix of the deceased's Will on 18.12.02 but that the applicant never objected and has never objected to-date.

Respondent's counsel pointed out that the present application was brought only by the applicant and none of the deceased's other children/beneficiaries has sought to participate in the application; and that there is a Will which the applicant has not challenged, except that he wants his shares under the said Will. Respondent's counsel pointed out that the respondent said in her replying affidavit that she transferred the shares to various beneficiaries including the applicant. I interpose here to note the applicant's rejoinder that he was not informed of the transfer of his shares to him; that the respondent is mismanaging the deceased's estate, hence the applicant's prayer, *inter alia*, for accounts.

It was respondent's counsel's submission that the deceased's Will created a continuing trust which would be brought to an end either by the respondent's death or re-marriage; that neither contingency has occurred; that the applicant is not entitled to distribution to him of shares due to him under the Will or to any accounts or to the grant of any of the prayers in his application. It was respondent's counsel's contention, as I understood it, that under the continuing trust created by the deceased's Will, the

respondent has an unfettered discretion in managing the deceased's estate. Respondent's counsel relied for the above propositions on the following:-

- a) Halsbury's Laws of England Volume 30 paragraph 837 to make the basic point that a trustee may exercise all such lawful powers as are expressly reposed in him by the instrument creating the trust or by statute. I interpose, though, to note that the same authority also requires the powers of a trustee to be exercised reasonably, in good faith and for the good administration of the trust estate. Counsel also referred to section 82 of the Law of Succession Act.
- b) Halsbury's Laws of England Volume 24 paragraph 459 to make the basic point that if not expressly confined to his minority, a trust or gift for the maintenance and education of an infant, or for his use and benefit, may be extended to a longer period. Counsel also referred to rule 42 in the First Schedule to the Law of Succession Act relating to Construction of Wills.
- c) Halsbury's Laws of England Volume 30 paragraphs 477 and 490. Paragraph 477 is on essentials of exercise of special power, i.e. there must be either a reference to the power, or a reference to the property subject to the power, or an intention otherwise expressed in the Will to exercise the power; while paragraph 490 relates to types of contingency which may qualify the existence of a power so that the power does not come into existence until the contingency occurs or the condition is satisfied. It was respondent's counsel's submission that under the Will, no power to convey real property to the applicant is vested in the trustee. Counsel also referred to clause 8 (d) of the Will and submitted that only death or re-marriage of the respondent would bring the trust to an end; that neither contingency has occurred and that, therefore, section 71 of the Law of Succession Act is inapplicable.
- d) Halsbury's Laws of England Volume 48 paragraph 637 to make the basic point that as the applicant is not the only beneficiary and that since the other beneficiaries have not participated in the application, he cannot singly bring the trust to an end.
- e) Stephenson (Inspector of Taxes) -vs- Barclays Bank Trust Co. Ltd [1975] I ALL ER 625 to make the basic point that even though the applicant is a beneficiary under the Will, he has not become entitled as against the trustee to the residuary estate. I interpose here to note that Stephenson's case related to capital gains tax.

It was respondent's counsel's contention that prayer 2 in the summons dated 30.10.06 for injunction restraining the respondent from dealing with the estate in any manner whatsoever pending hearing and determination of the present application has not been determined and that no injunction was granted; and that no case has been made out for injunction in terms of Giella -vs- Cassman Brown's case. Respondent's counsel submitted that the applicant is not under the law entitled to accounts but that accounts were all the same provided. I interpose here to point out that the applicant has denied being provided with any accounts and that I can find no accounts in the court file.

Respondent's counsel urged this court to dismiss the summons dated 30.10.06 with costs.

In reply, applicant's counsel essentially reiterated his earlier submissions.

Having regard to what has transpired in this matter, I shall at this stage confine myself only to preliminary findings.

The parties are on common ground that the applicant is the first son of the deceased and the respondent herein and that he is a beneficiary of the deceased's estate. The only question pending is as to when his beneficial interest is to take effect or mature and upon what contingency. The applicant has averred that the respondent has mismanaged the deceased's estate. He has cited instances of disposal of various properties belonging to the estate without him being consulted despite being of the age of majority. He has complained about the respondent claiming the deceased left nothing for him, only for him to discover in 2006 that the deceased left a Will under which he applicant is a beneficiary. He has ascribed bad faith on the part of his mother the respondent and averred that he is apprehensive that the

respondent may be up to something sinister as far as his share of the deceased's estate is concerned. That seems to be the basis for the prayers in his summons dated 30.10.06. Respondent has taken the position that the deceased's Will created a continuing trust; that she as sole executrix/administratrix of the Will has unfettered discretion in the way she administers the estate; that she has not mismanaged the estate; and that the applicant is not entitled to any of the prayers sought, not even prayer 3 for full and detailed accounts including income and expenditure of the estate of the deceased.

It is my finding that even if the applicant's beneficial interest in the deceased's estate has not matured, which issue I am not deciding at this stage, the applicant is certainly entitled at least to the accounts he has sought vide prayer 3, *inter alia*, to allay his fears that his beneficial interest in the estate is not in jeopardy and that the said accounts must be furnished to the accounts to the applicant. While contending that the applicant is not entitled to the accounts, the respondent nevertheless claimed to have furnished the accounts to the applicant. The applicant denies being furnished by the respondent with any accounts. No accounts are available in the court file.

Applicants counsel informed this court that Rawal, J had previously directed that requisite accounts be furnished to the applicant for his inspection. This seems to tally with the judicial notes of 13.11.06 by Rawal, J. The proceedings of 21.11.06 show that the court (Rawal, J) was informed that the accounts had not been given to the applicant and that the parties had agreed to maintain the *status quo* as regards the properties. The report that the accounts had not been given to the applicant was not contradicted. With regard to maintenance of *status quo*, this is the essence of prayer 2 of the summons dated 30.10.06. I find that respondent's counsel was in error when he said before me that no injunction in terms of prayer 2 had been granted. It was. The proceedings of 19.02.07 before this case eventually came to me show that Aluoch, J did reiterate the directions for *status quo*.

Before this court considers any of the issues raised by and in the course of the present application, the respondent must furnish the applicant with the accounts sought by him.

I make the following orders:-

1. Prayer 3 for the executrix/respondent to provide full and detailed accounts, including income and expenditure of the estate of the deceased, is granted. Such accounts to be filed and served on the applicant by 09.10.07.
2. The interim orders for status quo, i.e. interim restraining orders in terms of prayer 2, are extended to 09.10.07.
3. Mention on 09.10.07 for further directions or orders as appropriate.
4. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 24th day of September, 2007.

B.P. KUBO

JUDGE