



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

SUCCESSION CAUSE 42 OF 2002

IN THE MATTER OF THE ESTATE OF SAMSON LUGARICH
AGUFAA-DECEASED

AND

FLORENCE NDUTA/PETITIONER

VERSUS

HENRY MAHONGA
LUGARICHOBJECTOR

RULING

The applicant, **HENRY MAHONGA LUGARICH**, is the Objector in these probate and administration proceedings. He has asked the court to restrain the petitioner from intermeddling with the estate pending the hearing and determination of this cause.

In his supporting affidavit, the applicant says that the deceased left behind a farm and a plot at the Kenya Railways Corporation site.

It is the applicant's case that the petitioner had not paid rent to the Kenya Railways Corporation for a considerable length of time, resulting in outstanding arrears of Kshs. 104, 335/80.

As far as the applicant was concerned, had the petitioner been paying the rents due to Kenya Railways Corporation, there would be no arrears.

The money which the petitioner should have used to pay Kenya Railways Corporation should have been put together from the rents which the tenants were paying to the petitioner. Instead, the applicant believes that the petitioner simply collects the rent from the tenants and uses it all.

The applicant also accused the petitioner of having procured a buyer for the plot, but the applicant interjected, thus forcing the buyer to reject the offer.

His reason for opposing the intended sale was that it would have deprived the children of the deceased

and his other beneficiaries of the benefit that they would have otherwise derived from the rents paid by the tenants who occupy the units standing on the plot.

The applicant says that the petitioner was collecting the rents from the tenants, but was not using the money so collected, for the payment of rents payable to the Kenya Railways Corporation. Therefore, the applicant contends that the rents collected by the petitioner were unaccounted for.

Meanwhile, all the other beneficiaries are said to be receiving absolutely no benefits from the estate, especially from the rents earned from the railways' plot.

In her response, the petitioner says that the applicant had failed to prove the alleged acts of intermeddling.

In any event, the petitioner submits that the deceased had only held a licence from the Kenya Railways Corporation. Therefore, in her understanding of the law, the consequences of the demise of the deceased were said to be obvious.

It is the petitioner's understanding that the railways plot was not part of the estate, as the licence ceased upon the demise of the deceased.

But even if the licence did not cease automatically, immediately after the deceased passed away, the petitioner contends that the documents produced by the applicant showed that the petitioner had paid a total of Kshs.9, 000/=, as between 28/2/2007 and 7/6/2007. That sum was paid to the Kenya Railways Corporation. In other words, as far as the petitioner was concerned, she was trying her best to repay the debt owed to the Kenya Railways Corporation.

In the application on record, the applicant had only highlighted the issue of the railways plot. However, when canvassing the application, the applicant also alleged that the petitioner was just about to sell a lorry which belonged to his late father.

In answer to that allegation, the petitioner explained that the lorry in question had been attached during the lifetime of the deceased. The attachment was said to have been undertaken in a case which was before the Chief Magistrate's Court at Kitale. Since then, the lorry was said to be lying at Dobie Cooper Motors, Kitale, where the storage charges had accumulated to more than KShs.300, 000/-.

In those circumstances, the petitioner says that there is no way that she could sell the lorry.

Notwithstanding that answer, the applicant persisted in his plea to this court, to stop the sale of the property which formed part of the estate.

When I asked the applicant to provide the court with proof that the railways plot was a part of the estate, he made reference to the receipts issued by the Kenya Railways Corporation, showing that they had been paid some rents.

The court then asked the applicant if by paying rent, the person so doing did acquire proprietary rights. His answer was that the payment of rent did not, of itself, make the person paying the rents acquire proprietary interests. In effect, by virtue of the fact that the deceased had been paying rents to the Kenya Railways Corporation, did not give to the deceased any proprietary rights over the railways plot.

The applicant insists that the rents collected from the tenants occupying the units on the railways plot was

Kshs.5, 000/= every month. In his understanding, that sum was sufficient to pay the rents due to the Kenya Railways Corporation.

Although the applicant did not produce any document to back the figures he was citing, I find that the

same was not an idle speculation, on his part. I say so because by a letter dated 20/12/2002, the petitioner did ask the Estate Manager of the Corporation to allow her say;

“ Kshs.5, 000/= plus the monthly rent of the above-mentioned plot.”

The sum of Kshs.5, 000/= was to be paid monthly, as well.

That suggests that the rents were, in all probability, in excess of Kshs.5, 000/=.

The only way that the petitioner could satisfy the court that she was doing her best, in offsetting the debt owed to the Kenya Railways Corporation was by providing an affidavit detailing the rents received, and how the same were applied. That, the petitioner has not done.

Also, although the applicant did not prove that the railways plot was a part of the estate of the late Samson Lugarichi Agufaa, the petitioner provided a document which indicates that the said plot had been specified in the schedule of properties forming the estate of the late Agufaa.

On a prima facie basis, the railways plot is a part of the estate. If it were not so, the petitioner would not have written to the Kenya Railways Corporation on 20/12/2002, making a commitment to make payments to the Corporation, in her capacity as the **“ wife of the late Samson Lugarichi.”**

In this case, the applicant has failed to satisfy the court that the petitioner was intermeddling with the estate. I shall therefore not issue a restraining order.

However, the petitioner is reminded that she is accountable not only to the beneficiaries, but also to this court, for the manner in which she goes about collecting the estate and preserving it. Accordingly, this case will be mentioned on within the next 3 months from today, with a view to ascertaining the work so far done by the petitioner.

In order to enable the court ascertain the said task, the petitioner is directed to file a detailed affidavit, spelling out the property, inclusive of all rents collected to date. She will also be required to indicate the expenditures up to date. The affidavit, which will effectively constitute a report, is to be filed in court within the next two (2) months, and copies thereof provided to all the beneficiaries.

All interested parties will then be served with notices to attend court when the case will be next in court, for further directions.

Meanwhile, the costs of the application dated 23/7/2007 shall be in the cause.

Dated and Delivered at Kitale, this 22nd day November, 2007.

FRED A. OCHIENG

JUDGE