



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Succession Cause 500 of 1997

IN THE ESTATE OF KIBOWEN KOMEN - (DECEASED)

R U L I N G

By a consent recorded in this court on 10th February, 2006, the parties agreed that Letter of Administration be and was issued to four administrators namely:-

- Ø William Kiprop Komen
- Ø Rachel Chepngeno Komen
- Ø Mohamed Tanui Komen and
- Ø Magdalene Komen

It is important to mention that these proceedings commenced before this court in 1997. There were Objection proceedings, which one would rightly assume were compromised when the above consent order was recorded. Several applications have been presented in this matter and I find there are two considered rulings, by two of my brother Judges dated 20th May, 2005, by Kimaru J., and 9/12/2005 by Musinga, J., respectively.

This Succession cause having commenced over 9 years ago and the parties having agreed on common administrators, one would have thought the matter would be finalized there seems to be no end in sight as one of the Administrators Mohammed Tanui Komen has filed an application under Section 45 and 47 of the Law of Succession Act and Rules 47 and 73 of the P&A Rules respectively.

The application has sought for orders of injunction restraining the following respondents from entering into, trespassing into, cultivating or in any other way interfering with LR.10013/4. The respondents are:-

- Ø Rose Brown Agricultural Contractors Ltd.
- Ø Abdulkadir Mohammed Komen
- Ø Abdulgani Mohamed Komen
- Ø William K. Komen
- Ø Magdalene Talai Komen
- Ø Rachel C. Komen

There are no prayers directed against the 4th, 5th and 6th Respondents and thus it remains a mystery why they were cited in this application as respondents. This application is premised on the grounds stipulated on the body of the application and further expounded in the supporting affidavit of the applicant.

M/S Mukite Musangi & Co. Advocates, entered appearance on behalf of the party referred to as Rose Brothers Agricultural Contractors Ltd, the 1st Respondent had filed a Notice of Preliminary Objection dated 9.3.2006.

This is the Notice of Preliminary Objection that was argued before me on 20th March, 2006.

Firstly, Counsel for the 1st Respondent argued that the 1st Respondent is a stranger to the Succession Cause, they are neither beneficiaries of the Estate, Petitioners or Objectors. The only connection between the 1st Respondent and the Estate is a lease of a portion of the suit premises for cultivating the land. The applicant should have filed a civil suit against the 1st Respondent if indeed there is any cause of action arising out of the lease agreement or dispute over the use of the land.

On the part of the Applicant, Counsel submitted that this application was properly before the court. The provisions of Section 45 of the

Law of Succession Act, clearly provide that there should be no intermeddling with the property of a deceased. The 1st, respondent is not a beneficiary of the estate and the 2nd and 3rd Respondents who are not administrators of the estate of the deceased have no legal authority to deal with the deceased estate.

Reference was made to the provisions of Section 47 of the Law of

Succession Act as read with rule 73 of the P&A rules which gives this court inherent power and jurisdiction to make any order in the interest of justice and to ensure the process of the court is not abused by any party.

Counsel further submitted that it would defeat the cause of justice if a civil suit were to be filed.

I have carefully considered those arguments for and against the Preliminary Objection. I must state that the prayers sought in the Summons dated 6th March, 2006, of injunctions and the Preliminary Objections (these are matters provided under Order 39 and 50 of the Civil Procedure Rules) are all not provided for under the Law of Succession Act and the rules thereto. However, since the inherent jurisdiction of this court to ensure that there is no abuse of the court process was invoked, I will deal with the issues and give appropriate directions so that this Succession Cause can be determined and this long drawn dispute over the estate of the deceased can be resolved.

Firstly, I will deal with the first issue that was raised in the Preliminary Objection that is the 1st respondent was wrongly brought to this Succession Cause. I need to restate here that the Law of Succession Act is an wholesome Act of Parliament complete with its own substance and the procedures to be followed as provided for under the P&A rules. If there is reference to the usage of the Civil Procedures in the Law of Succession the same is provided for under Rule 63 of the P&A rules. The provisions of Order 39 of the Civil Procedure Rules are not some of the rules of the Civil Procedure that are envisaged by the Law of Succession and this could not have been a mistake by the framers of the P&A rules that order 39 of the Civil Procedure Rules was not imported into the P&A rules. In my opinion this was a deliberate and premeditated act so that matters and issues in the Law of Succession are not taken into the realm of the Civil Law.

Thus can the applicant invoke the provisions of Section 45 of the Law of Succession Act and seek for restraining orders against the 1st Respondent. The answer in my humble view is **no**. If the respondent is an intermeddler (that is an issue for debate) as documents attached by the Applicant show that he had signed a lease agreement with the 1st respondent for part of the suit premises. The applicant ought to

have taken out Summons under Section 45 seeking for orders that the 1st respondent be cited for intermeddling with the deceased estate.

The grant was issued to four persons and the applicant could only have taken out summons jointly with the three Administrators or with their express authority by any of a consent.

In the present application the co-administrators have been joined as the 4th, 5th and 6th respondents. The penalty for persons found to have intermeddled in the deceased estate are spelt out in the law and they are basically a fine or the intermeddler is made answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled.

I am of the firm view that the provisions of the law should be followed strictly for the proper administration and distribution of the deceased estate. The court should not allow itself to be used as a tool of oppression or delaying the effectual conclusion of the matter.

The applicant together with the other Administrators either jointly or with the consents of the others should have filed a civil suit against the 1st Respondent either for trespass or breach of contract or to nullify the contract entered with persons who have no locus standi.

If the Applicant was assaulted by the 2nd and 3rd Respondents he ought to have pursued his claim with the police and or similarly filed a suit for restraining orders.

As for the present succession suit, the 2nd and 3rd Respondents who claim to have been omitted as beneficiaries, the grant was in my view issued to persons ranking in law in priority that is the widows and son of the deceased. If they claim to be beneficiaries, they can file a claim under Part III on dependency or if they claim to be heirs of the deceased they can enter appearance by filing Form 26 of the P&A Forms.

This entry of appearance under rule 60 of the P&A rules as Interested parties entitles them to be heard on the application for confirmation. This is necessary so that the issues pending in the Succession Cause can be concluded, by determining who are the beneficiaries of the deceased, what are the assets and liabilities forming part of the deceased estate and how the estate of the deceased is to be distributed. Once these issues are determined and a Certificate of Confirmation stipulating the shares of each beneficiary is determined and issued and each party can move on with their lives.

If this court is however diverted from those issues and start dealing with third parties and making declarations against others before establishing their beneficial interest, it will not be in the interest of justice and the Succession Cause will drag on forever.

In the circumstances, I will disallow the application dated 6th March, 2006 which is hereby struck off.

The Applicant shall pay costs to the 1st Respondent.

It is so ordered.

Ruling read and Signed on 31st March, 2006.

MARTHA KOOME

JUDGE

31.3.2006