



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2791 of 2004

SUMMONS FOR DEPENDANTS UNDER SECTIONS 26, 27, 28, 29 AND 72 OF THE LAW OF SUCCESSION ACT (CAP.160) AND RULES 45 AND 73 OF THE PROBATE AND ADMINISTRATION RULES BROUGHT AFTER GRANT HAS BEEN APPLIED FOR BUT NOT CONFIRMED

AND

IN THE MATTER OF THE ESTATE OF

STEPHEN MAINA CHEGE (DECEASED)

R U L I N G

The above summons dated 01.04.05 by Mercy Wanjiku Ndolo and Victoria Njeri on 04.04.05 applied for orders that:-

1. The application be certified as urgent and service thereof be dispensed with at the first instance.
2. The application be by way of both affidavit and viva voce evidence.
3. The petitioners/respondents be and are hereby restrained from collecting the sum of Kshs.324,000/= due to the deceased's estate pending the hearing and determination of this summons.
4. The court do declare and find that the 1st applicant was a wife of the deceased.
5. No grant of representation to the estate of the above named Stephen Maina Chege who died on 26.04.04 shall be confirmed without such reasonable provision being made for the applicants Mercy Wanjiku Ndoto and Victoria Njeri as dependants of the deceased out of his net estate as the court thinks fit.
6. The costs of this application be provided for.
7. This honourable court may be pleased to give any further and/or other orders on any terms that it deems fair and just given the circumstances of the matter.

The grounds upon which the application is based are that:-

(a) The petitioners/respondents are in the process of realizing and collecting the sum of Kshs.324,000/= comprising the deceased's estate and unless the said realization, collection and/or administration is

stayed, this application shall be rendered nugatory and the applicant shall suffer irreparable loss and damage.

(b) The grant was obtained fraudulently by making of false statements and/or by concealment from the court of information material to this cause in that the petitioner failed to indicate that the deceased was married to the 1st applicant and that there was a child the 2nd applicant.

(c) The 1st applicant being the deceased's widow and the 2nd applicant being the deceased's daughter have been completely disinherited of the deceased's estate.

The application is supported by the affidavit of Mercy Wanjiku Ndoto sworn on 01.04.05.

At the hearing of the application on 22.02.06, the applicants were represented by learned counsel, Mr. S.O. Olunga while the respondents were represented by learned counsel, Mr. T. Nyakundi.

Respondents' counsel drew attention to notice of preliminary objection he filed on 08.04.05 on grounds that the application is an abuse of the process of the court; that the matters raised are *res judicata*; that the affidavit in support of the application is fatally defective and ought to be struck out; and that the application discloses no cause of action. Respondents' counsel said that a similar application dated 10.01.05 and filed on 13.01.05 by the 1st applicant, Mercy Wanjiku Ndoto on her own behalf and on behalf of 2nd applicant, Victoria Njeri was argued inter-partes before Koome, J who dismissed it on 03.02.05 and that the present application, not being an appeal or for review, is incompetent and an abuse of the court process. Counsel said some of the issues in the present application were raised in the earlier application and that those not raised in the earlier application should have been raised there.

Respondents' counsel also argued that the affidavit of the 1st applicant, Mercy Wanjiku Ndoto sworn on 01.04.05 in support of the application is incompetent because the jurat does not appear on the same page.

On account of the foregoing, respondents' counsel urged this court to dismiss the present application.

On the other hand, applicants' counsel argued in essence that the earlier application which was disallowed by Koome, J was different in that it sought revocation or annulment of the subject grant whereas the present application seeks inclusion of the applicants as dependants of the deceased in the distribution of the deceased's estate. Counsel added that in the previous application under certificate of urgency, only affidavit evidence and submissions were relied upon whereas in the new application, which is more substantive, reliance will be put on both affidavit and oral evidence.

Regarding the jurat being on a separate page, applicants' counsel referred to Gikundi & Another -vs- Maseno University [2001] LLR 2403 (HCK) to make the point that irregularity of jurat being on a separate page, being a defect in form, is curable under Order XVIII rule 7. In similar vein, applicants' counsel also cited Kamalkhan -vs- United Insurance Co. Ltd. [2000] LLR 2280 (HCK). He submitted that no prejudice has been occasioned to the respondents by the fact of the jurat being on a separate page and added that in any case a supplementary affidavit had been filed on 13.02.06 by the same deponent highlighting the provisions of the earlier affidavit and putting the jurat on the same page as the concluding text.

Applicants' counsel urged the court to dismiss the preliminary objection and allow the applicants' application to proceed to hearing.

In reply, respondents' counsel submitted that since the supplementary affidavit by mercy Wanjiku Ndoto was filed without leave of the court, it should be struck out.

I have duly considered the rival arguments of the parties.

I note that the earlier application filed by the 1st applicant, Mercy Wanjiku Ndoto sought revocation or

annulment of the subject grant to the respondents on grounds of fraud. That was the thrust of that application. It was disallowed by Koome, J on 03.02.05. In the present application, the applicants are the same but they essentially seek to be provided for in the deceased's estate as dependants of the deceased. Whether or not they are dependants is in my view a question of fact, not amenable to determination through a preliminary objection. In this regard, attention is drawn to Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd. [1969] EA 696 and in particular to the following observations by 'Sir Charles Newbold, P, to wit:

'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

I associate myself with the above observations.

On the issue of *res judicata*, the governing principle is that the matter in issue in the application filed on 13.01.05 and in the application filed on 04.04.05 now under consideration should not only be between the same parties but should also be directly and substantially in issue in both. Whereas the parties are the same, the issue in the present application is dependency while the issue in the previous application was revocation. The two issues seem to me to be different and I hold that *res judicata* does not apply.

As far the jurat in Mercy Wanjiku Ndoto's supporting affidavit sworn on 01.04.05 being on a different page is concerned, I note that it actually started at the bottom of one page and spilled over to the next page owing to lack of space on the previous page. The spill-over was a logical step for purposes of completing the said jurat. No prejudice is occasioned by the spill-over. The defect complained of by respondents is one of form and is cured by Order XVIII rule 7.

In view of the foregoing, I am of the respectful view that the preliminary objection cannot hold and the same is hereby dismissed. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 27th day of March 2006.

B.P. KUBO

JUDGE