REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Succession Cause 544 of 1998

IN THE MATTER OF THE ESTATE OF HENRY MAKUTO .....DECEASED

ELIZABETH NAKUTO .....PETITIONER/APPLICANT

V E R S U S

MILDRED MULUPI OMURONJI .....OBJECTOR/RESPONDENT

R U L I N G

On 11.7.06, *Elizabeth Makuto*, the Petitioner in this cause, filed an application for review of the consent orders dated 10-3-99 in which consent the Objector, *Mildred Mulupi Omuronji*, and the Petitioner were appointed administrators of the estate of the late *Henry Makuto* (the deceased).

The application was irregularly made by way of summons instead of Notice of Motion. Rule 63(1) of the Probate and Administration Rules imports, inter alia, Order XLIV of the Civil Procedure Rules into succession matters under Chapter 160 of the Laws of Kenya. As Order XLIV of the Civil Procedure does not itself stipulate the procedure to be followed in applying for review under Rule 1(1) of that Order, Order L Rule 1 of the said Rules comes into play. It requires that the application for review be made by way of Notice of Motion, hence the error in the petitioner bringing it by way of summons.

Secondly, the application is expressed to be premised, inter alia, on "section 73 of Probate and Administration Rules." There is no such section. Rule 73 of Probate and Administration Rules saves the inherent powers of the court to ensure ends of justice are met and to prevent abuse of the process of the court. It is not relevant in the application by the petitioner.

And now, the nitty gritty. In the grounds for making the application, the petitioner stated that she is the only surviving widow of the deceased and that the objector has married and gone elsewhere, and thus is not well suited to administer the estate as she has no commitment to the estate. The estate includes cash said to be held by the Public Trustee, and agricultural land. Besides the parties herein, other heirs include Henry Mulupi Makuto, Jonathan Mulupi Makuto, Bernard Makuto and Wycliffe Mukhwana Makuto. It is the money held by the Public Trustee amounting to Shs.339,000/= that the petitioner particularly wishes to have released to her for her upkeep and maintenance. As matters stand, it is alleged by the petitioner that she and the objector are at loggerheads and it is impossible for the estate to be administered by both hence, according to the petitioner, the need for the objector to be removed as an administrator.

Mr. Samba, learned counsel for the Applicant urged the court to allow the application and to grant the orders to enable his client to administer the estate alone.

Mr. Anziya, learned counsel for the objector, relying on his said client's replying affidavit objected to the application and pointed out that the objector is a daughter in-law of the deceased from the first house. The 1st widow, he said, is now dead. He pointed out that his client is unmarried and desired to have the Grant of Letters of Administration Intestate confirmed so that the estate is distributed. He pointed out that the application for confirmation of Grant has been filed and is awaiting hearing. He submitted that the formal consent order had not been extracted and that the application was therefore a non-starter.

The issue thrown up for determination is whether the consent order can be reviewed under Order XLIV Rule 1 of the Civil Procedure Rules on the grounds put forward and, if so, whether the absence of a formal order is fatal to the application. Under section 76 of the Law of Succession Act (Cap 160), a Grant can be revoked or annulled by the court either of its own motion or on application of a party where the reasons set out in sub-paragraphs (a) to (e) of section 76 (supra) exists. The power to revoke or annul a Grant under section 76 (supra) cannot be diminished by a consent by the parties. If this were not so, the power of the court to enforce the law (Cap 160) would be compromised and the intention of Parliament to ensure proper administration of estates of persons dying after 1.7.81 in accordance with the provisions of the Law of Succession Act would be defeated. Therefore, if good and sufficient cause is shown for revocation of the Grant of Letters of Administration issued even on the basis a consent of the parties, the court can revoke it such consent order notwithstanding. The court has power also to decline for good cause, to accept a consent order to appoint any person or persons as administrator or administrators who in its view is or are ill-suited to serve as administrators. And a formal order is not always necessary in review cases in succession matters and its absence in this case is not fatal.

The Grant was made to the Applicant on 1st November, 1999 and since that time the said parties have been haggling over who controls the administration of the estate. There are minors involved who are dependants of the estate. Under Part III of the Law of Succession Act, the petitioner ought to have applied for reasonable provision to be made for them. Either administrator can come to court. It is not necessary that both march in tandem as this is not always possible when things have gone awry.

On the material before me it is not possible to determine whether or not the objector has remarried nor that she is hostile as alleged. These are issues that can only be determined on evidence. There is nothing to prevent the petitioner or the objector or both from fixing for hearing the application for confirmation of Grant. The ends of justice dictate that before the allegation by the petitioner can be used as a basis for the orders sought, evidence must be adduced and determination on the issue made. For these reasons I decline to allow the application which I dismiss with no order as to costs.

Delivered, dated and signed at Kakamega this 5th day of October, 2006.

G. B. M. KARIUKI

J U D G E