



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Succession Cause 169 of 2003

IN THE MATTER OF THE ESTATE OF MAJOR HUDSON WAFULA

(DECEASED)

THROUGH

ANN AMIMO AND MANCHESTER WAFULA

AND

HALIMA MUCHEKE WAFULA INTERESTED PARTY

RULING

This is a preliminary objection dated 10th May 2005. It is an objection to a Chamber Summons dated 9th May 2005 purported to have been brought under rule 49 of the Probate and Administration Rules by one Margaret Kamene Wafula. The objection is that the person seeking orders before court has no locus standi.

Mr. Gumbo for the objector submitted that the applicant had no locus standi to seek the orders in the application. The application emanated from Probate and Administration Cause No.169 of 2003. In that cause the applicant was neither a party nor an interested party. He submitted that under rule 60 of the Probate and Administration Rules any person who felt aggrieved or interested in an estate, should enter an appearance. No entry of appearance had been entered by the applicant. The affidavit in support of the application deponed that the applicant had authority to swear the affidavit on behalf of the petitioners. That was a peculiar thing and should not happen. The petitioners should have made the application by themselves on behalf of the estate.

He further submitted that rule 79 of the Probate and Administration Rules, as well as general legal requirements for granting of injunctions required the applicant to have had a locus standi to bring the application. The applicant was not an administrator and therefore could not bring an action seeking injunctive orders. Also a prayer for interlocutory injunction could only be entertained if there was a prayer for injunction in the main suit. In this particular case there is no prayer for an injunction in the main cause and therefore an interlocutory injunction could not be granted by the High Court.

Mr. Kathili opposed the preliminary objection. He submitted that the application was brought by counsel to the petitioners who were parties in the main cause. It was brought in the name of the petitioners. The matter had not yet reached the stage of distribution of the estate. Dependants had not been determined. On 22nd November 2004 the interested party swore an affidavit acknowledging the applicant as a dependant

of the deceased. Before the cause was determined, all the dependants had an interest and could come to court in the cause. The application was brought in the interests of the estate and therefore should be heard on its merits. He urged the court to disallow the preliminary objection.

I have considered this matter and the arguments by both counsel in the preliminary objection. The preliminary objection arises from the application by way of Summons that was filed on behalf of Margaret Kamene Wafula, the mother of the deceased. It seeks that Halima Mucheke Wafula the interested party be restrained by temporary injunction from interfering with Margaret Kamene Wafula's peaceful occupation of the deceased's parcel of land situated at Mautuma Settlement Scheme Plot No.1365 in Jerusalem village Mbakala Location, pending the hearing of the application and the succession cause. It also seeks that Halima Mucheke Wafula be restrained from intermeddling with the deceased's estate before the conclusion of the succession cause.

It is not in dispute that Halima Mucheke Wafula is a wife of the deceased the late Major Hudson Wafula. It is also not in dispute that Margaret Kamene Wafula is the mother of the late Major Hudson Wafula. It is not in dispute that both are not the petitioners for letters of administration in the succession cause. The petitioners are Ann Amimo and Manchester Wafula.

In my view, the preliminary objection is two pronged. Firstly that the applicant has no locus standi to bring the application in that she is neither a petitioner nor an interested party. Under rule 60 of the Probate and Administration Rules she should have entered appearance in order to bring this application. She had not, therefore she does not have locus standi. Secondly, that the orders sought are injunctive orders and both rule 79 of the Probate and Administration Rules and the general legal requirements for granting injunctive orders require that the applicant should have locus standi to bring such an application. The applicant not being an administrator in the cause cannot bring an application for injunction. At the same time interlocutory injunctions can only be issued where there is an injunction prayer in the main cause.

I have perused rule 60 of the Probate and Administration Rules. It provides that: -

“60. Every interested party (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.”

In my view, the above provisions mean that where there is an application filed in an administration cause, any person who considers himself or herself interested and wishes to be heard, if he has not already appeared in the proceedings, has to enter an appearance in Form 26, and may file affidavits. It is only then that he can be heard in that application. In this particular case there is no application to which Margaret Kamene Wafula is responding to. She is filing her own application purported to be through the administrators Ann Amimo and Manchester Wafula.

The law is such that it is the responsibility of the personal representatives/administrators to bring applications to protect the estate. From my perusal of the file, because of objections, nobody has so far been appointed by the court as an administrator of the estate. The applicant is a mother of the deceased and in terms of section 29 of the Law of Succession Act (Cap.160) she could as well qualify as a dependant, being the mother of the deceased. So she is not a mere interested party but probably a dependant. It is my view that since this application was, in any event, brought in the name of the petitioners, it is properly before the court, its substantive merits or otherwise notwithstanding. However, as there is a contention on whether the applicant was authorized by the petitioners, I order that the application be served on each of the petitioners for their confirmation as to whether they authorized her to make the application.

Counsel for the objector has argued that temporary injunctions can only be granted when in the main suit there is a prayer for injunction. Further that the applicant has no locus standi in the matter, so an

application for an injunction cannot be sustained. I have perused Order 39 of the Civil Procedure Rules. The relevant parts of it provide that: -

“1. Wherein any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

In my view, the above provisions of the law do not require that a prayer for injunction should be present in the main suit. The temporary injunction is meant to protect property in dispute from wastage, damage, alienation or wrongful sale. It is also meant to prevent a defendant from removing or disposing of his property to obstruct or delay execution of decree against him.

However, this application was not brought under Order 39 of the Civil procedure Act but under rule 49 of the Probate and Administration Rules. Within the application there are also prayers against intermeddling with the property of the estate. This court has jurisdiction to make orders to preserve an estate of a deceased person pending confirmation of grant and distribution. That includes orders to prevent or stop intermeddling with the estate. Section 45 of the Law of Succession Act (Cap.160) prohibits the intermeddling with the property of a deceased person.

In my view, considering that the application has been brought by a probable dependant, and through the petitioners and also seeks for orders of restraint from intermeddling with the estate, I cannot dismiss it or strike it out on the basis of preliminary objections. Therefore I decline to dismiss the application and order that it will be heard and determined on merits. I also order that the applicant serves the application on the petitioners within 7 days from today requiring them to respond as to whether they have authorized her to make the application. The petitioners have to file and serve their response within 14 days from date of service.

In the result I dismiss the preliminary objection. I however order that the costs of the preliminary objection will follow the determination of the application. The application will be heard interpartes on 4th July 2005.

Dated and Delivered at Eldoret this 30th Day of May 2005

George Dulu

Ag. Judge

In the Presence of: Ms. Wambua h/b for M. Kathili for applicant

Mr. Gumbo for respondent