REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT 57 OF 2005

1. JOYCE KASOZI CEINO

2. PASQUALLE CEINO (minor suing through his mother

and next friend JOYCE KASOZI CEINO…….PLAINTIFFS

VERSUS

TUKERO OLE KINA…….……DEFENDANT

RULING

The applicants have brought a suit (by an Amended Plaint) against the respondent seeking to restrain the latter by a permanent injunction from harassing, intimidating or in any other manner interfering with the applicants and the property of the estate of the deceased, Ceino Franco Cosmo Damiano, including plot No. 3703, plot no. 2214 and all cash in Barclays Bank (K) Ltd, Nafex Nairobi and Malindi Branches.

The respondent in his statement of Defence has averred that suit as filed is defective for seeking to protect the estate of the deceased person without complying with the provisions of the Law of Succession Act. Secondly, it is stated in the defence that the suit is said to have been brought to safeguard the interest of a minor, the 2nd applicant, yet the procedure for commencing such action has not been complied with.

Consequently the respondent has raised a preliminary point in his Notice of preliminary objection filed on 14th June 2005 in which he has raised the two points.

It is necessary to test the objection against the principles laid down in the often cited case of **Mukisa Biscuit Manufacturing Co.Ltd. V West End Distributors Ltd** (1969)EA 696.

In that case Law, J.A. delivered himself on preliminary objection thus:

> "**So far as I am aware a preliminary objection consists of a point of law which has pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration…."**

Sir Charles Newbold, on his part went further and emphasized that:-

> "**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……."

Applying these principles to the objection raised, the first point is whether the objection relate to pure point (s) of law. The fist objection is that the applicants lack the necessary capacity to bring a suit in respect of the estate of the deceased persons as they have not applied for and obtained letters of administration.

The second objection is that the suit was filed by the minor (2nd applicant) through the 1st applicant as the next friend without a written authority of the next friend.

The last objection was overtaken by events as the amended plaint now clearly reflects that the 2nd applicant has brought the suit through the 1st applicant as his next friend. With it is a written authority signed by the 1st applicant. So, the only objection for my consideration is the one relating to the capacity of the applicants in bringing this suit.

The objection is on a point of law capable of disposing the suit if argued as a preliminary point. The objection, as required in the **Mukisa Biscuit** Case was pleaded in the defence. This did not amount to outright bad faith on the part of the respondent, as argued by the learned counsel for the applicants. It is a requirement that before a point of preliminary objection can be raised, it must be shown that the objection was pleaded. This serves as a notice to the plaintiff who may then opt either to amend or withdraw the suit altogether depending on the objection to avoid the suit being dismissed or struck out.

It is clear from the submissions by the learned counsel for the applicants that the assertion that the applicants have not taken out letters of administration for the estate of the deceased is not controverted. This fact does not require further investigation or evidence.

The learned counsel for the applicants argued that the objection is not sustainable as the applicants, in this suit are not seeking to administer the estate of the deceased person. That the applicants' concern is the preservation of the deceased person's estate, hence the Law of Succession Act, he argued, would not apply in this situation. The preamble to the Law of Succession Act provides that it is

"**An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary successioin and the administration of estates of deceased persons; and for purposes connected there with and incidental thereto")**emphasis supplied).

The Act therefore deals with more than just intestate and testamentary succession and the administration of the deceased person's estate. It also deals with matters connected with and incidental to succession and administration. It follows that perservation in whatever manner, of the estate of a deceased person will be such other matter, not strictly succession or administration of the estate.

It is a common ground that only a person with authority derived from the Law of Succession Act can institute and prosecute a suit in respect of the estate of the deceased.

Section 82 (a) of that Act provides, inter alia;

"**82. Personal representative shall, subject only to limitation imposed by their grant, have the following powers:-**

a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate"

b) ……..

c) ……..

d) ……..

From this, therefore, it is plain that only personal representative may agitate by suit any cause of action.

A personal representative is defined in Section 3 of the Law of Succession Act as the executor or administrator of a deceased person. On the other hand, an executor according to the same Section, means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. An administrator is defined as a person to whom a grant of letters of administration has been made under the Law of Succession Act.

The capacity of the applicants does not answer to the above description of personal representative. I find that they lacked the capacity to bring this suit, even if they were to show, as they have claimed, that they are wife and son to the deceased.

The case of **Roman Carl Hiritz V Mwangome Mwakima**, (1988) 1 KAR 282 – split decision of the Court of Appeal, Nyarangi JA, held:

> "**It seems to me, having regard to Section 2 of the Law Reform Act that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of a deceased estate without a grant of probate, or letters of administration to the estate".**

This was the majority holding. It meant that a close family member of the deceased did not require to obtain letters of administration to file a suit in respect of the estate of a deceased person. That was in 1984.

Come 1987 the Court of Appeal in the famous case of **Virginia Edith Wamboi Otieno V Joash Ochieng Ougo and Omolo Siranga** (1982-88) 1 KAR 1049 at P.1059 held (*Per Curian*)

> "**If a person like the appellant acts before the grant, she will be a volunteer. ……..She had not yet gained letters of administration. Her application has been contested. While she may be the preferred choice in Section 66 of the Law of Succession Act she has not yet received her grant and consequently cannot lawfully act in that predicament. She cannot legally claim the right to bury the body of husband as his personal representative".**

It is instructive to note that no reference was made to the **Hirtz** case.

The **Hiritz** case received a "*coup de grace*" and was "safely laid to rest" in 1990 when that decision was reversed by the Court of Appeal in **Trouistic Union International and Ingrid Ursula and Ingrid Ursula Heinz V Mrs.Jane Mbeyu and Mrs. Alice Mbeyu Civil Appeal No. 145 of 1990 (U.R).** That, in my view will suffice on the position of the applicants *vis a' vis* the estate of the dec eased that they set out in this suit to preserve and protect.

The learned counsel for the applicants further argued that the suit did not only seek to protect and preserve the estate of the deceased. As a matter of fact, the learned counsel for the respondent seemed to support this position when he stated that 80% of the suit was about the deceased person's estate. What then constitute the other bit or the 20%? A permanent injunction against the defendant or his agents or servants from harassing intimidating or interfering with the applicants.

I do not see how this relief can be severed from the estate of the deceased. It cannot stand on its own as it will not be justiceable. There is no evidence of how and why the respondent would interfere with, harass and intimidate the applicants. In the result, I find this action as well as subsequent application to competent and are dismissed with costs to the respondent.

Dated and delivered at Malindi this……day of……..2005.

W.OUKO

JUDGE

What it musts consist of **IN THE HIGH COURT OF KENYA**