



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE 188 OF 2005

IN THE MATTER OF SIMON NJENGA KAMAU

AND DOUGLAS WAINAINAPETITIONERS

AND

JANE WANJIRU KAMAU.....RESPONDENT

RULING

This is an application by the petitioners herein, Simon Njenga Kamau and Douglas Wainaina for Grant of letters of administration *ad colligenda bona* of the estate of James Kamau Kagiri (deceased) for the purpose of collecting and getting in and receiving the estate of the deceased and doing such other acts as may be necessary for the preservation of the same until further representation is granted.

The petitioners are sons of the deceased who died on 10th September, 2004. In their joint affidavit, they listed down the names of the people who survived the deceased and the properties that were left by the deceased. The deceased had two houses, one of Jane Wanjiru Kamau and the other one of Mary Wangari Kamau (deceased), mother to the petitioners. The properties of the deceased that were listed by the petitioners are:-

- (a) Nakuru Municipality Block 1/66
- (b) Nakuru Municipality Block 1/618
- (c) Nakuru Municipality Block 27/324
- (d) Nakuru Municipality Block 1/386
- (e) Nakuru Municipality Block 27/726
- (f) Motor Vehicle Reg. No. KAJ 970 Peugeot 504 Pick-up.
- (g) Motor Vehicle Reg. No. KAK 088F Peugeot 504 Saloon.
- (h) Motor Vehicle Reg. No. KAM 426L Saloon
- (i) Standard Chartered Bank Account NO. 0150159381000 Nakuru Branch.

(j) Family Finance Building Store A/C No. 185881(102).

(k) Coco Savana Club (Block 5/39).

Jane Wanjiru Kamau is the second wife to the deceased and she has three school going children aged 18, 16 and 13 years. She denied that the estate of the deceased was being wasted and thus opposed the application for grant of letters of administration ad *colligenda bona*. However, she stated that if any orders regarding administration of the estate were to be issued, she ought to be made a joint administrator.

She denied that the business known as Coco Savanna Restaurant was part of the deceased's estate and stated that the said business was initially registered in the name of Stephen Kungu Kagiri trading as Coco Savanna Restaurant and at no time had there been any official change of proprietorship to reflect the name of the deceased, but on 18/4/2005, a certificate of registration of change of particulars was issued by the Senior Assistant Registrar which showed that the business was now known as **NEW COCO SAVANA** and **Miss Jane Wanjiru Kamau** (the respondent) was registered as carrying on the said business on Plot No. Block 5/39/SEC VII.

However, she never deposed that the deceased was in fact not the proprietor of the said Coco Savana restaurant before his demise.

The petitioners responded by stating that Coco Savana Restaurant, also known as Club Coco Savana initially belonged to their uncle, Stephen Kungu Kagiri and by an agreement dated 26th June, 1998 he hired it out to the deceased for one year and on 18th November, 1998 the deceased purchased the same. The petitioners annexed to their affidavit copies of the said agreements. That clearly demonstrated that the said business formed part of the deceased's estate and the purported change of particulars registered after the death of the deceased and subsequent to the filing of this matter was fraudulent, the petitioners stated.

Mrs Ndeda for the petitioners, in an effort to demonstrate that the deceased's estate was being wasted, referred the court to a statement of the deceased's bank account number 01501-593810-00 at Standard Chartered Bank Kenya Ltd, Nakuru Branch, which showed that subsequent to the demise of the deceased, there had been seven ATM withdrawals of cash. The deceased also had another account at Family Finance Bank whose details were only known to the respondent and there were fears that the funds therein were also being withdrawn unlawfully. Counsel therefore urged the court to make appropriate orders for the preservation of the deceased's estate.

Mr. Githui for the respondent submitted that this court's jurisdiction had not been invoked properly in terms of Rule 36 of the Probate and Administration Rules saying that there was no urgency that necessitated the making of a grant ad *colligenda bona* as sought. With regard to the alleged wastage of the deceased's estate exemplified by the unauthorised withdrawals of cash from the deceased's aforesaid bank account, counsel submitted that it had not been stated who made those withdrawals.

With regard to Coco Savana Club, he submitted that the sale agreement which the petitioners referred to was not enforceable as per the provisions of Section 11 of the Registration of Business Names Act Cap 499 of the Laws of Kenya and therefore the business cannot be said to have formed part of the deceased's estate. Alternatively, if the court held that club formed part of the deceased's estate, it should be noted that the respondent was running it jointly with the deceased before he died, counsel submitted. Lastly Mr. Githui stated that the respondent had no objection to joint administration of all the other properties that formed part of the deceased's estate, excluding Coco Savana Club.

Having carefully perused all the affidavits filed by the parties herein and having considered the submissions made by counsel in this matter, the first issue that must be resolved is whether the petitioners' application for grant of letters of administration ad *colligenda bona* defuncti is necessary in the circumstances of this matter.

Rule 36(1) of the Probate and Administration Rules provides as follows:-

“36(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased”.

As was held in ***MORJARIA VS ABDALLA*** [1984] KLR 490, the purpose of such a grant is to collect the property of a deceased person where it is of a perishable or precarious nature, and where regular probate and administration cannot be granted at once. In this case, it has been shown that subsequent to the demise of the deceased, some funds have been unlawfully withdrawn from the deceased’s account at Standard Chartered Bank of Kenya Ltd., Nakuru Branch. It is not known who made those withdrawals. The deceased also had another account at Family Finance Building Society and there is evidence that M/S Kamere & Company Advocates are collecting rent from one of the properties owned by the estate of the deceased and are depositing the same in the aforesaid bank account. The said advocates indicated that they would continue to collect the rent and deposit the same in the said bank account until determination of the succession cause. None of the parties told the court what was happening to the funds in the said bank. The petitioners are therefore reasonably afraid that somebody is likely to withdraw those funds unlawfully and misappropriate the same.

Given the nature of the deceased’s estate and the differences that have already arisen amongst the beneficiaries thereto, it would take some time before a full grant of representation is made and there is real likelihood that some parts of the estate may be wasted or alienated and particularly the rent accruing from some of the properties and the motor vehicles. I therefore hold that this is a suitable matter for grant of the orders as sought.

The only real dispute between the parties insofar as administration of the deceased’s estate is concerned seems to be whether Coco Savana Club is a part of the deceased’s estate or not. The petitioners included the same in the list of the deceased’s assets but the respondent disputed such inclusion saying that it did not form part of the deceased’s estate, it was her personal property and she referred to the certificate of registration of a change of particulars for the said business which she procured on 18/4/2005. It is not in dispute that the said business was lawfully owned by the deceased prior to his death, having purchased the same from his brother, Stephen Kungu Kagiri on 18th November, 1998. That transaction was not denied by the respondent. The only contention raised was that the notice of change of particulars from the former owner to the deceased was not registered as required under Section 10 of the Registration of Business Names Act. Although Section 11 of the said Act states that the rights of any person who defaults in registering a statement of particulars or a notice of change in particulars are not enforceable by action or other legal proceedings while such default continues, the said provisions are not absolute because the defaulter can apply to the court for relief against the disability imposed by the section.

It is noteworthy that the respondent proceeded to register the notice of change of particulars after the demise of the deceased and indeed after this matter was commenced in court. She did that without informing the petitioners and she did it fraudulently. According to the provisions of Section 23 of the said Act, the true names of every person who is required to be registered should be stated. According to Section 23(2) of the Act where the person to be registered is a married woman, the words ***“wife of”*** followed by the forenames and surname of her husband have to be mentioned after and in addition to her own name. The respondent fraudulently referred to herself as ***“MISS JANE WANJIRU KAMAU”***. She even registered one of her minor children, Martha Wanjiku, aged 13 years as the Secretary of Coco Savana Club under the provisions of the Societies Act. I have no doubt in my mind that the respondent was doing all that in a desperate effort to defeat the petitioners’ interest in the said business. I therefore hold that the business known as Coco Savana Club or New Coco Savana Club or by whatever other name it may be called and that is operated on Plot No. Block 5/39/Section/VII Club Road, Nakuru Municipality, is part of the estate of the deceased.

Having so held and taking into consideration that both parties hereto have stated that they have no objection to the court granting letters of administration ad colligenda bona to both parties, I order that grant of letters of administration ad colligenda bona defuncti do issue to Simon Njenga Kamau, Douglas

Wainaina and Jane Wanjiru Kamau for the purpose of collecting and getting in and receiving the estate of James Kamau Kagiri (deceased) and doing such other acts as may be necessary for the preservation of the said estate pending the issue of a full grant. The petitioners are awarded the costs of this application and the same shall be paid by the estate.

DATED, SIGNED AND DELIVERED at Nakuru this 14th day of October, 2005.

D. MUSINGA

JUDGE

14/10/2005

Ruling delivered in open court in the presence of Mr. Ngure holding brief for Mrs Ndeda for the petitioner and Mr. Githui for the respondent.

D. MUSINGA

JUDGE

14/10/2005