



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 1831 of 1996

IN THE MATTER OF THE ESTATE OF HEMED ABDALLA KANIKI-(DECEASED)

- 1. MARIAM MBUVE ABDALLA ALIAS MAMA KANYAYA**
- 2. MOHAMED ALI**
- 3. SALIM ALI MUCHOKI**
- 4. HALIMA MUCHOKI**
- 5. ASHA MUCHOKI**
- 6. ABDALLA MUCHOKI**
- 7. FATUMA NGORORO**
- 8. HABIBAABDALLAH**
- 9. ASHA ABDALLA ALIAS MAMA LELA**
- 10. MOHAMED ABDALLA.....APPLICANT/RESPONDENTS**

VERSUS

- 1. SOPHIA SALIM GATHIACA**
- 2. SALIM MOHAMED ABDALLAH KANIKI...RESPONDENTS/APPLICANTS**

RULING

The Applicants herein took out a Chamber Summons dated 19th May 2004 against the Respondents herein seeking, inter alia, for variation or in the alternative the setting aside of the order of Hon. Mr Justice Githinji issued on 28th April 1999 in connection with the management of suit property subject matter of the main application for Revocation of Grant. The said present application is brought under the provisions of Rule 73 of the Probate and Administration Rules, Law of Succession Act (Cap 160) and section 3A of the Civil Procedure Act (Cap 21).

The Respondents herein are the Applicants under the said main suit for revocation of Grant and the Applicants herein are the Respondents thereunder, and the appointed Administrators of the estate of the deceased. The main subject matter of the said main suit is the question of determination of legal ownership

of residential rental premises known as plot No. B2/4(A & B) presently registered in the name of the deceased as L.R. No. 31/XII/632 and 36/XII/633, (hereinafter referred to as "the subject properties").

It is the Applicants case that the management of the said subject properties is going to waste by reasons of various interlocutory orders (and in particular the said orders of 28th April 1999) that have been made under the said main suit. Their main concern is that due rent is not being collected and that payment of all the outgoings especially Nairobi City Council Rates and tenant purchase instalments dues are in arrears. The said properties are now being subjected to waste as the appointed administrators (Applicants herein) cannot by reason of the aforesaid suit and said orders exercise their vested statutory duties. They argue they are the lawful administrators of the estate of the deceased because the grant has not yet been revoked and that therefore they are entitled to manage the said property to the exclusion of all. They further argue that the attempt to reply to this application by the Respondents is defective as it offends the basic principles governing preparation of affidavits as set out under Order 18 of the Civil Procedure Rules and consequently the affidavit filed in reply should be struck off as it is superfluous, oppressive and irrelevant. They therefore seek the intervention of this court so that the estate of the deceased may be protected from further damage and loss.

They justify their belated application on the grounds that there is no statutory time limit for seeking variation and or setting aside of a court order, and also in the interest and for the ends of justice. They also contend that the defects on their application are curable for the ends of justice, and that this court may accordingly invoke its inherent powers and grant them the relief sought. They deny that this application is intended to pre-empt and or dispose the main suit for their main concern is the protection of the estate from damage and loss.

The Respondents and an interested party herein have strongly opposed this application. They have also filed specific grounds of opposition in support of their case. They argue that the said orders of 28th April 1999 should not be varied or set aside but concede that an independent entity should be appointed to manage the rental collection from the said subject premises. They support their opposition by adducing evidence that the applicants herein cannot be trusted on account of their previous conduct. They allege that the said applicants have even at one time contributed to the mismanagement of the said properties. They also argue that this application is intended to pre-determine and or dispose the main suit for revocation of grant to the detriment of their interests in the said subject properties. They further contend that the Applicants herein have come to this court belatedly and are guilty of laches on account of inordinate unexplained delay. They repeat that the application herein is incurably defective as it is not brought under the relevant provisions of the Law of Succession Act as prescribed. They finally submit that there are no outstanding due against the said subject properties and, this being an excuse and not reason put forward by the Applicants, this application should be disallowed with costs.

At the very onset, and for the ends of justice, and in pursuance of the provisions of Rule 73 of the Probate and Administration Rules read together with S.47 of the Law of Succession Act. I admit the application filed herein together with the affidavit of Ali Hussein Ali dated 17th June 2004 as being properly on record, notwithstanding the procedural but curable defects alluded to. I also hold that there is no statutory time limit set for commencing this application and an order may be set aside or and varied in the interests of justice so long as such recourse will not cause any prejudice.

It is not in dispute that the ownership of the subject properties of this application is contested between the parties herein. It is also not disputed that the Applicants herein were issued with a grant of Letters of Administration validity of issuance of which is contested only to the extent of the said subject properties. The role of a personal representative in respect of the property of an estate is very well defined under the Law of Succession Act which provides at section 79 that;

"The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to my limitation imposed by the grant, all property of the deceased shall vest in him as personal representative."

A personal representative is thus vested with the statutory duties of protecting all the properties of an estate under his administration.

Such duties are conferred unto such personal representative as a trustee thereof and are clearly more expressly defined under S.83 of the Law of Succession Act which provides inter-alia that the personal representative is duty bound;

..... " to ascertain and pay, out of the estate of the deceased, all debts."

Until such time as he is legally discharged, the personal representative is thus duty bound to take all necessary steps and protect the estate of a deceased person from waste and damage so as to obviate an action in devastavit.

The grant of Letters of Administration issued to the Applicants herein has been challenged to the extent only of the said subject properties. Until such other orders are made, the said grant stands valid for execution subject to the determination of the main suit herein. By reason of the pending suit, ownership of the said properties is *sub judice* and ultimately, the Applicant's powers thereto are severely constricted. They cannot only ensure that the said subject properties are retained in *status quo* prevailing at death and that the same are not subjected to waste or damage. The said Applicants are therefore at the moment under a duty to ensure that income realizable from the said properties is duly remitted and that all the outgoings and in particular all statutory claims are settled on time and no more and no less. To otherwise abdicate would place the estate status quo ante in a state of limbo to the detriment of all the interested parties. The said applicants are after all duty bound to account.

This court takes full cognizance of the claim in trust lodged by the Respondents herein against the said subject properties under the main suit. In the circumstances and by reasons aforesaid and until final determination it is ordered that:

1. All tenants of the said subject properties are hereby ordered to commence payment of monthly rent to the Registrar High Court of Kenya with effect from 1st July 2004 and in default thereof the Applicants herein will be at liberty but with leave of court to initiate necessary recovery proceedings against the defaulting tenant or tenants.
2. The Applicants herein as administrators of the estate of the deceased do forthwith ensure that an account of income from the said subject properties realized since the death of the deceased is compiled and filed in court and at any rate within thirty days hereof.
3. All previous orders made hereinbefore are accordingly set aside and or varied.
4. This order be served on all the tenants.
5. Costs of the application be in the cause.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 6th DAY OF July 2004.

P J KAMAU

AG. JUDGE