



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.297 OF 2004

TABITHA WARUGURU NG'ANG'A.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYADEFENDANT

RULING

In a Complaint filed on 8th June 2004, Tabitha Waruguru Nganga the Plaintiff avers inter alia that she brings these proceedings in her own right as the widow and relic of James Ng'ang'a Mugo who died intestate on 16th November, 2002. In paragraphs 5 to 9 of the Complaint the Plaintiff narrates the relationship between the Defendant and her deceased husband as charger in respect of Title No. CHANIA/NGORONGO/T.136/1. She indeed describes this property as the deceased's property.

At paragraph 12 the Plaintiff states that no grant of Letters of Administration intestate have been made to her or to any of the dependants of the deceased. Yet her interest appears to be that of an heir or beneficiary of the estate of the deceased. This can be deduced from her pleading at paragraph 15 of the Complaint at which she avers that unless the Defendant is restrained it will intermeddle with the estate of the deceased and cause irreparable loss and damage to the dependants of the deceased.

Simultaneously with the filing of the Complaint, the Plaintiff has taken out a summons in Chambers where she prays for interlocutory injunctive relief. The application is supported by the Plaintiff's affidavit sworn on 4th June 2004. The facts averred in the Complaint are reiterated in the supporting affidavit. The Defendant has filed a replying affidavit sworn by one Zipporah Mogaka the Defendant's Manager Legal Services. This affidavit is to the effect that the Plaintiff's deceased husband was indeed indebted to the Defendant and had charged the said property which had previously been advertised for sale without success. The Defendant in this affidavit also challenges the legal capacity to institute these proceedings.

At the commencement of the hearing of the application on 27th July, 2004, the Defendant's advocates raised objection to the Plaintiff's capacity to institute this suit on her own behalf and or on behalf of the estate of her late husband. Counsel argued that the Plaintiff cannot maintain this action if she has not obtained a Grant of Representation under the Law of Succession Act. For this proposition he relied on the following cases:

1. Virginia Edith Wamboi Otieno –v- Joash Ochieng Ougo & Another Nairobi C.A. No.31 of 1987.
2. Trouistik Union International & Another –v- Mrs Jane Mbeyu & Another Nairobi C.A. NO.145 of 1990.
3. Francis Kamau & Another –v- James Kinyanjui Mbugua. NAIROBI HCCC NO.111 OF 2004 OS.

4. Ingall –v- Moran (1944) 1KB 160 5. Burns –v- Campbell (1951) 1 KCB 15.

Counsel for the Defendant on the above authorities asked me to strike out the Plaintiff and the application with costs.

Counsel for the Plaintiff contended that under the Law Reform Act the Plaintiff was entitled to come to Court in her own right. Some reliance was placed on the case of Hirtz –v- Mwakima (1984) KLR 294. Counsel was of the view that the Plaintiff has a life interest in the estate of her deceased husband and under the Law of Succession Act she can maintain this suit.

I have carefully considered the application in the light of the affidavits on record and the arguments by Counsel for both parties. I have come to the following conclusion. The Plaintiff is not a party to the contract of charge between the Defendant and her husband: Yet she avers that if the statutory power of sale is exercised she will be prejudiced as a dependant of the deceased. The only way the law recognizes a dependant of a deceased is through a succession cause.

The Defendant cannot assume the status of a dependant by the mere say so. She cannot institute legal proceedings on the basis of the mere fact that she is a widow of the deceased.

My understanding of the Law is that a person who wishes to enforce an action in respect of an estate of a deceased can only do so on obtaining a Grant of representation issued under the Law of Succession Act (Cap 160). Section 2 provides:-

“Except as otherwise expressly provided in this Act or any other written law the provisions of this Act shall constitute the Law of Kenya in respect of and shall have universal application to all cases of interstate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

AND Section 82 (a) is in the following terms:-

“82. Personal representatives shall subject only to any limitation 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”

A personal representative under Section 3 of the same Act is described as the executor or administrator of a deceased person and an administrator is described as a person to whom a grant of Letters of Administration has been made under this Act.

The Plaintiff in this suit is challenging the exercise of the Defendant’s statutory power of sale under a charge executed by her husband in favour of the Defendant. The Law is very clear. She cannot challenge the exercise of the statutory power of sale or indeed any aspect of the charge unless she has been granted Letters of Administration under the Law of Succession Act. The Law Reform Act is of no application.

In the result I uphold the Preliminary Objection raised by the Defendant. The Plaintiff has no locus standi to institute these proceedings. The application and the plaint are accordingly struck out with costs. Orders accordingly.

**DATED AND DELIVERD AT NAIROBI THIS 29TH DAY OF
SEPTEMBER, 2004.**

F. AZANGALALA

AG. JUDGE

Read in the presence of:-