



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
MISC. CIVIL SUIT NO. 154 OF 2004

1. JOYCE MUKELI MUTUKU

**2. WILSON MUENDO MUTUKU (Suing as the Legal Representative of
PETER MUTUKU MULI (DECEASED))..... APPLICANT**

VERSUS

1. THE PUBLIC TRUSTEE MACHAKOS

2. MONICAH MUTIO RESPONDENT

R U L I N G

The applicants in this matter Joyce Mukeli Mutuku and Wilson Muendo Mutuku moved this court under Section 47 of the Law of Succession Act and Order 39 Rule 1 & 8 of Civil Procedure Rules, Section 3 A Civil Procedure Act seeking orders of injunction to issue against 1st Respondent, his servants and/or agents from releasing any money to the 2nd Defendant/Respondent or interfering with the money held on behalf of the Estate of Peter Mutuku till Mombasa Succession Cause No. 320/03 is heard and determined.

The application was filed under Certificate of Urgency and the court ordered that the Public Trustee be served. On being served the Public Trustee filed a Notice of Preliminary Objection dated 7/10/04 and requested the court to hear it before the application is heard.

The Public Trustee raised several points in his objection. The first one I will consider is whether the affidavit in support of the application and sworn by Wilson Muendo is proper. It was the Public Trustee's submission that it is defective and should be struck out because the jurat appears on its own page. In support of that argument he cited the case of *STEPHEN KIBUNJA Versus FOREST ROAD FLATS LTD H.C.C 371/00* in which the court struck off a supporting affidavit whose jurat appeared on its separate page. Mr Sila contends that the affidavit is proper as there is a Para 17 before the jurat.

I do agree with Mr Sila that the jurat does not appear on its own page with the affidavit ending on a separate page as held in the case cited. There is a Para 17 on the page where the jurat falls and the affidavit is competent.

The applicants named the '**PUBLIC TRUSTEE MACHAKOS**' as the first Respondent. It is the Public Trustee's contention that the said Public Trustee Machakos does not exist in law. Mr Sila for applicant argues that Defendants were properly sued that 1st Respondent and the addition of the word '**Machakos**' does not make a difference to the name. Section 23 (3) of the Public Trustee Act provides that: all

proceedings in law the Public Trustee shall sue or be sued by the name '**Public Trustee**'. It means that the 1st Respondent as described does not exist. However, I do find that, anomalously would not be a reason to strike out the whole proceedings because of a misdescription of a party. They have just come to court and can amend their papers anytime.

The other limb of the objection is that there is pending in Mombasa High Court Succession Cause 320/03 regarding the Estate of the deceased.

This is evidenced by the annexures to the application dated 28/9/04. This issue was also raised by the court when this application was filed under Certificate of Urgency. The Petitioners in Succession Cause 320/03 are the applicants in the present application. This application touches on the Estate of the deceased. The applicants cannot have the Succession Cause pending in Mombasa and come to court in Machakos to file such an application. All issues regarding the deceased's Estate can only be dealt with in the pending case in Mombasa. The filing of this application amounts to an abuse of court process because it is possible that this court can give conflicting decision with that in the main cause. I also do uphold the Public Trustee's objection that the Chamber Summons is not a substantive form of pleading known in law to initiate a cause of action. There should have been a substantive suit filed.

The Respondent also objected to the bringing of this application under Order 39 of the Civil Procedure Rules because Rule 63 The Probate and Administration Rules precludes the application of that order from proceedings under The Succession Act.

Indeed Rule 63 of Probation and Administration Rules has specified provisions Under the Civil Procedure Rules which can apply to such proceedings under Law of succession Act and Order 39 Civil Procedure Rules is not one of them.

The issue of whether or not the acts of the Public Trustee were lawful is arguable. It cannot be taken up at this stage.

In all, however, I do agree with the Public Trustee that the Chamber Summons is improperly before this court there being another succession cause in Mombasa and this application amounts to an abuse of court process. The objection is upheld and the application is hereby struck out with costs to the Respondents.

Dated, read and delivered at Machakos this 28th day of October 2004.

Read and delivered in the

Presence of Mr Sila for applicant.

R.V. WENDOH
JUDGE