

REPUBLIC OF KENYA
THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL SUIT NO. 145 OF 2002 (ORIGINATING SUMMONS)

MATHEW MWENDWA MWOVI:..... PLAINTIFF

VERSUS

BEATRICE MUTAVE MWOVI:..... 1ST DEFENDANT

MAINGI MWOVI:..... 2ND DEFENDANT

R U L I N G

Mathew Mwendwa Mwovi moved this court under Order 36 Rule 1 and 7 Civil Procedure Code, the Succession Act, Judicature Act, Rules of Equity and Section 3 A Civil Procedure Act, by way of Originating Summons asking the court to ascertain the heirs and dependants of Jackson Mwovi Mbusya now deceased and all questions arising out of intended administration of the Estate of Jackson Mbusya and that the court do make a declaration that the plaintiff is entitled to inherit from the Estate of the deceased in same degree as the other sons of the deceased; in the alternative reasonable provision be made for the plaintiff from the Estate of the deceased proportionate to the dependency which he enjoyed during the deceased's lifetime. The Respondents Beatrice Mutave Mwovi and Maingi Mwovi who are administrators of the deceased's Estate opposed the Originating Summons by filing an affidavit in reply.

Counsel for the Respondents Mr Masika also filed a Notice of Preliminary objection dated 4/10/04. The objection is three fold:

1. That the suit is time barred since the estate of the deceased has been distributed and no objection was filed by the plaintiff when the defendants applied for letters of administration.
2. That the suit is overtaken by events since the issue of who was or was not the heir of the deceased should have been dealt with during the time of granting letters of administration.
3. That the suit does not challenge the obtaining of the letters of administration and the Originating Summons is therefore a non – starter.

In response to the Preliminary Objection the counsel for the plaintiff contents that “that” fraud cannot be relied upon to disinherit the plaintiff and that the letters of administration were obtained based on false statements and concealment of material facts to the court and that this Originating Summons was filed on discovery of fraud used in omitting the applicant from list of beneficiaries and so even if distribution has been done it is still illegal and he urged the court to dismiss the Preliminary Objection. The plaintiff annexed to the Originating Summons a certificate of confirmation grant issued on 22/3/00. This Originating Summons was filed in 2002. In his affidavit in support of the Originating Summons the plaintiff claims that he is aware of the Succession Cause No. 1523/99 and that distribution has been done.

Though he claims that material facts were concealed in the Succession Cause, he did not annex the proceedings in Succession Cause 1523/99 for the court to ascertain what materials the defendants placed before the court before the grant was issued and later confirmed. The plaintiff does not state anywhere in his affidavit why he did not lodge his objection in the Succession Cause where the court would have determined whether he was an heir or not.

Besides, the above counsel for plaintiff alleges fraud. Fraud is not pleaded and alleged anywhere in the

Originating Summons. Particulars of fraud will normally be pleaded to enable the other party to ably respond.

I do agree with Respondents that the Originating Summons is overtaken by events. Issues of Heirs and distribution has been determined in the Succession Cause. The application does not challenge the issuance of the grant of letters of administration and the subsequent confirmation. Meaning that their issuance was proper.

As earlier noted the plaintiff has not said why he failed to bring this application during the pendency of the Succession Cause. I do agree that this Originating Summons is time barred, a non starter and brought before the wrong forum. If the plaintiff has any claim it is in that Succession Cause. I accordingly uphold the objection, and Originating Summons is dismissed with costs to the Defendants/Respondents.

Dated, read and delivered at Machakos this 21st day of October 2004.

R.V. WENDOH

JUDGE