

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 1647 OF 2001

IN RE ESTATE OF ANASTACIA MBULA KILUNGU (DECEASED)

RULING

I have posed the question seeking to know the provision of the Law of Succession Act which allows the Court to entertain an application for an injunction under order XXXIX of the Civil Procedure Rules in Probate and Administration proceedings. Mr Kitulu for the application/objector has mentioned to me section 45(1) of the Law of Succession Act and has added rules 44, 49 and 63 of the Probate and Administration Rules and claimed that those provisions allow the Court to entertain an application for an injunction under order XXXIX of the Civil Procedure Rules in Probate and Administration proceedings. Mr Wandago for the administrators does not agree. He adds that the objector's application for an injunction in this matter is incompetent and should be struck out.

I have looked at the provisions of the Law of Succession Act mentioned by Mr Kitulu during this submissions where he had added rule 73 of the Probate and Administration Rules, and have also looked at his summons dated 2nd November, 2001 where he mentions section 76 of the Law of Succession Act.

The proper position is that none of those provisions allow the Court to entertain an application for an injunction under order XXXIX of the Civil Procedure Rules in Probate and Administration proceedings where the procedure at each stage is fully provided for under the provisions of the Law of Succession Act and the rules thereon. It be noted that rule 63 of the Probate and Administration Rules providing for the use of certain provisions of the Civil Procedure Act and Rules in Probate and Administration proceedings does not include order XXXIX of the Civil Procedure Rules. It does not even mention a section like section 3A of the Civil Procedure Act. In fact instead of section 3A of the Civil Procedure Act the provisions of the Law of Succession Act have their own rule 73 of the Probate and Administration Rules which specifically gives the Court inherent powers in matters of Probate and Administration.

That having been done, it does not mean that rule 73 can be used to do what the law of Succession Act does not allow the Court to do. That rule, just as section 3A of the Civil Procedure Act, has to be used to do what is lawful only and to apply order XXXIX of the Civil Procedure Rules in Probate and Administration matters when rule 63 of the Probate and Administration Rules has excluded order XXXIX from the provisions of the Civil Procedure Act permitted to be applied in Probate and Administration matters, will be to do what is not lawful in Probate and Administration matters.

From what I have been saying above therefore, I agree with what Mr Wandago has said that this summons dated 2nd November, 2001 is incompetent, as an injunction under order XXXIX of the Civil Rules in the Civil Procedure Act (cap 21 Laws of Kenya) is not available in Probate and Administration proceedings under the Probate and Administration Rules of the Law of Succession Act (cap 160 Laws of Kenya). Mr Wandago said the application should be struck out but I think it deserves a more drastic measure than just striking it out. It deserves dismissal and I do hereby dismiss the said summons dated 2nd November, 2001 with costs to the administrators/respondents.

Further order: Leave to appeal granted. Copies of the proceedings and Ruling be supplied from the Registry. There can be no stay of a dismissal order already made and not requiring execution.

Dated and delivered at Nairobi this 29th day of January 29, 2002

J.M KHAMONI

JUDGE