



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 95 OF 2001

JOHN KASYOKI KIETI ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

TABITHA NZIVULU KIETI ::::::::::::::::::::::::::::::: 1 ST DEFENDANT

ANNAH NDILEVE KIETI ::::::: ::::::::::::::::::::::::::::::: 2 ND DEFENDANT

10 Coram: J. W. Mwera J.

Makundi Advocate for Applicant

Kimeu Advocate for 1st Respondent

2nd Defendant/Respondent in person

C.C. Muli

RULING

This court was about to hear an application dated 21.6.2001 brought under O.39 rr. 1, 2 Civil Procedure Rules and S.3A Civil Procedure Act, to restrain the defendants from interfering with the running of Mbaitu General Stores and Wananchi Bar, both located at Kikima Market until the suit herein is determined. It was filed along with a plaint. However Mr. Kioko on a preliminary point of law served on Mr. Makundi for the plaintiff submitted that the two business outfits referred to belonged to one Francis Kieti Mbuva now deceased. That the plaintiff is the late Kieti's son while the defendants are his mother and step mother respectively (the widows of Kieti). This was not in dispute save that the business being part of the late Kieti's estate and the plaintiff not having had a grant of probate or administration to administer that estate, he had no capacity to file and prosecute this suit plus the application. That he was already acting in the capacity of an executor or administrator of the late Kieti contrary to SS. 2, 3 of the Law of Succession Act, hereinafter the Act. So Mr. Kimeu sought this court's orders to strike out the entire suit herein in order that all the parties, who may as well be all heirs and probable administrators of Kieti, move according to law relating to a deceased's estate.

Mr. Makundi saw the striking out of the suit on the ground advanced as likely to cause hardship and injustice to the plaintiff who undertook to raise money from the business of his late father in order to pay off hospital and other debts. Otherwise he would be required to pay them personally. That infact the plaintiff was mandated by the deceased and the whole family to operate the said two businesses on account of paying the late Kieti's debts. So it was submitted that by this suit the defendants should not chase away the people the plaintiff had been overseeing running the two

businesses thereby closing the same down. He added in the plaint:

“..... the defendant’s action amount (sic) to intermeddling with the estate of the deceased as Letters of Administration of the Estate .. have not yet been applied for.”

The main prayer in the suit was the injunction and the chamber summons asked for a temporary one in the meantime.

The plaintiff exhibited copies of demand notes from M/s Mevac and Hemton Services and Nairobi Hospital for payment of medical bills on account of Francis Kieti. There was evidence that the plaintiff bound himself in writing to pay off the debt at Nairobi Hospital or the hospital would use any means to exact payment from him.

The brief advice of this court on this family dispute is that all involved should allow operation of any businesses, outfits etc. owned by the late Kieti to generate funds so that his certified debts can be paid. This will save the heirs personally or the estate ultimately from suits for accumulated debts probably with interest. That is a question of common sense.

Turning to the preliminary point of law the plaintiff has no capacity to sue in matters relating to his late father’s property at all. The two businesses herein apparently form part of a deceased’s person’s estate anybody dealing with them ought to have a grant of probate or administration. From the extract of the plaint and the submissions here none of the litigants has such a grant. So doing anything affecting the estate of the late Kieti is to intermeddle.

The most advisable course for all involved to take is to procure a grant of representation as soon as possible so that the liabilities of the estate are duly charged. This suit as it stands is incompetent for lack of capacity. The plaintiff cannot seek reliefs under it in anyway on that account and the suit should not be entertained before court either.

Although the preliminary point is upheld this court sees no reason to strike out the suit sterile as it is. Parties would do well to withdraw it and move by way of succession. But they should similarly be alive to the need to continue to pay off debts incurred by the deceased Kieti using resources that they can marshal. Only that if there resources include income from the assets of the estate a full and proper account ought to be kept for later accounting to whoever will eventually be an execution or administrator.

Preliminary point upheld.

Orders accordingly.

Delivered on 25th July 2001.

J. W. MWERA

JUDGE