



In re Estate of IB (Deceased) (Miscellaneous Application 29 of 2017 & Petition 63 of 2017 (Consolidated)) [2023] KEHC 17925 (KLR) (Family) (15 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION 29 OF 2017 & PETITION 63 OF 2017 (CONSOLIDATED)**

MA ODERO, J

MAY 15, 2023

IN THE MATTER OF MENTAL HEALTH ACT, (CAP 248) OF THE LAWS OF KENYA

AND

IN THE MATTER OF IB

AND

IN THE MATTER OF AN APPLICATION BY DOPP AND NPO TO BE APPOINTED AS GUARDIANS OVER THE AFFAIRS AND ESTATE OF IB

IN THE MATTER OF

DOPP 1ST PETITIONER

NPO 2ND PETITIONER

AS CONSOLIDATED WITH

PETITION 63 OF 2017

BETWEEN

RB (SUING AS ADMINISTRATOR OF THE ESTATE OF IB (DECEASED)) APPLICANT

AND

DOPP 1ST RESPONDENT

NPO 2ND RESPONDENT



JUDGMENT

1. Before this court is the amended summons dated January 25, 2023 by which the applicant RB (suing as the administrator of the estate of Indra Bali) seeks the following orders:-
 1. That there be a declaration that all withdrawals amounting to a sum of Kshs 39,958,257/= and a further USD 24,476.95 made by the 1st respondent DOPP from the deceased's Bank account at Diamond Trust Bank being Account Number 581xxxxx02 from 2015 to 2019 were unlawful.
 2. That the respondents (NO & DP) shall forthwith account for the sum Kshs 39,958,257/= and a further USD 24,476.95 being monies withdrawn from the deceased's Bank account at Diamond Trust Bank being Account Number 581xxxxx02 from 2015 to 2019.
 3. That there be a declaration that all expenditure made by the respondents NO & DP ostensibly on behalf of Indra Bali (Deceased) without the leave of this honourable court were unlawful and shall be refunded to the estate of the deceased forthwith.
 4. That the respondents NO & DP be ordered to refund sum of Kshs 39,958,257/= and a further USD 24,476.95 being monies withdrawn from the Deceased's Bank account at Diamond Trust Bank being Account Number 581xxxxx02 from 2015 to 2019, and/or all monies they charged to her estate.
 5. That in default of the refund to the estate, the guardian shall be at liberty to take out execution proceedings.
 6. That this honourable court be pleased to find that the 1st respondent herein D P is in contempt of the court order issued on February 28, 2019 and proceed to punish her accordingly.
 7. That this honourable court be pleased to grant any other or further orders as it may deem fit to grant in the circumstances.
2. The application was premised upon sections 26, 27, and 28 of the *Mental Health Act* Cap 248, Law of Kenya section 3 and 3A of the *Civil Procedure Act*, the inherent powers of the court and all enabling provisions of the law and was supported by the affidavit of even date, the supplementary affidavit dated December 1, 2011 as well on the further affidavit dated January 27, 2023.
3. The respondents DOPP and NPO opposed the application through the replying affidavit dated December 8, 2022. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated January 25, 2023 and the submissions dated January 30, 2023 whilst the respondents relied upon their written submissions dated December 8, 2022.

Background

4. The applicant was on February 28, 2019 appointed as the sole legal guardian and manager of the estate of his mother Indra Bali who at the time was adjudged to be incapacitated in terms of section 26 of the *Mental Health Act* Cap 248, Laws of Kenya.
5. The orders of guardianship given in Kenya were confirmed by letters of Full conservatorship and letters of Full Guardianship which were issued to the Applicant by the 2nd Judicial District Court, County of Bernalillo, State of New Mexico, USA.



6. The subject however passed away on July 4, 2021. The applicant then obtained a limited grant ad litem in respect of the estate of the deceased which grant was issued to him on November 15, 2021. The applicant was also issued with letters of special administration of the estate of the deceased by the probate court of Bernalillo County, New Mexico, USA
7. The applicant avers that the 1st respondent opened and held an account with the deceased at Diamond Trust Bank. That the 1st respondent withdrew large amounts of money from said account even after the date when the applicant was appointed legal guardian, without authority. The applicant prays that the respondents be ordered by the court to refund all monies illegally withdrawn from said joint account.
8. The respondents in their replying affidavit state that the applicant has misrepresented the facts to the court. That the account held at Diamond Trust Bank was in fact a Joint account held in the name of the deceased and the 2nd respondent.
9. The respondents allege that the applicant had not been in contact with his late mother (the deceased) for a several years. They state that they applied for Probate in Respect of the estate of the deceased in the USA which case is due for hearing in April 2023.
10. The respondents assert that the guardianship order issued to the applicant over the deceased, ceased upon the death of the deceased. That the funds which the applicant alleges were misappropriated cannot in any event be refunded to the applicant but can only be rendered to the legally appointed administrator the estate of the deceased.
11. The applicants finally urge this court to dismiss this application in its entirety.

Analysis and Determination

12. I have carefully considered the application before this court, the reply filed by the respondents as well as the written submissions filed by the parties.
13. It is not in dispute that during the life time of the deceased the applicant was appointed as the sole legal guardian and manager of her affairs. The application for guardianship was brought under section 26 of the *Mental Health Act* of Kenya. This appointment authorized the applicant to exclusively manage all the affairs of the then subject including her Bank accounts.
14. It is common ground that the then subject passed away on July 4, 2021. The pertinent question then is what was the fate of the order of guardianship held by the applicant once the subject dies?
15. The position in law is that an order of guardianship terminates/abates once the subject dies. Any assets held by the subject at the time of her demise now become a part of her estate.
16. The proceeding in this miscellaneous file were brought under the *Mental Health Act*. Once the subject has died then the Applicant (or any other party wishing to do so) must file a Succession Cause in respect of the estate of the Deceased.
17. It would appear that a Succession Cause No. E2162 of 2021 was filed in the High Court of Kenya and it is under that cause that the applicant sought and obtained a grant ad litem in respect of the estate of the deceased. The parties also state that there are succession proceedings in respect of the estate of the same deceased person pending in the Probate Court of New Mexico, USA.
18. The claim now being made by the applicant for a refund of monies which he alleges were illegally drawn from the account of the deceased. This is a claim which properly ought to be pursued by the administrators of the estate of the deceased under a Civil Cause. That claim cannot be pursued under



this miscellaneous cause as this miscellaneous cause abated when the subject in respect of whom the cause was opened passed away.

19. I note that the applicant holds a grant ad litem issued to him on November 15, 2021. That grant was limited for purpose of filing suit in respect of the estate of the deceased. That suit to recover fund allegedly owed to the deceased cannot be instituted under this miscellaneous cause.
20. The applicant cannot file a suit under the succession cause to recover monies which he claims are owed to the estate of the deceased. It is trite that the duty of a Probate Court is limited to supervising the distribution of the estate to the genuine beneficiaries thereof. Any debts due to the estate must be recovered through the civil process.
21. The avenue now open to the applicant is to file a civil suit using the grant ad litem issued to him and to sue the Respondents in a Civil Suit to recover any monies he believes are due to the estate of the Deceased.
22. The amended summons dated January 25, 2023 is therefore misplaced and cannot be determined under this miscellaneous cause. I therefore dismiss the same and decline to issue the orders prayed for. This being a family matter I make no order on costs.

DATED IN NAIROBI THIS 15TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

