



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 21 OF 2010

FAZALA CHELAGAT CHEPKONGA.....APPLICANT

VERSUS

SAMUEL KIPRONO CHEPKONGA.....1ST RESPONDENT

ABRAHAM KIBET CHEPKONGA.....2ND RESPONDENT

Coram: Hon. Justice R. Nyakundi

Metto & CO. Advocates for the applicant

A.K Chepkonga & CO. Advocates for the respondent

RULING

What is before the court is an application dated 15th April 2021 expressed to be brought under section 45 and 67 of the Law of Succession Act, Cap 160, Order 40 Rule 1 of the Civil Procedure Rules, Rule 3 of the High Court (practice Procedure) Rules, and the Judicature Act, Section 3(a) of the Civil Procedure Act. The applicant seeks the following orders;

- a) Spent
- b) Leave be granted to the applicant to amend its summons dated the 12th day of November 2020
- c) The draft amended summons and supplementary affidavit dated 15th April 2021 be deemed to have been properly filed upon allowance of this application.
- d) The applicant be granted leave to file a supplementary affidavit.

The application is supported by an affidavit filed by the applicant and is based on the grounds that;

- a) The court has set the summons for ruling
- b) There are new and important matters that have come to the knowledge of the applicant who wishes to bring the same to the attention of the court.
- c) It is only upon the grant of the orders herein that the court can be able to appreciate and determine the controversies between the parties therein.

d) The court is duty bound to ensure that this matter is allowed to be determined on priority and bring this litigation to an end.

The applicant deponed that there has been a discovery of new and important matters that ought to be considered before the ruling.

The application is opposed by a replying affidavit. The respondents filed submissions on 15th December 2020. The respondents submit that the application is fatally defective as it is not brought within the requisite provisions of the law. It is purported to be brought under section 45 and 67 of the Succession Act which does not provide for amendment of summons. Further, it is premised on order 40 rule 1 of the Civil Procedure Rules which is not applicable to succession matters.

The respondents submitted that the applicant has not shown the new and important matters that warrant the court's intervention. Further, that the application was brought in bad faith as it was filed on the eve of the scheduled delivery of the ruling dated 12th November 2020.

The amended summons ought to be disregarded as it was attached as an annexure and is not a draft amended summons. The court has never granted leave for filing of an amended summons.

The amendments sought are similar to a previous application that was dated 16th July 2020 and the same was dismissed by Hon. Githinji. The amendments sought are not consistent with the original application or pleadings.

Upon perusing the pleadings and the submissions by the parties, I have identified the following issue for determination;

a) Whether the Applicant should be granted leave to amend the summons

WHETHER THE APPLICANT SHOULD BE GRANTED LEAVE TO AMEND THE SUMMONS

The applicant seeks to amend the summons dated 12th November 2020 which sought the review of the order issued by the court on 7th March 2011 and the appointment of the applicant as an administrator of the estate. It also sought preservative orders on the known assets of the deceased which it listed and disclosure of the properties of the deceased that are in Uasin Gishu.

The application is anchored on sections 45 and 67 of the Law of Succession Act. Section 45 of the Law of Succession Act provides;

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration

Section 67 of the Law of Succession act provides

(1) No grant of representation, other than a limited grant for collection and preservation of

assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

(2) A notice under subsection (1) shall be exhibited conspicuously in the courthouse, and also published in such other manner as the court directs.

From a clear reading of the abovementioned sections it is evident that they do not provide for the amendment of summons.

The applicant also premised the application under Order 40 Rule 1 of the Civil Procedure Rules, Rule 3 of the High Court (practice Procedure) Rules, and the Judicature Act, Section 3(a) of the Civil Procedure Act. There are several pronouncements that have been made by the court on which provisions of the Civil Procedure Act and Rules are applicable to Succession proceedings. In **Shah vs Shah (2002) 2 KLR 607** Onyancha J stated;

Where any proceedings are governed by special legislation, the provisions of the Civil Procedure Act and rules do not apply unless expressly provided by such special legislation, and the position remains the same even if the special legislation is silent about it and does not exclude the Civil Procedure Act and Rules.

Rule 63 (1) of the Probate and Administration Rules provides that: -

"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."

As was held **In re Estate of Kaleb Mwangi Hezekiah Muchoki (Deceased) [2021] eKLR** order 40 is one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by dint of Rule 63 of the Probate and Administration Rules. However, Order 40 addresses temporary injunctions.

The applicant has not based the prayers for amendment of summons on any statutory provisions as the same is not provided for under the law of succession act. In any event, if the application was to be considered valid the prayers sought were addressed by the court as they were contained in the application dated 16th July 2020 which was determined conclusively vide the ruling delivered on 22nd July 2020.

In the premises I find that the prayer for amendment of summons is unmerited and dismissed accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14th DAY OF FEBRUARY, 2022.

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R. NYAKUNDI

JUDGE

In the presence of:-

1. LUGWE FOR THE RESPONDENT