



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. E011 OF 2021

IN THE MATTER OF THE ESTATE OF EDWARD MURITHI MUTEGI (DECEASED)

CATHERINE CIRINDI JOSPETER.....1ST PETITIONER/APPLICANT

KEVIN MAWIRA MURITHI.....2ND PETITIONER/APPLICANT

VERSUS

ESTHER MUTHONI JUSTIN.....RESPONDENT

RULING

1. Before the court for determination are two applications by the applicants/petitioner herein dated 10/05/2021 and 13/05/2021 respectively. They are both brought pursuant to Sections 45 and 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules and all other enabling provisions of law. In the first application, the applicants seek, in the main, orders restraining the respondent, her agents, assigns or anyone claiming through her from intermeddling with the deceased property to wit, **Guusheni Auto Spare Dealers** by either taking possession or interfering with the applicants' possession, management and control thereof, pending the hearing of the application and the determination of this cause. I believe the other prayers in that application, were compromised by the consent of the parties recorded orally in court on 03/06/2021.

2. The application is predicated on the grounds on the face of the application and the supporting affidavit of Catherine Cirindi Jospeter, the 1st applicant herein, sworn on 8/04/2021. She asserts that she is the widow to the deceased whereas the respondent is her sister in law. She contends that **Guusheni Auto Spares Dealers** (hereinafter referred to as the suit business) was owned and operated solely by the deceased. She has exhibited the certificate of registration, single business permits and receipt for payment of rent in support of her assertion. On 8/05/2021, she had gone to collect and preserve the spare parts from the suit business when the respondent came with police officers and impounded the goods. Those actions by the respondent, according to her, amount to intermeddling with the deceased estate. She contends that the respondent has no claim whatsoever against the said business. The court is urged to issue the orders sought in order to preserve the suit business.

3. The 2nd application seeks inter alia stay of any further proceedings and/or any orders issued in **Chuka CMCC No.E073 of 2021** pending the hearing and determination of this cause and transfer of **Chuka CMCC No.E073 of 2021** to this court for hearing and determination.

4. The grounds upon which that application is founded are set out in the supporting affidavit of the 1st applicant, Catherine Cirindi Jospeter, sworn on 13/04/2021. That affidavit asserts that the pleadings and the issues raised by the respondent, in Chuka CMCC No.E073 of 2021 are substantially similar to the ones the 1st applicant is raising herein. I understand her to contend that, the respondent misled the court in Chuka CMCC No. E073 of 2021 that, the suit business belonged to her and not the deceased herein. Her contention is that suit business belongs to the deceased and not the respondent.

5. Both applications are opposed by the replying affidavit of Esther Muthoni Justin, the respondent herein, sworn on 31/05/2021. She maintains that she filed Chuka CMCC E073 of 2021, to have the issue of ownership of the spare parts in the suit business determined. According to her, it is the 1st applicant who is guilty of intermeddling with the deceased estate and not herself. She wishes to have the impounded stock returned to the shop in house number R51 Chuka Town Mauuru. She contends that she established the suit business and employed the deceased to run it. She has exhibited a single business permit and receipts for re-stocking the suit business to prove that she is the owner thereof. She avers that the 1st applicant broke into the suit business without consulting her, which prompted her to involve the police.

6. In her supplementary affidavit sworn on 2/06/2021, the 1st applicant avers that the suit business was solely owned by the deceased and is therefore part of his estate. She denies breaking into the suit business as wrongly alluded to by the respondent.

7. The parties on 03/06/2021 consented to have the two applications canvassed together by way of written submissions. On 23/06/2021, Miss Maore for the applicants was tasked to avail to court a copy of the submissions served upon her by the respondent. In their submissions, the applicants reiterate the averments in their applications that, the suit business forms part of the estate of the deceased. They cited the case of Jeremiah Kamau Giatau & 2 others v Wandai & 5 others (1989) eKLR on what amounts to intermeddling with any free property of a deceased.

Determination

8. I have discerned the issue for determination in both applications to be whether the suit business forms part of the estate of the deceased or not.

9. The primary duty of this court, as a succession court, is to identify the beneficiaries, ascertain the assets and ultimately distribute the deceased estate to the rightful beneficiaries. The court is assisted in that mandate by the parties who provide evidence as to who is a beneficiary and which are the assets and liabilities of the estate. The beneficiaries herein have been undoubtedly ascertained. I must respectfully and regrettably so, say that both the applicants and the respondent have not been very helpful to the court. The 1st applicant and the respondent both contend to be having ownership documents for the suit business. It is not disputed that the issue of ownership of the suit business is pending for determination in Chuka CMCC No. E073 of 2021.

10. I have noted that the applicants have not listed the suit business as an asset belonging to the deceased, in their affidavit in support of the petition for letters of administration, sworn 8/04/2021. The suit business is equally not listed, as a property owned by the deceased, in the chief's letter dated 07/04/2021. The certificate of registration shows that the suit business was registered under the name of the deceased on 20/06/2018. A rent payment receipt dated 14/01/2020 in the name of the deceased has also been exhibited. The two single business permits unveiled by the applicants are of no much help, because they are neither in the name of the deceased nor the respondent. However, the one produced by the respondent evidently shows it was procured by her. There is on record, another chief's letter dated 25/05/2021. According to that letter, the deceased and the respondent jointly carried out business, although the nature of that business has not been disclosed.

11. I am not sure what the applicants wanted to achieve by claiming that, the suit business forms part of the deceased estate, yet at the same time omit it from his assets. I am not convinced that the applicants have prima facie established that, the suit business does indeed form part of the deceased's estate. Whether it belongs to respondent or not is a determination that will be made by the civil court at Chuka.

12. In coming to this determination, I have been persuaded by the decision in re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR in which **W Musyoka J**, held: -

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.

13. On the issue of intermeddling, the same is unfounded as it has not been conclusively established, whether the suit business belongs to the deceased. Section 45 of the Law of Succession Act provides as follows:

(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.

14. I associate myself with the opinion of **Musyoka, J** in Veronica Njoki Wakagoto (Deceased) [2013] eKLR which interpreted the provision that:

“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who

handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

15. I also agree with the position in *re Estate of M’Ngarithi M’Miriti [2017] eKLR* that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

16. The upshot is that both applications are devoid of merit and the same are hereby dismissed.

17. However, the file before me is a Succession Cause which has attracted a contestation beforehand. The court has a duty to make order as are necessary to not only protect the estate but also progress the matter towards resolution.

18. Having considered the corpus of the papers filed in this file I do consider that none of the parties, having not obtained the grant to administer the estate of the deceased, have the right to deal with any part of the estate and any action by both, on any property that may later be adjudged as estate property, amount intermeddling. In fact, all the property of the estate, including any goods in trade, ought to remain where they lay on the date the deceased died.

19. However, now that the merchandise, motor vehicle spare part, were removed from the shop, I do direct that the same be removed from the police station so that the daily accrual of lorry hire charges, said to be in the sum of Kshs 15,000, is avoided.

20. I direct that the 1st applicant and the respondent do jointly take back the said merchandise to the shop where the deceased ran his business and have them stored there, with each side keeping a key or separate locks, pending the determination whether the property forms part of the estate. In the event that the shop is no longer available the two shall identify a store to store the merchandise and share the rental expenses equally pending further orders in the succession cause.

21. On the cost of hire of the lorry, I note that both sides agree that it was the 1st applicant who hired same and used it to remove those merchandise from the shop they had been kept. I direct that the 1st applicant meets those hire charges to enable the lorry be released to the owner. Ultimately the said costs will form part of determination in the cause if were properly and prudently incurred, if the merchandise is determined to belong to the estate.

22. In conclusion, I consider the suit filed in Chuka as Chuka Cmcc No. E073 of 2021, in so far as it concerns a property alleged to belong to the estate, ought not to proceed away from this cause. If the property is ultimately determined to belong to the estate, the suit will emerge to have been filed by a person lacking locus and against another equally with no right to represent the estate. I direct that the same file be called and put together with this file and all orders issued therein to be stayed pending further orders to be issued herein.

23. As I said before, none of the three parties in the applications have the power, as yet, to deal with the property of the estate. I decline to issue any orders and direct that this cause be fast tracked so that appropriate orders issued to protect and gather the estate.

24. Mention on 8/7/2021 at 2.00 p.m.

25. I make no orders as to costs.

DATED, DELIVERED AND SIGNED AT MERU BY MS TEAMS THIS 7TH JULY, 2021

PATRICK J.O OTIENO

JUDGE

In Presence Of

M/S Maore For Applicant/Petitioner

N/A For Kijaru For The Respondent

PATRICK J.O OTIENO

JUDGE