



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION NO. 407 OF 2019

IN THE MATTER OF THE ESTATE OF ESTATE OF PATRICK GEORGE MUSYOKI (DECEASED)

RULING

1. The deceased whose estate the proceedings herein relate is Patrick George Musyoki who died on 5.3.19. A grant of letters of administration in respect of the estate was on 3.6.2020 issued to Dominic Masila Muthama (Dominic), a son of the deceased.

2. Before me are 3 applications for consideration. The first application dated 21.9.2020 is by Dominic Masila Muthama (Dominic), seeking the following orders:

1. Spent

2. The Honourable Court be and is hereby pleased to issue an order allowing Bemac Auctioneers to distress for outstanding rent of Kenya Shillings Seven hundred and twenty thousand (Kshs. 720,000) owed to the estate of the deceased with respect to House Number 23, Highrise Seefar Apartments.

3. The Honourable Court be and is hereby pleased to issue an order of committal, committing Timothy Mutungi and Hezron Mutende Nawate to civil jail for intermeddling.

4. The Honourable Court be and is hereby pleased to issue an order directing Timothy Mutungi and Hezron Mutende Nawate to render to this Honourable Court proper rent accounts from March 2019 to date pursuant to the Court Order issued on January 2020.

3. The case according to Dominic is that Hezron Mutende Nawate (Hezron) has been a tenant in House No. 23, High Rise Seefar Apartments (House 23) since March 2019, at the monthly rent of Kshs. 40,000/=. Hezron has however not paid the rent to Dominic, the administrator of the estate of the deceased, of which House 23 is a part. He has instead been paying rent to Timothy Mutungi (Timothy) who has been illegally posing as the agent for the estate. Despite demand, both Hezron and Timothy have refused to pay and account for the outstanding rent. Dominic accused them both of intermeddling with the estate of the deceased.

4. Timothy opposed the application by his undated replying affidavit. He averred that the deceased had asked him to identify contractors to repair the deceased's apartment no. 11 in Riverside which had been damaged by fire. The deceased issued cheque no. 200297 dated 8.4.17 for Kshs. 505,000/=. The deceased however used up the funds before Timothy could encash the same. The deceased therefore asked Timothy to meet the costs, which would be repaid from the proceeds of the sale of the said apartment. In the event the apartment was not sold in good time, Timothy would recover his moneys from the rental income of House No. 23 Highrise Seefar. Timothy further averred that the deceased introduced him to the caretaker of High Seefar Apartments by the name Dan Maillu, and that it was through Dan that Timothy got a tenant, Hezron who moved into the apartment in March 2019. The agreed monthly rent was Kshs. 30,000/= which was however reduced to Kshs. 20,000/= in 2020 on account of the COVI-19 pandemic. Rent for September to November 2020 has not been paid and Timothy instructed Hezron to pay rent to the firm of Amolo & Kibanya Advocates on account of the estate of the deceased.

5. I have considered the application and the response by Timothy. It is evident that the dispute between Dominic on the one hand and Timothy and Hezron on the other, is about rent that is due to the estate. Such a dispute is not for the succession Court. The law under which the succession Court operates is the Law of Succession Act. That Act is described in its long title n as follows:

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

6. It is noted from the long title of the Act, that the mandate of this Court under the Act is rather limited in scope. The Court concerns itself with determination of the assets of the estate of a deceased person, the beneficiaries of the estate and the ultimately the distribution of the estate to the legal beneficiaries thereof. When it comes to disputes between the estate and third parties, such disputes are best determined outside the succession Court under the provisions of the relevant laws.

7. In the case of In re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR, Musyoka, J had occasion to consider third party claims in a succession cause and had this to say and I concur:

The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested...Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

8. The learned Judge went on to say:

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, ...The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

9. Although House No. 23 Highrise Seefar is said to form part of the estate of the deceased, the dispute relating to rent arrears ought not be brought to this Court but should be taken elsewhere for resolution. Similarly, the dispute arising from the agreement between Timothy and the deceased is for resolution outside of the framework set out in the Law of Succession Act and the rules made thereunder. Upon obtaining the grant of representation in respect of the estate of the deceased, it was for Dominic to pursue the claims against Hezron and Timothy in the right Court and not in this Court. Consequently, and for the reasons above stated, I must find and hold that this Court has no jurisdiction to resolve the dispute in the Application dated 21.9.2020.

10. The second application is dated 16.11.2020 in which Dominic seeks in the main, stay of sale, transfer, alienation and/or any interference with L. R. No. 4580/11, an estate property (the suit property), by Stanwil Limited (Stanwil), without his involvement as the Administrator of the estate of the deceased. Dominic contends that Stanwil, the management company of the property has passed a resolution to sell the same without his involvement. He further alleges that Stanwil has sought a Court order to deposit the proceeds of sale in an account as may be directed by the Court.

11. In the third application which is dated 21.12.2020, Lissa Wangu Gatungo (Lissa) and Aika Nyangara Gatungo (Aika), also seek stay of sale of the suit property which are erected 4 apartments known as Stanwil Apartments. They also seek orders restraining their eviction from House No. 1 on the suit property in which they state they lived with their father, the deceased. They stated that the deceased owned the property jointly with his business partners through Stanwil. Their further contention is that the sale of the suit property begun without their involvement or that of the estate of the deceased, which risks losing a substantial amount of money as the property has been grossly undervalued. They claimed that they risk eviction and will suffer irreparable loss if the orders sought are not granted.

12. The Application is opposed by means of a replying affidavit sworn by Mohamed Aslam Khan (Mohamed), a director and shareholder of Stanwil who denied the allegations by Lisa and Aika. His case is that the suit property belongs to Stanwil and not the deceased. Stanwil, is a separate and distinct legal entity from the deceased. By a resolution on 6.6.17, the board of directors approved the sale of the suit property at the highest price offered. Denying that the suit property was grossly undervalued, Mohamed averred that the board proceeded to advertise the sale in the Daily Nation. After failing to receive any offers, the board resolved to engage several estate agents to identify a buyer. After evaluating the offers received ranging from Kshs. 100,000,000/= to Kshs. 130,000,000/= and proof of funds, the board then settled on Manish Popat who offered Kshs. 120,000,000/=. Mohamed further stated that in order for Lisa and Aika to search for alternative premises, they were kept informed of every step made in the process through email and WhatsApp message to their advocates on diverse dates from 28.1.2020 to 18.12.2020. The board further resolved that the share of the purchase price attributable to the deceased would be deposited in Court pending the outcome of the succession proceedings.

13. Mohamed urged the Court not to stop the transaction of which they were aware and to which did not object. Mohamed further averred that Lisa and Aika have not brought any one offering a higher purchase price than the current purchaser. They have not proved any loss that would be occasioned to them nor any legal or equitable right to Apartment 1 or indeed the suit property. To Stanwil therefore, the application is mischievous, a waste of the Court's time and intended to delay and hinder the performance of a properly executed agreement for sale between Stanwil and Manish Mohanlal Popat. Stanwil urged the Court to dismiss the Application with costs.

5. The second and third applications will be considered together. I have considered the parties' respective written submissions and the following issues fall for determination:

- i) Whether the suit property forms part of the estate of the deceased.
- ii) Whether stay of the sale of the suit property should be granted.

Whether Plot 4580/11 forms part of the estate of the deceased

14. The Applicants Lisa and Aika contend that the suit property is jointly owned by the deceased and his partners through Stanwil in which he was a shareholder and therefore forms part of his estate. Stanwil denied this and stated that the property is owned by Stanwil. The exhibited copy of Grant No. 114472 and certificate of official search in respect of the suit property both indicate that Stanwil is the registered owner thereof. This has not been controverted. As per the well-known principle espoused in the famous case of Salomon v Salomon & Co. Ltd. [1897] AC 22, a company is a separate legal entity apart from its members. The property belongs to Stanwil and not to any of the company's individual shareholders. The assertion by Lisa and Aika that the deceased owned the suit property jointly with his business

partners through a company is clearly a misapprehension of the concept that a company is a separate legal entity distinct from its members. To say that the deceased and his business partners owned the property through Stanwil is a misnomer. Notably, it has not been demonstrated that Stanwil had granted a lease of Apartment 1 occupied by Lisa and Aika, to the deceased. Accordingly, I find and hold that the property and indeed Apartment 1 thereon do not form part of the estate of the deceased.

Whether stay of the sale of Plot 4580/11 should be granted

15. Lisa and Aika seek stay of the sale of Plot 4580/11 on the ground that the same has been grossly undervalued in the executed sale agreement. They further contend that the resolutions for the sale were not communicated to them or the representative of the estate of the deceased as required, thereby denying them the opportunity to be involved. Citing Sections 500 and 501 of the Companies Act, Lisa and Aika argued that the sale transaction was in bad faith and an attempt to defeat justice. They submitted that should the transaction proceed, they stand to suffer irreparable loss as they will be rendered destitute and homeless, which is a violation of the rules of natural justice. In this regard, they relied on the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR, where the Supreme Court said this of the Superior Court's position on following due process where eviction is necessary:

On the issue of Constitutional Requirement for Consultation and Participation, the Court recognized that there may be instances when eviction of people may be necessary, but reiterated that even in such instances, there is a need to follow due process: that those to be affected should be given reasonable notice, and that there should be consultation and participation of those to be affected by the removal process.

16. I have looked at the documents exhibited by Stanwil. They include minutes of a meeting held on 6.6.17 in which a resolution was passed to sell the suit property and the proceeds be distributed proportionately to the shareholders. At the time the resolution was passed, the deceased though absent from the meeting, was still alive. Further, there are emails from sent to Lisa and Aika's advocates of the resolutions relating to the sale of the property together with a copy of the executed agreement for sale. I therefore find that contrary to their assertions Lisa and Aika have through their advocate, been kept sufficiently informed of the process notwithstanding that they are neither shareholders nor directors of Stanwil.

17. Section 500 of the Companies Act allows a personal representative of a deceased shareholder of a company to execute a transfer of shares or interest of the deceased in the company notwithstanding that such personal representative is not a member of the company. Section 501 obliges a company to accept a grant of representation produced to it, in respect of a deceased and makes such company liable to pay damages to any person who sustains loss in consequence of the refusal to accept such grant produced to it. With respect, these sections cited by Lisa and Aika have no bearing in the matter before Court.

18. Lisa and Aika have also claimed that the sale of the property will result in their eviction and their being rendered destitute thereby occasioning them irreparable loss. While vacating the apartment they occupy may be a consequence of the sale of the suit property, I find that adequate notice was given to them. My view therefore is that due process was followed. Accordingly, I am not persuaded that the sale of the property will occasion them irreparable loss. In any event, this Court sitting as a probate Court has no jurisdiction over the sale by Stanwil of the suit property or any of its properties.

19. It bears repeating that the Court must give due regard to the well settled principle of company law in Salomon v Salomon case (supra). Stanwil is a separate legal entity apart from its members. The operations of Stanwil as a limited liability company and how it deals with its assets including the suit property are governed by the Companies Act and not the Law of Succession Act. Githinji, J expressed the same view in the case of In re Estate of Mark Kiptarbei Too (Deceased) [2019] eKLR, relied on by Stanwil. Sitting as a succession Court, the learned Judge declined to interfere with the operations of a company in which the deceased therein was a director and stated that:

A limited company is a juristic person with separate legal entity from the directors and shareholders. Upon demise of one of the directors, the remaining directors continues (sic) with the business of the company.

20. For the purposes of the succession proceedings herein, the only asset of interest to this Court so far as Stanwil is concerned, are the shares that the deceased held therein and no more. The Court cannot therefore interfere with the operations of Stanwil. The Court cannot even go into the question as to whether the suit property was grossly undervalued as alleged. This is not a matter for these proceedings, as the Court has no jurisdiction over property that does not belong to the estate of the deceased. Accordingly, the orders sought for stay of the sale of the suit property which belongs, not to the deceased, but to Stanwil cannot be granted.

21. In the result and in view of the foregoing, the Court finds that the Applications dated 21.9.2020, 16.11.2020 and 21.12.2020 all lack merit and the same are hereby dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 1ST DAY OF OCTOBER 2021

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... for the Applicant

..... for the Respondent

..... Court Assistant