



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1805 OF 2002

IN THE MATTER OF THE ESTATE OF JOHN MARK MUCHURA (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION BY THOMAS COLLINS MUCHURA & WILLIAM OLOTCH (APPLICANTS)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OF ANNULMENT OF GRANT OF THE LETTERS OF ADMINISTRATION

BY

ROSELYNE ACHIENG MUCHURA.....OBJECTOR

AND

EVERLYNE AWUOR AYOO.....INTERESTED PARTY

RULING

1. The Petitioner filed a Notice of Preliminary Objection (hereafter referred to as NOPO) dated 10.1.2020 against the application dated 3.1.2020 on the following grounds:

(i) THAT the Application is filed contrary to the provisions of Article 163 of the Constitution.

(ii) THAT this Honourable Court lacks the Jurisdiction to issue temporary injunction order against the Petitioners in respect of Plot No. 77 Indusi Road Tom Mboya estate Kisumu.

(iii) THAT this Honorable Court lacks the jurisdiction to stay the proceedings and all consequential orders and/set aside the proceedings in Kisumu chief Magistrate's Court Case No. 288 of 2015, Kisumu Chief Magistrate's Civil Case No. 1 of 2020 and Kisumu Senior Resident Magistrate's Court Misc. Civil Application No. 281 of 2019.

(iv) THAT the Application seeks orders in relation of a property not the subject of the Succession proceedings herein.

(v) THAT Tenant/Interested party lacks the legal capacity to approach this Honourable Court to grant the orders sought.

2. The parties filed written submissions in the NOPO which I have duly considered. The Petitioner submitted that this Court has no Jurisdiction to hear and determine the Application dated 3.1.2020 since the said Application is seeking orders to restrain them from levying distress, attaching, advertising for sale, selling, disposing, alienating, dealing and/or interfering whatsoever with the tenant/interested party's quiet occupation of the Residential Premises at Plot No. 77 Indusi Road Tom Mboya Estate in Kisumu (hereafter referred to as the suit property).

3. The Petitioner also submitted that the interested party is not a dependent of the estate of the deceased and therefore she has no locus standi to file the said application.

4. Further, that the tenant/interested party's claim arises from Landlord/Tenant relationship which is beyond the scope of the Law of Succession Act.

5. The Petitioner urged the Court to allow NOPO and dismiss the Application dated 3.1.2020.

6. The Objector/Interested party submitted that the NOPO has not met the threshold as set out in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO. LTD VS. WESTEND DISTRIBUTION LTD (1969) E.A 696.**

7. Further, that that the jurisdiction of the high court under the law of succession Act Cap 60 Laws of Kenya is set out in **Section 47** as follows;

Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

8. The objector submitted that she is a daughter of the deceased and the tenant/interested party has been her tenant for over 20 years and therefore she has locus standi to file this suit.

9. The Objector and the Interested Party urged the Court to allow the Application dated 3.1.2020.

10. The objector and Interested Party are seeking the following orders in the Application dated 3.1.2020

(i) THAT this Application be certified urgent and heard ex parte in the first instances.

(ii) THAT the time limited for lodging objection to the making of the Grant herein be extended

(iii) THAT the Notice of Objection lodged herein be deemed to have been lodged within time.

(iv) THAT leave be granted to the Tenant/Interested Party to be enjoined in these proceedings.

(v) THAT pending the hearing and determination of this application inter-partes, this Honorable Court do issue a temporary injunction directed at the Petitioners, their employees, workers, agents or whomsoever jointly and severally restraining them from levying distress, attaching, advertising for sale, selling, disposing, alienating, dealing and /or interfering whatsoever with the Tenant/Interested party's quiet occupation of the Residential premises at Plot 77 Indusi Road Tom Mboya Estate in Kisumu.

(vi) THAT pending the hearing and determination of this Objection Proceedings, this Honorable Court do issue a permanent injunction directed at the Petitioners, their employees, workers, agents or whomsoever jointly and severally restraining them from levying distress, attaching, advertising for sale, selling, disposing, alienating, dealing and /or interfering whatsoever with the Tenant/Interested party's quiet occupation of the Residential premises at Plot 77 Indusi Road Tom Mboya Estate in Kisumu.

(vi) THAT pending the hearing and determination of this application inter-partes, this Honorable Court be pleased to grant an order for stay of Proceedings and all consequential orders thereto set aside in KISUMU CHIEF MAGISTRATE'S COURT CASE NO. 288 OF 2015, KISUMU CHIEF MAGISTRATE'S CIVIL CASE NO. 1 OF 2020 AND KISUMU SENIOR RESIDENT MAGISTRATE'S COURT MISC. CIVIL APPLICATION NO. 281 OF 2019 and this limb of the Application be heard ex-parte in the first instance owing to the urgency involved in seeking to preserve the status quo in all of the suits above.

(vii) THAT pending the hearing and determination of this Objection Proceedings this Court be pleased to grant an order for stay of Proceedings and all consequential orders thereto set aside in KISUMU CHIEF MAGISTRATE'S COURT CASE NO. 288 OF 2015, KISUMU CHIEF MAGISTRATE'S CIVIL CASE NO. 1 OF 2020 AND KISUMU SENIOR RESIDENT MAGISTRATE'S COURT MISC. CIVIL APPLICATION NO. 281 OF 2019 and this limb of the Application be heard ex-parte in the first instance owing to the urgency involved in seeking to preserve the status quo in all of the suits above.

(viii) THAT pending the hearing and determination of this Objection Proceedings this Court be pleased to grant an order for stay of Proceedings and all consequential orders thereto set aside in KISUMU CHIEF MAGISTRATE'S COURT CASE NO. 288 OF 2015, KISUMU CHIEF MAGISTRATE'S CIVIL CASE NO. 1 OF 2020 AND KISUMU SENIOR RESIDENT MAGISTRATE'S COURT MISC. CIVIL APPLICATION NO. 281 OF 2019 and this limb of the Application be heard ex-parte in the first instance owing to the urgency involved in seeking to preserve the status quo in all of the suits above.

(ix) THAT pending the hearing and determination of this Objection Proceedings this Court be pleased to inhibit any dealings affecting the parcels No. KISUMU PLOT 77, KWALE/FUNZI ISLAND/21 and KWALE/FUNZI ISLAND/22 and for this purpose this application be heard under Certificate of Urgency and ex-parte in the first instance

(x) Costs of this Application be provided for.

11. The issue for determination in the NOPO dated 10.1.2020 is whether this court has Jurisdiction to hear the Application dated 3.1.2020 filed by the Objector and the Interested party.

12. The Jurisdiction of the Probate Court is limited to transmission of property of deceased persons to the beneficiaries.

13. In **re Estate of Julius NdubiJavan (Deceased) [2018] eKLR** Justice F. Gikonyo stated as follows;

‘The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant. [Underlining mine for emphasis]

(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.

(6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.

(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court’s approval is given.

(8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.

(9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.

14. I find that the dispute between the interested party and the Petitioners is not within the province of the Probate Court.

15. However, the Objector as a beneficiary of the Estate of the deceased has locus standi to file this suit.

16. I accordingly partially allow the NOPO and direct that the interested party defends her claim in the Chief Magistrate’s Court where the matter has been filed.

17. However it is apparent that the letters of administration intestate in respect of the Estate of JOHN MARK MUCHURA (the deceased herein) were issued to THOMAS COLLINS MUCHURA and WILLIAM OLOTCH on 13.12.2002 but no summons for Confirmation of grant has been filed.

18. I direct that the petitioners file a Summons for Confirmation within 30 days of this date.

19. The Objector will be at liberty to raise her objection upon being served with the Summons for Confirmation.

20. All the beneficiaries of the Estate to appear in Court for Confirmation of grant on 17.3.2020.

21. The costs of the Application dated 3/1/2020 and the NOPO dated 10.1.2020 to abide in the cause.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 14TH DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.