



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 497 OF 2013

IN THE MATER OF THE ESTATE OF THE LATE PHILLIP NJOKA KAMAU alias PHILIP NJOKA (DECEASED)

JUMA KIPLENGE ----- APPLICANT

VERSUS

ELIZABETH WANJIKU NJOKA ----- RESPONDENT

R U L I N G

1. The application before me is dated 9th May 2019. It seeks orders that;

“The court be pleased to allow the executor of the will to dispose of wasting assets of the estate among them tractors registration number KAQ 830M, Lorry registration number KYT 025, tractor ZC 1553 and the proceeds of sale be deposited in court or in such other manner as the court may direct.”

2. The grounds for the application on the face of the application are that, the applicant Juma Kiplenge Advocate is the executor of the will of the deceased and the grant of probate was made to him on 19th November 2013. That there are objection proceedings pending before this court, and also **High Court Miscellaneous 33 of 2016**. That it is in the interest of the estate that the properties mentioned herein be sold as they are wasting, and the proceeds be preserved as part of the estate.

3. The application is supported by the applicant’s affidavit sworn on 9th May 2019. Annexed to the affidavit is the deceased’s will, the grant of probate, a copy of the plaint in High Court Miscellaneous Case Number 33 of 2016.

4. The application is opposed by Elizabeth Wanjiku Njoka vide affidavit sworn on 9th May 2019 as the legal representative of the estate of Alice Kahaki Njoka (HC Succession 16 of 1984). She depones that her late mother owns 95% of the assets sought to be disposed off, and that they are parked in the late mother’s homestead, Githunguri/Gathangari/3047. That in High Court Miscellaneous 33 of 2016 she has explained how the estate of the late mother owns 95% of the said assets.

5. That the applicant would like to dispossess her of the said assets, yet he does not have a greater interest than her, that the application ought to have been made in High Court Miscellaneous 33 of 2016 and the application is only intended to persecute her, and in the larger scheme of things, *“to tire her financially, emotionally and psychologically, to persecute her”* that as the legal representative of her mother’s estate, she owns the motor vehicles under **Section 79 of the Law of Succession Act**, that if the motor vehicles are sold, then the proceeds be deposited in the estate of Alice Kahaki, High Court Succession Number 16 of 1984.

6. In response, Mr. Juma Kiplenge swore a supplementary affidavit on 29th October 2019 that the three (3) motor vehicles are parked in the ancestral home of the deceased and not in the home of the respondent who does not reside in Kenya. That Githunguri/Gathangari/3047 is property of the deceased, and that as the executor of deceased’s will, the assets are in his possession, that it is in the interests of the beneficiaries that the estate be preserved.

7. Counsel filed submissions to support their rival positions. I have carefully considered the same and the only issue is whether the application before me has any merit.

8. It is submitted for the applicant that he is the executor of the deceased’s will. That there are objection proceedings and High Court Miscellaneous 33 of 2016 where he has been sued by the respondent. That until that suit is heard and determined, the respondent cannot claim that the estate of Alice Kahaki Njoka owns 95% of the three (3) motor vehicles. That due to these issues, the assets which are registered in the name of the deceased will continue to be wasted, to the detriment of the estate. The applicant relies on **Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules**.

9. For the respondent the court was referred to ten (10) authorities;

1. *The Constitution of Kenya, 2010.*
2. *The Law of Succession Act.*
3. *The Repealed Married Women Property Act, 1881.*
4. *Lvs I 1971 E.A. at page 278*
5. *Echaria vs Echaria, Court of Appeal at Nairobi, Civil Appeal No. 75 of 2001.*
6. *Githua vs Githua, Court of Appeal at Nairobi, Civil Appeal No. 10 of 2003.*
7. *Charles Mbembe Oloo – v – Kenya Post and Telecommunications Corporation (1983 – 1988) IKAR 655.*
8. *Bull vs. Bull (1955) 1 AER page 232.*
9. *Standard Resource Limited vs Commissions of Domestic taxes, High Court Petition No. 342 of 2016.*
10. *Nairobi High Court Succession Cause No. 920 of 1986: In the matter of the estate of Shiraku Inyundo (deceased).*

10. It is submitted that the properties are subject matter of the High Court Miscellaneous 33 of 2016 and motor vehicle registration number KYT 025 is in mentioned in the plaint at page 53, and that since the assets were acquired during the marriage of the deceased and his wife, his wife's estate has an interest in the same.

11. It is submitted that the respondent needs the three, and that this the averment in the affidavit was not responded to, however it is responded in the supplementary affidavit where the applicant clearly states that the three are registered in deceased's name and are parked in the deceased's ancestral home and the only intention is to preserve the estate.

12. It is argued that the tractor, lorry and trailer are required for farming activities and that the law under **Section 83 of the Law of Succession Act** requires the applicant to preserve the estate. The applicant has demonstrated that the respondent resides in the United States of America and nobody is using the lorry and tractor which continue to waste because they are parked.

13. It is also submitted that the doctrine of co-ownership applies to these motor vehicles, but that is not the issue here, as the applicant is not taking away the assets but asking to be allowed to carry out his duties as executor.

14. Reading the submissions on behalf of the respondent they appear to me suited to the main suit Miscellaneous 33 of 2016 where the issue as to whether the Estate of Alice Kahaki Njoka owns 95% of the estate of Philip Njoka Kamau will be determined. In this application the only issue is whether the executor can dispose of wasting assets to preserve the estate, that is all.

15. As matters stand now the applicant is the administrator of the estate of Philip Njoka Kamau. The three vehicles are part of his estate, in fact according to the respondent, one of them has already been sold. They are parked and not being used. They are registered in the deceased's name, the respondent's fear that if they are old the estate of Alice Kahaki will be deprived of the same is unfounded. She has accused the applicant of a greater ulterior motives, but looking at the issue before me, I see none.

16. The respondent argues that under **Section 79 of the Law of Succession Act**, she owns the said motor vehicles. **Section 79** states, 'property of deceased to vest in personal representative'

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”

17. While this applies to the applicant with regard to the properties of Alice Kahaki Njoka, it applies equally to the applicant herein with effect from the date the grant of probate was issued to him over the assets of the deceased herein. The three motor vehicles have not yet been declared to be assets of the estate of Alice Kahaki. When that is done, and if the motor vehicles will have been sold, the estate will have its requisite share.

18. The provisions of **Section 82**, provide for the powers of personal representatives. Again this applies equally to each of them with regard to the respective estates. For the applicant, it is the estate herein and he can under **Section 82 (b)**;

“sell or otherwise turn to account so far as seems necessary or desirable, in the execution of [his] duties, all, or any part of the assets as [he] thinks best.”

19. Of course there are limits. In this case, the applicant has clearly expressed good faith for the reason of disposal. He is alive to the disputes that exist over the said assets and that in my view is why he has moved the court. He is also alive to the fact that the matter in High Court Miscellaneous 33 of 2016 may take long to be determined, and since he will be required to account for her estate, as is sought by the

respondent in that suit, he has left it to the court to determine the best place to have the money deposited.

20. I have therefore come to the conclusion that having considered everything that has been said, the application before me has merit and it is allowed and the executor is at liberty to dispose of the three motor vehicles subject hereof.

21. The sale will be subject to a valuation by a reputable valuer. The valuation report(s) be deposited in court.

22. The executor be guided by the provisions of s. 82 (b) of the Law of Succession Act and the obligation to account.

23. Ultimately the proceeds be deposited in court pending the hearing and determination of all the pending matters in relation to this cause.

24. The matter be mentioned on 9th June 2020 for progress report.

25. Costs be borne by the estate.

Dated, Delivered and signed at Nakuru this 7th Day of May 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Edna Court Assistant

Kamau Kuria & Company Advocates – Mr. Kamau Kuria SC

Waiganjo & Company Advocates – Ms Wangari holding brief