



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 4 OF 2020

IN THE MATTER OF THE ESTATE OF GIOVANNI FORINO (DECEASED)

Coram: Hon. Justice R. Nyakundi

Kimeto Advocate for the Applicants

Binyenya Thurania Advocates for the Respondents

Atiang Advocate for the interested party

RULING ON CASE MANAGEMENT DIRECTIONS

Introduction

“The acid test of any legal system is not the greatness or grandeur of its ideal concepts, but whether, in fact, it is able to produce order and justice.” (Lee Kuan Yew, Former Prime Minister of Singapore)

With profound respect to the parties, from the procedural history of this Probate and Administration there is need to entail a system of orderliness pursuant to Section 1 (a) ***“on overriding objective of the Civil Procedure Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”***

To this end therefore, the Court must carry out activities of direction, management and control of the cases to rationalize and optimize the use of judicial resources more significantly, for the interest of justice.

Giovanni Forino, herein after referred to as the deceased, died intestate domiciled in Italy on the 22nd of January 2019. He was survived by:

- a. Gioia Anna - married on 16th May 1963 - Wife**
- b. Michellina Forino - born 1st February 1964 - Daughter**
- c. Alfonso Forino - born 25th December 1965 - Son**
- d. Salvatore Forino - born 7th March 1968 - Son**
- e. LKF - born 1st April 2014 - Son (Contested)**
- f. Caroline Wangui Wanjugu - Girlfriend (Contested)**

He also had the following **assets**:

- a. Bank accounts
 - i. Bank account number [xxxx] and [xxxx] held at Imperial Bank Limited (In Receivership), Malindi Branch

- ii. Bank account number [xxxx] and [xxxx] held at Kenya Commercial Bank(KCB) Limited, Malindi Branch
- iii. Bank account number [xxxx] held at Diamond Trust Bank (DTB) Limited, Malindi Branch
- iv. Bank account number [xxxx] held at NIC Bank Limited, Nkrumah Branch
- b. Share Certificate- 999 shares in Gio-Fo Limited- Company No. [xxxx]
- c. Property title number **CHEMBE/KIBABAMSHE/405** registered in the name of **Gio-Fo limited**
- d. Motor vehicles
 - i. Steam rolled - Chassis no. 018311
 - ii. Catamaran “sea Cat Marine” - Reg. No. SBF3032
 - iii. Chassis 12 884 - Manitu
 - iv. Chassis BA3471, Plate No. CH0149 - Cement Mixer
 - v. Chassis 5M800920 - Caterpillar
 - vi. Chassis ZB3723105 TPS27619 - Trailer
 - vii. Chassis E-651756 - Truck DAF-88430
 - viii. Chassis ZA9T3STOP00C86358 - Trailer Technokar
 - ix. KBN 100C - Toyota Vanguard
 - x. Long Trailer
 - xi. Wheel loader with excavator
 - xii. Water Trailer

Total estimated value Kshs.250,000,000.00/=

Liabilities

Nil

The Case

The Petitioners **Gioia Anna , Michellina Forino and Salvatore Forino**, through their advocate **Ms. Jackline Kimeto of Kimeto & Associates Advocates**, filed for letters of grant of administration over a part of the estate of the deceased in **Malindi High Court Succession cause number 4 of 2020** on the 14th of February 2020.

Alfonso Forino as one of the persons entitled to a share of the estate was cited by the Deputy registrar of the High Court on the **19th of February 2020** to enter an appearance within 15 days to accept or refuse letters of administration or show cause why the same should not be issued to **Gioia Anna, Michellina Forino and Salvatore Forino**. He consequently entered appearance through his advocate, **Mr. Benjamin Binyenya of Binyenya Thurania & Co. Advocates** on the 2nd of March 2020. He further swore a replying affidavit to the citation on the 2nd of March 2020 and filed it in court on the 3rd of March 2020. In his affidavit he asked that the citation be dismissed with costs as he had been awaiting the gazettelement of the Petition for him to object as per Rule 7(4) and 17 of the Probate and Administration Rules.

On the 31st of March 2020, **Ms. Kimeto** moved the court under certificate of urgency and summons seeking orders that:

1. THAT for reasons to be recorded and on grounds set out in the certificate of urgency service of this application be dispensed with and certified as urgent and the application herewith be heard ex parte for purposes of prayers 1,2 and 3 hereof.

2. THAT pending the hearing and determination of this application, this Court do hereby order the Receiver Manager Imperial Bank Limited (Under Receivership) to release the sum of Kshs. 5 Million from the deceased bank account Nos. Imperial Bank Account No. [xxxxx], Malindi Branch and Imperial Bank Account No. [xxxxx], Malindi Branch to the Petitioners.

3. THAT the said sums be hereby paid into NIC Bank Account No.[xxxxx], Malindi Branch in the name of Michellina Forino.

4. THAT this court be pleased to issue letters of administration (Intestate) to the Beneficiaries of the Estate of the Deceased namely Gioia Anna, Michelina Forino and Salvatore Forino in accordance with the Petition filed before this court on the 14th of February 2020.

5. THAT this court be pleased to issue any other orders it deems just and fit to grant.

6. THAT costs of this application be costs in the cause.

The court did on the 31st of March 2020 grant the following orders;

1. THAT the Court process server under the directions of the Deputy Registrar does serve the suit papers upon the Respondent.

2. THAT the legal counsel representing the respondents cited in the petition be served.

3. THAT service be effected upon the Respondent by the court process server.

4. THAT directions be taken before the Deputy Registrar on how an interpartes hearing can be arrived at on a priority basis.

The Respondent, **Alfonso Forino**, through his advocate **Mr. Binyenya**, filed a Preliminary objection to the summons filed by the Applicant/Petitioners, dated 18th May 2020.

The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Summons.

Issues for Determination

a. Whether the Preliminary Objection is competent

b. Who among the Applicants and Respondents has priority in law to be issued with the Grant of letters of representation of the deceased's estate?

Legal Analysis

In the words of **Lord Kinnear in Sim v Robinow {1892} 19 R. 665, 668:**

“It has often been said that, in the pursuit of justice, procedure is a servant and not a master. This is a case, if the Court of Appeal for the Eastern Caribbean is right, where the law of procedure prevents the appellants from invoking a power which is designed to ensure that the litigation is centred in the court “in which the case may be tried more suitably ... for the ends of justice.”

It is not in dispute that the late **Giovanni Forino** had a wife, **Mrs. Gioia Anna**, whom he married on the 16th May 1963. It is also not in dispute that the late **Giovanni Forino** had three children with **Mrs. Gioia Anna; Michellina Forino**, a daughter, born on the 1st of February 1964, **Alfonso Forino**, a son, born on the 25th of December 1965 and **Salvatore Forino**, a son, born on the 7th of March 1968. It is also alleged that he had a son, **LKF**, born on the 1st of April 2014 whom he fathered with one **Caroline Wangui Wanjugu** who claims to have been his girlfriend.

In light of the accusations and counter accusations swinging from the Applicants to the Respondents and vice versa on the size and composition of the estate of the deceased as well as the inclusion of **Master LKF** as a beneficiary of the deceased's estate and due to the erratic manner in which the parties have been filing matters over the same estate both this Honorable Court and the lower court, I thus set out to determine the following two issues in this judgment;

a. Whether the Preliminary Objection is competent.

b. Who among the Applicants and Respondents has priority in law to be issued with the Grant of letters of representation of the deceased's estate?

a) Whether the Preliminary Objection is competent.

In the case of **Mukisa Biscuits Manufacturing company Limited v West End Distributors Limited {1969} EA 696**, the Court of Appeal defined a Preliminary Objection as follows and I quote:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of

pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

In the most recent case of **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited {2017} eKLR para 44 – 47** the court stated that;

“The multiple filing of suits and seeking to strike out matters on technicalities ought to stop forthwith so as to get to the root of the dispute between the parties herein. In the same breathe, dismissing the action herein in limine suit herein will have denied this court the opportunity of hearing and determining the real issues that are in dispute or in controversy over the parties....Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application....Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”

In view of the foregoing it is my humble opinion that there are weighty matters that need to be addressed in this suit and as such the grounds adduced by the Respondent’s Preliminary Objection cannot stand. The objection is not based purely on points of law but on disputed facts and that therefore this court in dealing with the objection won’t reach final decision on the matter before this court.

The effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort. This was the position taken by the Court of Appeal in the case of **D. T. Dobie & Company (Kenya) Ltd v Muchina {1982} KLR 1 at p. 9** where it was stated as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

Here there is no question of the respondent disputing the petition of grant of Letters of Administration as a point of Law. It is difficult to see how the parties intend to litigate on this estate without first sorting out the issue of the making of the grant and appointment of the Administrator. In addition, except where the consequences of failure to comply with the provisions of the Succession Act as specified on petitioning for grant of letters procedurally the Court may make an Order to put matters right. There is consequently no basis for the sons and daughter to the deceased to act in cross purposes.

b) Who among the Applicants and Respondents has priority in law to be issued with the Grant of letters of representation of the deceased’s estate?

Section 2 of the Law of Succession Act a personal representative is defined as “the executor or administrator of a deceased person” and an administrator is defined as a person to whom a grant of letters of administration has been made under the Act.

The inherent jurisdiction of this court under rule 73 of the Probate and Administration Rules which states as follows:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Further Section 26, 27 and 28 of the Law of Succession Act (Chapter 26 of the Laws of Kenya) provides for application for adequate provision for dependants not adequately provided for by will or on intestacy as follows:

26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.

27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.

28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to -

(a) The nature and amount of the deceased's property;

(b) Any past, present or future capital or income from any source of the dependant;

(c) The existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) The conduct of the dependant in relation to the deceased;

(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant.

26. Section 29 of the LSA is set out the meaning of the term 'dependant' as follows:

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Consequently, I hereby invoke my discretion as per Section 66 Law of Succession Act which provides that;

“ When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice, to that discretion, accept as a general guide the following order of preference –surviving spouse or spouses with or without association of other beneficiaries; other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by Part V; the Public Trustee; and creditors.”

From the foregoing it is evident that the surviving spouse of the deceased has priority over the Estate as everyone else is considered as dependents under Section 29 of the Act which provides that;

Dependants include;

“(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death”

Section 56 of the Law of Succession Act which provides as follows; -

“56(1) No grant of representation shall be made-

a. to any person who is a minor or of unsound mind or a bankrupt, or

b. to more than four persons in respect of the same property.”

Without evidence that the spouse of the deceased has denounced her right to apply for the grant or consented in writing to the making of grant, I hereby order that the widow of the deceased, **Mrs. Gioia Anna** as the surviving spouse do apply for the grant of letters of administration intestate.

In the event that she is unable to carry out her duties as the Personal representative of the Estate of the deceased, I hereby direct the Deputy Registrar to organize a virtual court mention in which **Mrs. Gioia Anna** shall in the presence of a notary public in Italy give authority to whoever she pleases to represent her after which she will be expected to gazette the same after which anyone who objects to the grant is expected to file an objection.

I also find it prudent to remind both counsel appearing for both parties that there cannot be two grants and two sets of administrators in respect to the same Estate. **(See Re Estate of Luduska Hornik Platto (Deceased) {2012} eKLR)** Consequently any other party displeased with this grant of letters of administration to the Widow can object as stipulated in Section 68 of the Law of Succession Act which makes it clear that objection may be lodged with the Court, in such form as may be prescribed within a period specified by the notice, or such longer period as the court may allow. The period in this case is the one that is specifically specified by the notice, thus the Kenya Gazette Notice.

Further, under Rule 17 (1) (2) of the Probate and Administration Rules is very clear as to how objections, answers and applications ought to

be initiated before court. It provides: -

“17. (1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7 (4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.

(2) A request by an intending objector for an extension under section 68 (1) of the Act of the period specified in the notice under rule 7 (4) shall be made to the registry at which the application for a grant was made or by which the notice was issued, as the case may be, by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant.”

Disposition

As it stands the parties have the following cases before this honorable court as well as in the lower court over the same Estate:

- 1. Malindi CMCC Succession Cause No. 3 of 2019 in the Chief Magistrate’s Court**
- 2. Malindi CMCC Succession Cause No. 6 of 2019 in the Chief Magistrate’s Court**
- 3. Malindi High Court Succession Cause No. 6 of 2019**
- 4. Malindi High Court Succession Cause No. 11 of 2019**
- 5. Malindi High Court Succession Cause No. 4 of 2020**

The principles of consolidation of suits was re-stated in **Stumberg & Another Vs Potgeiter 1970 E.A. 323** as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”

In the Indian case of **Brij Kishore Vs Bir Singh & Others** at the High Court of Punjab and Harana (L.R 5922 of 2013 Justice Paramjeet Singh quotes the following from the Supreme Court Case of **Prem Lala Nahata & Another Vs Chandi Prasad Sikaria, (2007) 2, Supreme Court Cases 551** at paragraph 18:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

Furthermore in the case of **Law Society Of Kenya Vs The Centre For Human Rights And Democracy, Supreme Court Of Kenya, Petition NO. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it”

The Civil Procedure Rules 2010 mandate Courts in consideration of consolidation of suits to be guided by the following;

- i. Do the same question of law or fact arise in both cases?**
- ii. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?**
- iii. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?**

Considering all the above, it is my view that this is a proper case for consolidation. Further it is my considered opinion, that all the cases with regard to this estate should be consolidated to enable the court avoid an abuse of its proceedings. This is with a view to furthering the expeditious disposal of the cases and to ensure proper case management. I have no choice but to stop all other proceedings and consolidate all other proceedings into one file. That file shall be **Malindi High Court Succession Cause No. 4 of 2020**.

For the above reasons, an injunction will issue under Order 40 (1) against any intermeddling of the estate property pending the petition of

grant of Administration by the widow as aforesaid stated. Each party has leave to apply.

Though this statement is founded in Biblical philosophy I do find it applicable **Mutatis Mutandis** in the realm of administration justice.

‘That the truth shall set you free if we ensure we live in the truth’

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JUNE, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Gioia Anna
2. Alfonso Forino
3. Salvatore Forino
4. Caroline Wangui Wanjugu