



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1157 OF 2015

IN THE MATTER OF THE ESTATE OF ALOYSIUS NDUNGU GAKUNGA (DECEASED)

RULING

Background

1. The deceased herein Aloysius Ndungu Gakunga died intestate leaving behind 7 survivors among them Mary Njeri Gakunga (widow) (1st administrator), Brian Ndungu Gakunga (2nd administrator) and Jennifer Caroline Gakunga (3rd administrator). Among the assets comprising the estate cited in form P & A 5 is L.R. 10871/2 Number I.R. 19153/1. Upon petitioning for a grant of representation, the same was made and issued on 9th November 2015 to the three petitioners as joint administrators of the estate.
2. On 20th May 2016, Middle East Bank Kenya Ltd lodged a caveat against the estate claiming creditor's interest arising from a loan facility advanced to the deceased who charged the property mentioned above as security but died before repaying a sum of Kshs 15,000,000/= advanced plus accrued interest thereof.
3. By a summons dated 14th June 2016 and filed the same day, the administrators/petitioners sought orders discharging the caveat lodged arguing that there was no proof of such loan facility. The applicants further sought confirmation of the grant and distribution of the estate.
4. In response to the said application, the creditor/caveator (MEBKL) filed grounds of objection dated 6th July 2016 but filed on 8th July 2016 terming the petitioner's application as an abuse of the court process, misconceived and an act of contempt to the court. Prior to the filing of the said grounds of objection, the creditor/caveator had filed a chamber summons dated 17th June 2016 but filed on 20th June 2016 seeking revocation of the grant issued on 9th November 2015. They further sought the appointment of an independent advocate or account or a trust corporation nominated by the creditor or by the court appointed administrator of the estate in place of the current administrators. The application was supported by an affidavit sworn by Dharendra Rana on 17th June 2016.
5. In reply to this application, Mary Njeri Gakunga filed a replying affidavit sworn on the 23rd September 2016 and filed the same day admitting that her late husband had taken a loan facility with the creditors amounting to Kshs.15,000,000/=. She however disputed the manner in which the loan interest was calculated and exaggerated. In response to Njeri's replying affidavit, the creditors through a further affidavit sworn by Dharendra sworn and filed on 2nd November 2016 went further to explain in detail through bulky documents how the loan and accrued interest came about.
6. When the matter came up before J. Muigai on 2nd October 2017, the honorable Judge made directions inter alia: that recovery of the debt apart from what is on the ground/issue of inheritance and liabilities are within the dominion of the civil court of the high court and; It is on record that the administrators have paid the principle sum liability on the assets as agreed and documents produced.
7. While this matter was pending, the administrator moved the court through an ex parte summons dated 10th August 2018 seeking an injunction to restrain the creditor from realizing the asset in question by way of a statutory sale to recover the amount due and owing and that the creditor be compelled to withdraw a charge against the land in question as they have already paid 20,000,000/= to the creditors as per the court order of 14th February 2017 and that a balance of 7,000,000/= is due to be paid. They however disputed a statutory notice of sale to recover Kshs.36,000,000/= issued by the bank (creditors).
8. Having perused the application, the court granted an ex parte injunction on 13th August 2018 and fixed it for inter partes hearing on 27th August 2018. Subsequently, the creditors (respondents) opposed the application through a replying affidavit sworn by Dharendra Rana on 25th September 2018 and filed the same day and another one sworn by Felix Nganga Karanja sworn the same day thus denying entering a consent for the administrators to pay Kshs 27,000,000/= to the creditors.
9. Besides the replying affidavit, the creditors filed a preliminary objection dated 7th November 2018 and filed on 9th November 2018 arguing that: this court has no jurisdiction to hear this matter in accordance with the order of J. Muigai of 10th April 2017 hence the issue is resjudicata: that no orders can be made in favour of the applicants as they have obtained ex parte orders by deceit and deliberate perjury

especially that a consent order was made herein on 14th February 2017 whereby the respondent agreed to pay Kshs 27,029,806 in settlement and that: the application is misconceived and an abuse of the process of the court because the applicants do not have locus standi to bring it.

10. On 26th November 2018, Mary Njeri Gakunga filed a further affidavit sworn the same day in which she denied that the suit was misconceived and an abuse of the court process. She averred that the averments contained in Dhirendra Rana's and Felix Nganga's affidavits were full of lies.

11. When the matter came for interpartes hearing on 4th December 2018 for the application dated 10th August 2018, parties agreed by consent to dispose of the preliminary objection first through written submissions. Consequently, the court directed them to file their submissions.

12. Pursuant to the above directions, the applicants/administrators through the firm of Karuru Mwaura and Co. Advocates filed their submissions on 17th December 2018 and Esmail & Esmail Advocate representing the respondents/objectors filed theirs on 11th December 2018.

13. In their submissions, Mr. Mwaura merely reiterated the averments contained in the affidavit in support to the application and a further affidavit all sworn by Mary Njeri Gakunga. Regarding lack of jurisdiction, Mr. Mwaura contended that the court has jurisdiction to entertain the matter by dint of Section 47 of the Law of Succession which provides:

“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”.

14. Learned counsel further referred the court to rule 73 of the Probate and Administration rules which confers the high court with inherent powers to make such orders as may be necessary for the ends of justice to be met. Concerning the orders made by J. Muigai on 10th April 2017, Mr. Mwaura opined that the Judge's observation has been taken out of context. Learned counsel stated that the objector has all along participated in these proceedings and even filed an application before court one of them dated 17th June 2018 hence acknowledging jurisdiction. He termed the preliminary objection as baseless and filed in bad faith. Counsel went further to submit that the applicants have already settled in full the amount of Kshs.27,029,807/77 and there is nothing remaining.

15. Mr. Mwaura went further to challenge the validity of the charge in question claiming that it had been registered after the demise of the deceased and that the deceased had no mental capacity to have signed the charge in question. Mr. Mwaura referred the court to various court decisions to prove that this court has jurisdiction to entertain the matter inter alia **Floris Piezzo and Another vs Giancarlo Falasconi (2014) eKLR, Millicent Mbatha Mulavu and another vs Annah Ndunge M. Mulavu and 3 others (2018) eKLR and in the estate of Benson Muriungi (deceased) (2017) eKLR and Zipporah Mukami s Evangeline Ngugi Mbobua.**

16. On the other hand, Mr. Esmail for the objector submitted that the issue at hand only concerns a commercial transaction in which a loan facility was advanced to the deceased through a duly and validly executed charge hence a subject within the ELC's remit pursuant to Article 162 (2) and (3) of the Constitution and Sections 13 (2) of the Environment and Land Court Act and Sections 150 of the Land Act. Counsel argued that any dispute concerning the validity of a charge is not a subject within the jurisdiction of the family court handling a succession case. To buttress his contention, counsel referred the court to an authority in succession case No. 1800/2004 Estate of DR Soni Nairobi where Judge Musyoka held:

“The question of ownership of or title to property as between two contending persons or entities is not for resolution by the high court. The Constitution 2010 has taken away that jurisdiction and vested it in the Environment and Land Court by dint of Articles 162 (2) and 165(5) of the Constitution.

“The primary mandate of the probate court is distribution of the estate of a dead person where a dispute arises over a property purported to belong to the estate, then the probate court ought to direct the parties to have the issue of ownership resolved at the ELC”.

17. Mr. Esmail urged the court to find that the objectors are not intermeddling with the estate as they are legally executing a statutory mandate of sale as per the law established.

18. I have considered the grounds raised in the preliminary objection vis a vis the application dated 10th August 2018, supporting affidavit, replying affidavit and rival submissions by both counsel. Key before me is the issue of lack of jurisdiction. As stated in the most celebrated case of **Owners of Motor Vessel “Lillian” vs Caltex Oil Kenya Ltd 1989 KLR** jurisdiction is everything and where a court holds that it has no jurisdiction, it should then down its tools and move no further step. Further in the case of **Mukhisa Biscuit Manufacturers vs West End Distributors (1969) EA 696** the court held that a preliminary objection must be able to dispose of a suit in Limine and should be argued on the assumption that all facts pleaded by the other side are correct.

19. From the above cited authorities, it is clear that a court without jurisdiction over a matter is like a legless stool which cannot stand on its own. The issue before me is whether this court while exercising jurisdiction in a succession cause can entertain and determine a dispute touching on the validity of a charge in a commercial transaction in form of a loan breach of which calls for a statutory power of sale to realize the loan facility.

20. The objector has urged this court that to make any orders touching on the loan agreement in which the deceased deposited one of his assets comprising part of the estate as a security but died before making payment in full will amount to assuming nonexistent jurisdiction.

Although from the onset the administrators/applicants were optimistic that the deceased did not owe the objector/creditor any debt out of a loan advanced by the creditor, they later admitted and indeed paid a sum of Kshs.27,000,000/=. The only dispute seems to be the calculation of accrued interest.

21. There is no dispute that this court has jurisdiction over succession matters under Section 47 of the Law of Succession. There is no dispute also that a creditor has a beneficial interest on a property comprising the estate and has a right to lodge a caveat challenging the distribution of the estate if no provision is made for clearance of the outstanding debt (See Section 66 of the Law of Succession). It is not in doubt therefore that the objector has a right under the Law of Succession to take part in the proceedings of a succession case in respect to an estate to which they have an interest as creditors. The objector therefore properly came on board to protect their interest in the estate which in law if proved must be taken care of first before distribution of the net intestate estate.

22. During the pendency of these proceedings, J. Muigai made directions on 2nd October 2017 that recovery of the debt in question is within the dominion of the High Court. On 10th April 2017 Judge Muigai endorsed a consent agreement for the repayment of the loan by the administrators and further held that the court lacked jurisdiction over the matter on recovery of the loan.

23. It is not in dispute that J. Muigai had on two occasions i.e. 2nd October 2017 and 10th April 2017 made remarks and advised that the court did not have jurisdiction to entertain a claim based on a charge for recovery of a debt. It is trite that the transaction giving rise to the loan facility, deposit and execution of a charge in favour of the objector for a loan facility of Kshs15,000,000/= is a commercial transaction in nature. It is therefore predominantly a civil case which should be litigated in the high court in this case Commercial Division. This is in line with the case of **Cooperative Bank of Kenya Ltd vs Patrick Kangethe Njuguna and 5 others (2017) eKLR** in which the court held that issues to do with the validity and terms in mortgages and charges agreement is the preserve of the high court (commercial division) and not ELC.

24. To the extent that there is a dispute over the validity of the charge even when part payment has been made, fraud allegations and miscalculations of interest alleged, it is not for the succession court to determine. This is purely a commercial transaction and breach of contract calling for execution of the agreement against the estate and it's the duty of the administrators to file a suit challenging the legality or validity of the charge before the right court seized of the jurisdiction and in this case the high court commercial division.

25. In the case of **Kimeu Mwanthi vs Rukaria M'twerandu M'iruingi (2013) eKLR** the Court of Appeal held:

“the litigation in this matter has seen parties litigate for the same subject matter both under civil procedure and the Law of Succession. We must state this is a procedure that causes confusion and there is a clear justification and sound reasoning why legislature separated both regimes. This case is a clear demonstration that when both regimes of law are applied interchangeably, a simple matter for example succession in a deceased's estate becomes protracted and parties keep hovering from civil court to succession case. The Law of Succession Act was envisaged as a complete regime of law if there is any claim of civil procedure against a deceased's estate a claimant is supposed to file a civil suit against the administrators of the estate. Involvement of claimants of civil obligations or others in matters of administration of a deceased's estate causes delays and difficulties in resolving them within the regime of the law of succession”.

26. I am in agreement with Mr. Esmail's submissions that this court has no jurisdiction to entertain a civil suit against the objectors in challenging the legality or validity of the charge. That is the mandate of the high court Commercial Division. The administrators should actually file a suit challenging the objector's statutory right of sale and that court shall determine whether there is any money owing to them by the estate and once completed, this court shall proceed to distribute the free net intestate estate free from any liabilities.

27. Further, Justice Muigai had twice given directions that this court lacks jurisdiction to determine the issue of legality or validity of the charge in question. I cannot turn round and hold the opposite as I am in agreement with her sentiments. As a court of concurrent jurisdiction, I cannot over turn her orders.

28. Having held as such, it is my conviction that the application for injunction dated 10th August 2018 is wrongly filed and misplaced before this court. This court cannot ascend or descend to that arena of entertaining loan disputes and validity and or legality of a charge. Having held that this court has no jurisdiction, I therefore down my tools by dismissing the application dated 10th August 2016 and the interim orders issued thereof set aside. However to fast tract this case, both parties are given 30 days to negotiate and record a consent in default to apply for partial confirmation for the undisputed property only. Regarding the issue of costs I would order that each party bears own costs.

Order accordingly.

DATED, DELIVERED AND SIGNED, AT NAIROBI ON THIS 12TH DAY OF MARCH, 2019.

J.N. ONYIEGO

(JUDGE)