



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 152 OF 2017 (OS)

ISABELLA WANJIKU KARANJA suing in her capacity

As a beneficiary and co-administrator of the Estate of The late

CHARLES KARUGA KOINANGE (Deceased).....APPLICANT

VERSUS

ASHFORD MURIUKI MUGWUKU

t/a ASHFORD & ASSOCIATES ADVOCATES.....DEFENDANT

JUDGMENT

The applicant is one of the administrators of the Estate of the late Charles Karuga Koinange and brought this suit by way of Originating Summons seeking orders that the respondent delivers a fully itemized detailed schedule of all land titles, allotment letters, leases, log books, share certificates, bank accounts and any other documents in his possession and in particular, the securities specified in the schedule attached to the pleadings.

It is pleaded that the respondent is possessed of those securities and that upon delivery, he should surrender the same to the applicant on behalf of the administrators of the estate or, in the alternative, to any other person and or entity as shall be agreed upon by the Estate administrators, on such reasonable terms as shall be agreed upon by the parties. In default, the court should impose terms to safeguard any legal fees that may otherwise be due to the respondent from the estate.

There is another prayer that, upon the respondent furnishing a full detailed itemized schedule and upon the applicant studying the same, she be at liberty to raise further demands and or claims against the respondent touching on any aspect relating to the securities. The respondent filed a replying affidavit in which he admitted that he has in his safe custody, various securities and documents belonging to the estate which came into his custody lawfully, following authority as counsel in his professional capacity, in matters he has cited in the replying affidavit. He depones however, he is entitled to legal fees relating to work already done and has attached a copy of a draft bill relating thereto.

There are some issues raised about representation of the administrators which however have no bearing in the final determination of this application. The respondent has denied any allegations of fraudulent transactions, but asked the court to protect and direct payment and all related fees to work already done. It is his position that, this suit is premature as the subject of the succession cause and appeals are still ongoing and in any case, the issues raised can reasonably and amicably be solved by the parties through discussions and negotiations in good faith. Parties have filed their submissions which I have noted.

A suit by way of Originating Summons is subject to directions under Order 37 relating to the mode of hearing. On 4th July, 2018 counsel proposed that they shall rely on affidavits and submissions to be filed which was recorded, and subsequently the respondent and one of the administrators filed replying affidavits followed by submissions by both sides. In my view, those orders complied with the requirement that directions be given.

At some point this court made an observation that the matter be subjected to court annexed mediation and an order that effect made on the record. On 9th January, 2019 the mediator returned a report showing that the parties have not reached any settlement.

The applicant has annexed a schedule of assets/securities held by the respondent in respect of the estate. It is not clear where the applicant obtained that list but I note the respondent has not denied the schedule as submitted. There is a blanket order sought that the respondent do deliver those securities and any other documents in his possession. The applicant in the schedule does not include the words 'any other documents'. To avoid a fishing expedition, I shall confine myself to the schedule that has been provided by the applicant and annexed to the Originating Summons.

The applicant is not the only administrator of the estate. She says as much in paragraph 1 of her supporting affidavit. The other administrators are William Kihara Karuga (now deceased) Samuel Karuga Koinange and Peter Mbiu Koinange. One would have expected that this suit would be presented by the three living administrators. The applicant does not say that she has the authority of the other administrators to file this suit. Originating Summons being a suit is required to comply with the provisions of Order 1 rule 13 of the Civil Procedure Rules.

It is required under the said Order that the applicant may be authorised to plead or act for the other administrators provided that she has authority to do so, but such authority shall be in writing and signed by the party giving it and shall be filed in the case. There is no such authority in this file except what is headed as 'consent' signed by several beneficiaries of the estate. That consent does not meet the requirements of Order 1 rule 13 of the Civil Procedure Rules aforesaid.

In fact one Peter Mbiu Koinange who is one of the administrators of the estate has sworn an affidavit opposing the suit lodged by the applicant. In effect, the applicant lodged this suit alone notwithstanding the fact that there are other administrators in the case. This concern shall however be addressed in the final orders.

It has not been seriously disputed that the respondent is entitled to his legal fees for acting for the estate. Indeed, the cited authorities to show to advocate's lien on securities held by an advocate demanding fees from his client, cannot be wished away. See **Booth Extrusions (formerly) Booth Manufacturing Africa Limited vs. Ndumbeya Nelson Muturi Aaron t/a Nelson Aaron & Company Advocates (2014) e KLR and Re: The Resident Magistrate's Court (Nairobi) (1929- 1930) LRK 66** .

In the case of **National Bank of Kenya Limited vs. Kangethe George Joseph & Another (2015) e KLR and Beatrice N. Karanja vs. Njeri Kariuki** the courts have held that advocates fees are due and payable after taxation. The respondent in this matter has submitted that he has finalised his bill of costs so as to bring this suit to an end. I have not seen any certificate of taxation to confirm that position. The position I take however is that, in the event the applicant establishes her claim, whether alone or with the authority of the other administrators the respondent deserves the right to be paid for his professional services.

The estate is said to have no money to discharge liabilities which include the fees payable to the respondent. To avoid any further litigation in this matter, I believe the order that commends itself in the circumstance of this case is that, the suit by way of Originating Summons should be allowed, but on conditions that protect the interests of the parties and the estate.

In that regard therefore, I make the following orders;

1. The respondent shall declare an honest and open inventory of all securities and or document held by him on behalf of the estate.
2. He shall present his fee note to the administrators of the estate jointly and severally based on a certificate of taxation.
3. If that certificate is not available, then the agreed costs.
4. If the bill has not been taxed then the same shall be taxed expeditiously, but in any case within 30 days from the date of this judgment.
5. Upon that presentation, the administrators shall pay the respondent such fees as shall be reflected as above.
6. In the event they are unable to settle the said fee note, then the respondent shall retain such security and or securities as shall be sufficient to discharge his fee note as and when the same is paid.

Having noted that the applicant did not obtain the authority of the other administrators to file this suit, the securities shall be released to a 3rd party or entity agreed upon by the administrators jointly. In the event the parties are not agreed as to who should hold the said securities, the right to apply is hereby reserved. Each party shall bear their own costs of this suit.

Dated, signed and delivered at Nairobi this 14th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE