REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSIONN CAUSE NO 291 OF 2006

IN THE MATTER OF THE ESTATE OF MOHAMMED MAKAU

HADIJAH MOHAMMED

MAKAU (DECEASED)...................................1ST PETITIONER/APPLICANT

ABDUL MOHAMMED MAKAU...................2ND PETITIONER/APPLICANT

FATMA MOHAMMED MAKAU..................3RD PETITIONER/APPLICANT

VERSUS

FARIDA OMAR MOHAMMED (DECEASED).............1ST RESPOPNDENT

SAIDA OMAR MOHAMMED...2ND RESPONDENT

RULING

1. By Summons dated 3rd December, 2018, 2nd May, 2018, the Applicants herein seek the following orders:

> **1) THAT service of summons filed be and is hereby certified as urgent and service thereof be dispensed with and t be heard *exparte* n the first instance**
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> **2) THAT the Honourable Court be pleased to issue orders restraining the 2nd Respondent by herself, agent, servant or any such person acting under her authority on instructions from disposing, selling, wasting ,interfering or in any manner whatsoever intermeddling with the estate herein above and particularly with regards to Land reference Number Machakos Town Block 11/132 pending the i*nterpartes* hearing and determination of this cause.**
>
> **3) That the Honourable Court be pleased to issue orders restraining the 2nd respondent by herself, agent, servant or any such person act under her authority and instructions from disposing, selling, wasting, interfering or in any manner whatsoever intermeddling with the state herein above and particularly with regards Land Reference Number Machakos Town block 11/132 pending the *interpartes* hearing and determination of this cause.**
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> **4) THAT this Honourable Court be pleased to make any other conservatory orders for the preservation of the deceased's estate as it may deem fit and just to grant.**
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> **5) THAT the 2nd respondent be compelled by an order of this Honourable Court to provide true accounts for the sums of money received by herself and/or co-respondent as rental income from the estate of the deceased within fourteen days or any such other period as the Court shall direct since the year 2001.**
>
> **6) THAT the costs of this summons be in the cause.**

2. According to the Applicants, they are son and daughter of the deceased while the Respondents are their sisters in law having gotten married to their later brother and were therefore the deceased's daughter in law. However, the 1st Respondent has since passed away.

3. According to the Applicants, though the property of the estate being Machakos Town Block 11/134 is yet to be distributed amongst the

beneficiaries, the Respondents have been engaging in acts of waste and intermeddling of the estate. According to the Applicants, the Respondents and the 2nd applicant reside in the said property which comprises of five shops and having been collecting rents in the sum of Kshs 24,000/- per month since November, 2001 and have converted a private toilet therein into a public toilet wherefrom they have been collecting user money while denying the 2nd applicant and his family access thereto. As a result of the foregoing the Respondents have acquired properties within Machakos County and developed the same with the rent proceeds to the detriment of the other beneficiaries while not paying rates owed to the local authority.

4. It was further contended that despite collecting rents the Respondents have not been rendering accounts and have exposed the said property to a risk of being sold by the Municipal Council of Machakos to recover the unpaid rates.

5. The applicants therefore sought an order that the 2nd Respondent be directed to account for the rents collected, settle the rates and pay the rents from the said property into a joint account pending the hearing of the cause.

6. In reply to the application the 2nd respondent denied that she has denied the applicants the use of the suit property. According to her, during her lifetime, her mother in law had shown her late husband and the 2nd applicant their respective portions of the property hence the parties are aware of what they are entitled as inheritance and use during the pendency of the cause. It was her averment that the portion which the applicants alleged comprises of five shops from which she collects rents was developed by her late husband, her late co-wife, the 1st respondent and herself after the original building had been left by their father in law, the deceased herein, to become derelict.

7. It was her case that there is a portion in the middle which is undeveloped and which the daughters can develop and in any even they had been bequeathed a parcel of land at a place known as Kalivani which property they sold and benefited from its proceeds alone. According to her the property she bought at Kyumbi area was from her own monies as a businesswoman and through the assistance of her children and not from the proceeds from the estate. She disclosed that the 2nd applicant herein has also developed his portion of the said property where he has one shop from which he collects rent and has not been barred from further developing his portion. She however denied that she has turned the private toilet into a public one and that she collects money therefrom.

8. It was her case that she has paid a substantial sum of the outstanding land rates half of which the applicants ought to be ordered to reimburse her.

9. According to her this application is *res judicata* as the applicants filed a similar application dated 19th September, 2014 which was dismissed on 15th December, 2015.

10. In their submissions the applicants relied on sections 45, 47, 49 and 73 of the ***Law of Succession Act*** which in their view empowers the court to intervene in a case such as this by issuing injunctive orders to preserve the estate pending its distribution. They also relied on **The Matter of Erastus Njoroge Gitau (deceased) Nbi HC Succession Cause No. 1930 of 1997**. According to the applicants there is no evidence adduced to show that the Respondents developed the subject property and that it is not in dispute that there are shops thereon. In the absence of such proof the said shops ought to be treated as the property of the deceased. According to the Applicants the actions of the Respondents amount to intermeddling with the estate and relied on **The Matter of the Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR**.

11. On behalf of the 2nd Respondent, it was submitted that the respondents are widows to a son of the deceased, **Omar Mohammed**. The 1st respondent is however deceased. On the other hand, the applicants are siblings to the respondents' husband. The 1st respondent together with the 2nd and 3rd applicants are administrators to the estate of the deceased herein after successfully applying for revocation of letters of administration earlier issued to the applicants. The deceased died in 1969 and left behind a wife, **Halima Mohammed**, who distributed the estate Machakos Town/Block 11/132 whereby the property was bequeathed to the respondents' husband, **Mohammed Omar**, and the 2nd applicant herein which they renovated as it was dilapidated.

12. It was contended that a similar application dated 19/9/2014 filed by the applicants, seeking the same prayers as the present one herein, was dismissed on 15/12/2015 for want of prosecution.

13. It was submitted that the applicants have deliberately omitted the fact that the 2nd applicant operates a shop in the said property from which he collects rental income. In addition, the applicants' claim that the respondent collects rent of Kshs 24,000/= per month are unsubstantiated since nothing has been produced in evidence to support the said allegations hence the applicants' claims relating to the said figure is unfounded. It was therefore submitted that in view of the discussed facts, section 45(1) of the ***Law of Succession Act*** is not applicable to circumstances of the case herein as the issue of intermeddling does not arise.

14. It was further submitted that the disputed property was in rent arrears of Kshs 95,829/= as per the annexed copies of receipts in the 2nd respondent's replying affidavit, whereby the respondent took upon herself to pay the rent arrears after the applicants refused and/or denied to contribute to the payment of the rent arrears due to the estate of the deceased. Accordingly, the rent arrears of the property in dispute has been paid up to date as per the receipts marked as Sm1 and hence the applicant's claim that the property maybe be sold by the Municipal Council to recover the rent is unsubstantiated and misleading.

15. According to the 2nd Respondent, if at all the applicants are genuinely desirous of preserving the estate of the deceased they would have contributed and/or participated in contributing to the payment of the rent arrears of the old building in Machakos Town/Block 11/132. According to her, the shops in Machakos Town/Block 11/132 were opened in 1986, the respondent's husband was still alive and collected rent from the said shops also till his demise in the year 2006 and the applicants have never challenged that.

16. In the 2nd Respondent's view, the present application lacks merit and the same ought to be dismissed.

Determination

17. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

18. The first issue for determination is whether the current application is caught up by the doctrine of *res judicata*. Section 7 of the ***Civil Procedure Act, 2010*** provides that:

> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

19. The Court of Appeal dealt with the question of *res judicata* in **Civil Appeal No 105 of 2017 the Independent Electoral and Boundaries Commission vs. Maina Kiai and 5 Others [2017] eKLR** by holding that:

> **"Thus, for the bar of** *res judicata* **to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms;**
>
> **(a) The suit or issue was directly and substantially in issue in the former suit.**
>
> **(b) The former suit was between the same parties or parties under whom they or any of them claim.**
>
> **(c) Those parties were litigating under the same title.**
>
> **(d) The issue was heard and finally determined in the former suit.**
>
> **(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**
>
> **The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in** *Uhuru Highway Development Ltd v Central Bank of Kenya* **[1999] eKLR they rendered the elements as;**
>
> ***"(a) the former judgment or order must be* final*;***
>
> ***(b) the judgment or order must be on merits;***
>
> ***(c) it must have been rendered by a court having***
>
> ***jurisdiction over the subject matter and the parties; and***
>
> ***(d) there must be between the first and the second action identity of parties, of subject matter and cause of action."***
>
> **The rule or doctrine of** *res judicata* **serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of** *res judicata* **thus rest in the public interest for swift, sure and certain justice.**

20. The rationale for this doctrine was also discussed in ***Res Judicata, Estoppel, and Foreign Judgments*** by **Peter R. Barnett** on page 9 as follows:-

> ***"The doctrine finds expression and justification in two fundamental principles; one public- that it is in the interest of the state that there be an end to litigation, and the other private- that no person should be proceeded against twice for the same cause. Even so, the main object of the doctrine of res judicata is the avoidance of repetitious and wasteful litigation".***

21. In this case it is contended that the earlier application was dismissed for want of prosecution. One of the requirements of res judicata is that the matter in issue must have been heard and finally decided in the former suit. A dismissal of a suit for want of prosecution, in my respectful view, does not amount to a determination of the same for the purposes of *res judicata*. See the cases of **The Tee Gee Electrics & Plastics Co. Ltd. vs. Kenya Industrial Estates Ltd. Civil Appeal No 333 of 2001 [2005] 2 KLR 97** and **Jairo Angote Okonda vs. Kenya Commercial Bank Ltd. Civil Appeal No. 216 of 1999.** Accordingly, it my considered view that the earlier matter was not finally determined for the purposes of *res judicata*.

22. Sections 45 and 47 provide as follows:

45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

47. 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.

23. I associate myself with the opinion of **Musyoka, J** in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** that:

> **"The effect of [section 45]…is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."**

24. I also agree with the position in **re Estate of M'Ngarithi M'Miriti [2017] eKLR** that:

> **"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."**

25. It follows that any action taken by a person whose effect would be to interfere with a property of a deceased intestate without being authorised to do so by the court amounts to intermeddling with the estate under section 45 of the ***Law of Succession Act***. Absence an order from this court, no one is lawfully authorised to interfere with the estate of a deceased.

26. In this case, it is contended which contention is not denied that the 1st respondent together with the 2nd and 3rd applicants are administrators of the estate of the deceased. In my view the substance of the applicants' complaint is that the estate of the deceased is not being properly administered. Where there are more than one administrators of the estate of a deceased, all the administrator must act jointly. This is so because an administrator is in the position of a trustee for the benefit of the beneficiaries. Just like other trustees, he must act in the best interests of the beneficiaries. It was therefore held in **Willis Ochieng Odhiambo vs. Kenya Tourist Development Corporation & Another Kisumu HCCC No. 51 of 2007** based on ***Lewin on Trusts*** **16th Ed at 181** that:

> **"In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were one collective trust and therefore must execute the duties of their offices in their joint capacity."**

27. In my view unless an administrator acts in accordance with the instrument that appointed him, in this case jointly, he may well be considered to be intermeddling with the estate since his powers and authority must always be jointly exercised.

28. It is clear from the depositions of the parties herein that the estate of the deceased which is yet to be distributed is being administered in a manner not contemplated under the Act and the Rules. Whereas the 2nd Respondent avers that the various portions of the estate have been identified and apportioned, that apportionment can only lawfully be undertaken as provided for under the Act.

29. Section 83(h) of the Act provides that the legal representatives are liable:

to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

30. There is no evidence that any such accounts have been rendered. However, since it is not just the Respondent who is an administrator, all the administrators are under a duty to render accounts. In the premise the order which commends itself to me and which I hereby make is that the 1st respondent together with the 2nd and 3rd applicants either jointly or severally do prepare and file in this cause statements of accounts showing the monies which have come into their hands from the estate of the deceased and what they have spent within a period of 45 days from the date of this order.

31. Since administration is a joint venture and since there is no evidence that the estate of the deceased has been lawfully distributed, an order of injunction is hereby issued restraining the said administrators from directly receiving any rents arising from the suit property and that there be a joint account to be opened in the joint names of the said administrators wherein the said income is to be deposited pending further orders of this court.

32. It is so ordered.

Read, signed and delivered in open Court at Machakos this 7th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey