



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 12 OF 2018

IN THE MATTER OF THE ESTATE OF ESTATE OF ERACH JEHANGIR AUSTIN (DECEASED)

SAMUEL KARISA MASHA a.k.a. SAMUEL KARISA AUSTIN...PETITIONER/APPLICANT

VERSUS

MARZBAN JEHANGIR AUSTIN.....RESPONDENT

RULING

1. The proceedings herein relate to the estate of Erach Jehangir Austin ("the Deceased") who died on 2.11.17 at Ganjoni, Mombasa. A Petition for a grant of letters of administration intestate was filed on 29.3.18 by Samuel Karisa Masha a.k.a. Samuel Karisa, the Petitioner/Applicant. By an application of even date, the Petitioner/Applicant seeks the following:

1. *Spent.*

2. ***THAT pending the Hearing and Determination of this Application:***

a) An Interim Order of Injunction do issue restraining the Respondent whether by himself, his agents, servants, employees, representatives or whosoever claiming through him or otherwise, from evicting, alienating, generally interfering with the Petitioner's occupation, possession, enjoyment and derivative use, and/or in any other manner whatsoever, dealing with the property Ref Plot; No. 129/XXI Mainland North, Mombasa, Chandubhai Patel Road, commonly referred to as the "JBA-House," in any manner adverse to the Petitioner's interest therein, and/or in a manner likely to degrade and waste the same, as an Asset of the Estate of the Deceased, Erach Jehangir Austin;

b) An Order do issue directing the Branch Managers, Sidian Bank Limited, Moi Avenue Branch and Kenya Commercial Bank Limited, Treasury Square Branch to furnish the Court, within Three (3) Days of service of such Order, with full particulars of the Details and Status of ANY and All Bank Accounts maintained with in the name of and/or by the Deceased, Erach Jehangir Austin as well as M/s Austin & Partners Limited, the Deceased's Company;

c) An Interim Order of Maintenance do issue directed to the Branch Managers, Sidian Bank Limited, Moi Avenue Branch and Kenya Commercial Bank Limited, Treasury Square Branch to pay through an Account designated by the Petitioner, and to the Petitioner's benefit, the sum of Kshs. 500,000 per month, as subsistence allowance;

3. ***THAT the Orders subject of Prayer 2 (a) and (c) above do persist until the Hearing and Determination of the Succession Proceedings herein.***

4. ***THAT Costs be in the Cause.***

2. The Petitioner/Applicant alleges that he is the legally-recognized foster son of the Deceased and Changawa Karisa Masha (Changawa) who died on 12.12.17. The Deceased and Changawa were married on 7.1.14 at the Registrar's Office in Mombasa. The Petitioner/Applicant further claims that he was born on 9.2.93 and shortly thereafter abandoned by his biological mother in Elgeyo Marakwet. He alleges that the Deceased and Changawa shared equal parental responsibility over him and also exercised joint legal and actual physical custody, care and control of him from March 1993. He further states that his adoption by the Deceased and Changawa was legally formalised and they raised him as their son and catered for all his needs. He received a reasonably high standard of education and resided in their home on Plot No. 129/XXI/MN, Mombasa- JBA House.

3. The Petitioner/Applicant further claims that upon the demise of the Deceased, Marzban Jehangir Austin, the Respondent herein who is the Deceased's brother began to issue threats to him to vacate the house and not to claim any interest in the estate. He further claims that he came across a will of the Deceased which according to him is fatally defective and purports to exclude the Petitioner/Applicant and leave him

destitute. The Deceased did not have capacity to make a will in 2014 having undergone head surgery in 2011 and remained an invalid till the day of his demise.

4. The Petitioner/Applicant listed the Deceased's assets as:

- i) JBA House
- ii) L.R. No. 48/XXI, Mainland North known as Austin House No. 1, a 2 storey building along Moi Avenue.
- iii) L.R. No. 216/XXI, Mainland North, Mombasa, known as Austin House No. 2, a 1 storey building along Moi Avenue.
- iv) Business enterprise referred to as Austin & Partners Limited.
- v) Bank Accounts at M/ Sidian Bank Limited and Kenya Commercial Bank Limited;

5. The Petitioner/Applicant further claimed that the Respondent is in the process of intermeddling with the estate of the Deceased while seeking to disinherit the Petitioner/Applicant who is unemployed. That unless the Respondent is restrained by this Court, he shall deal with the estate in a manner that is adverse to the best interests of the estate and of the Petitioner/Applicant who is "an indisputable beneficiary of the Estate." It is in the interests of justice, fairness, equity, constitutionalism, principles of the rule of law and natural justice and protection of fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010 that this Application ought to be allowed as prayed. The Petitioner/Applicant is willing to abide by any conditions set by the Court.

6. The Application is opposed. The Respondent in his Replying Affidavit sworn on 11.4.18 denies that the Petitioner/Applicant was abandoned in Elgeyo Markwet. The birth certificate annexed to his supporting affidavit indicates that Changawa is his birth mother and he was born in Kwale, Coast province. The Petitioner/Applicant is not a child of the Deceased and no adoption order has been produced. The Respondent further claims that the Deceased was married to Nillie Homi Austine (Nillie) with whom he had 3 children, Jehangir Erach Austine, Ardvan Erach Austine and Hermesh Erach Austine who are the dependents of the Deceased. The Respondent further alleges that Changawa, the mother of the Petitioner/Applicant was a long time employee of the Deceased until 7.1.14 when he married her. The Petitioner/Applicant was at that time already an adult. The marriage was celebrated after the Deceased had undergone his head surgery.

7. The Respondent states that Plot Nos. Mombasa/Block XXI/48 and Mombasa/Block XXI/216 do not constitute the estate of the Deceased as the same were owned by the Deceased and Nillie as joint tenants. JBA house is the family property inherited from their father and is registered in the name of the Respondent, the Deceased and their late mother Naja Jehangir Austin. The estate of the Deceased has no income and in fact owes the Respondent the sum of Kshs. 8,500,000/= lent to the Deceased to settle Court decrees and auctioneers fees. The Respondent spent a further Kshs. 150,000/= for the Deceased's hospital bills and funeral expenses.

8. The Respondent claims that upon the demise of the Deceased and Changawa, he offered to assist the Petitioner/Applicant purely on humanitarian grounds and allowed him to stay in room in JBA House. The Respondent needed the Petitioner/Applicant to stop drug and substance abuse so that he could do something meaningful with his life. The Petitioner/Applicant has brought in other people to live in JBA house on terms unknown to the Respondent. JBA House belongs to the Respondent as well and the Petitioner/Applicant cannot live there without his consent and misuse the same. The Deceased did not die intestate as alleged by the Petitioner/Applicant in his petition but had left a written will.

9. The Petitioner/Applicant has brought this application to protect his interests as well as those of his estate. It is trite law that any action brought on behalf of a deceased person by an applicant who is not a holder of a grant of representation is incompetent and bad in law. Section 82(a) of the Law of Succession Act provides:

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

10. In Trouistic Union International & Another CA Civil Appeal No.145 of 1990, Apaloo, C. JA had this to say about who may institute actions concerning an estate of a deceased person.

To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the Law of Succession Act. That Section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, Section 3, the interpretative Section, provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person".

11. While the Court notes that the Petitioner/Applicant has petitioned this Court for a grant of representation in respect of the estate of the Deceased, no grant has been issued to him. In the circumstances he has no *locus standi* to file the Application herein seeking injunctive orders against the Respondent in relation to the estate of the Deceased. He has no legal capacity to seek an order compelling Kenya Commercial Bank and Sidian Bank to furnish the Court with any particulars regarding any accounts held by the Deceased. The Application having been filed by a person to whom no grant of representation has been issued is incompetent. In so finding, I am guided by the holding in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR where the Court of Appeal observed-

"But an administrator is not entitled to bring an action as an administrator before he has taken out letters of Administration. If

he does, the action is incompetent at the date of its inception...”

12. The Petitioner/Applicant has prayed that the named Banks be ordered to pay to him a subsistence monthly allowance from the accounts of the deceased. This is an order that the Court cannot make before ascertaining the amount in the said accounts. Such ascertainment can only be done by a holder of a grant of representation in respect of the estate of the deceased, which the Petitioner/Applicant is not. It is therefore necessary that a grant of representation is issued to enable the holder thereof collect and get in all free property of the deceased as required by Section 82(b) of the Act. In any event the entitlement of the Petitioner/Applicant to the estate of the Deceased has been contested by the Respondent. This issue must also be resolved.

13. In the circumstances, the Court finds that the Application lacks merit, is incompetent and the same is hereby struck out. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 9th day of November 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioner/Applicant**

.....**for the Respondent**

.....**Court Assistant**