



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 421 of 2014

IN THE MATTER OF THE ESTATE OF KARL JACOBS RUEDIN (DECEASED)

ALPHONSE MWANGEMI MUNGA & 10 OTHERSAPPLICANT

VERSUS

SHEILA NKATHA MUTHEE1ST RESPONDENT

ROLAND RUEDIN2ND RESPONDENT

HANSPETER RUEDIN3RD RESPONDENT

Succession Cause No. 421 of 4 Estate of Karl Jacobs Ruedin

RULING

1. By a Summons dated 7.9.18, the Applicants seek:

a) *Spent.*

b) ***THAT the Respondents, namely SHEILA NKATHA MUTHEE, ROLAND RUEDIN and HANSPETER RUEDIN be ordered to pay the Applicants costs amounting to Kshs. 5,266,359/= in respect of the Court of Appeal Civil Appeal No. 314 of 2014 (Nairobi) and the subsequent ruling delivered at the Court of Appeal on 8th December, 2016 within Thirty (30) days from the date of the order thereof.***

c) ***THAT the Court be pleased to grant an order to allow forensic audit to be carried out in respect of the ESTATE OF KARL JACOBS RUEDIN (DECEASED) to establish the whereabouts of the entire estate of the deceased.***

d) ***THAT costs of this application be provided for.***

2. The grounds of the Application are contained in the Application and in the affidavit of Alphonse Mwangemi Munga sworn on 7.9.18. It is claimed by the Applicants that they represent 367 employees of African Safari Club Ltd which was owned by Karl Jacobs, the Deceased. The Employment and Labour Relations Court (ELRC) in Nairobi in its judgment ordered the sale of the Deceased's plot to pay the said employees. Appeal No. 314 of 214 filed by the 1st Respondent was dismissed with costs on 19.5.16. The Applicants filed a bill of costs dated 7.6.16 and a ruling was delivered in their favour on 8.12.16 for the sum of Kshs. 5,266,359/=. The Respondents have neither paid the said sum nor filed a reference in respect thereof.

3. It is further claimed that the Respondents have offended the provisions of Section 45 of the Law of Succession Act which prohibits intermeddling with the estate of a deceased person and imposes criminal sanctions. According to the Applicants. The Respondents obtained a certificate of confirmation of grant dated 16.5.16 through concealment of material facts and further failed to comply with the said Act in the administration of the estate.

4. In her Replying Affidavit sworn on 8.10.18, the 1st Respondent stated that she was the Administrator of the estate of the Deceased. She swore the affidavit on behalf of the 2nd and 3rd Respondents who are the beneficiaries of the estate of the Deceased. She avers that the affidavit sworn by Alphonse Mwangemi Munga in not an affidavit within the meaning of Section 5 of the Oaths and Statutory Declarations Act. The date is typewritten and could not have been inserted by the Commissioner for Oaths. The exhibited ruling on taxation is not signed nor is it certified. The Application ought to have been filed in ELRC Case No. 133N of 2018 as the purported taxation arises from orders given by that Court and further this Court has no jurisdiction to enforce to enforce payment of costs alleged to have arisen from proceedings in that Court. The Application is therefore incompetent and is meant to harass the Respondents. The Applicants are not parties to this Cause

and have not been enjoined herein. The 1st Respondent claims that she is the Petitioner herein and her capacity has not been converted to that of Respondent. She further states that the 2nd and 3rd Respondents are not parties herein but beneficiaries of the estate of the Deceased.

5. The 1st Respondent further listed all the assets that were sold by auctioneers instructed by the Applicants' advocates Kurauka & Co. Advocates in execution of the Decree in the ELRC matter. The 1st Respondent further alleges that the Applicants' advocates and certain other parties organised a fraudulent sale of Plot No. 1515/I/MN belonging to the Deceased on the basis of an illegal and fraudulent consent order in the ELRC Case between Mr. Kurauka, Advocate, Mr. Kabiru, Advocate to satisfy the decree and to pay a debt due to one Frank Neugerbauer. She further alleges that Hon Justice Mathews Nduma Nderi was aware that the proprietor of the property was dead and the estate was not involved in the consent. The property was auctioned for Kshs. 120 million yet the value was Kshs. 420 million.

6. The Respondents deny having intermeddled with the estate of the Deceased and allege that the Applicants, their advocates and the Hon. Judge of the ELRC are the ones who violated Section 45 of the Law of Succession Act. The Applicants and their advocates are therefore liable to pay to the estate the sum of Kshs. 420 million. The Respondents are not liable to pay costs that were brought about by fraudulent and criminal actions by the Applicants in recording the consent to sell the property of a dead person without hearing the estate. They further claim that this Court has no jurisdiction to order a forensic audit if the estate in an application that the Court has no jurisdiction to hear and determine.

7. The Court notes that the Applicants have not cited the provisions of law that they rely on in this Application, but no matter. It is clear from the prayers sought that they seek that the Respondents be ordered to pay to them the sum they claim as taxed costs. This Court must now determine whether the orders sought can be granted.

8. The Respondents challenge the affidavit sworn in support of the Application on the basis that the date in the jurat is typewritten and therefore not possibly have been inserted by the commissioner for oaths. Section 5 of the Oaths and Statutory Declarations Act provides:

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

9. There is nothing in the foregoing provision that states that the date may not be typewritten or to suggest that if the date is typewritten then the same could not possibly have been truly stated by the Commissioner for Oaths before whom the oath was taken. In the premises I find the argument by the Respondents lacking in merit.

10. The Respondents further argue that this Court has no jurisdiction to entertain the Application and that the same ought to have been made in ELRC Cause No. 133N of 2008 as the purported taxation arises from orders given by the ELRC. The issue here concerns costs awarded to the Applicants in Civil Appeal No. 314 of 2014 against the 1st Respondent. The subject matter was the estate of the Deceased specifically Plot No. 1515/I/MN. I am therefore of the view that the alleged costs if proved would be payable by the estate of the Deceased. As such, the Application is properly before this Court.

11. I have looked at the exhibited Ruling on Taxation in Civil Appeal 314 of 2014 which forms the basis of this Application. The Ruling is neither signed nor certified. Further there is no certificate of costs issued by the taxing officer following the ruling on the taxation. This is a fatal omission on the part of the Applicants. The net result is that the debt is not proved. The Court can only be moved to make orders in favour of a party who persuades it to do so by tendering sufficient evidence. Without proof of the costs the Applicants seek to recover, this Court is unable to grant the orders sought. The cited case of In re Estate of Barrack Deya Okul (Deceased) [2018] eKLR is not applicable as in that case the debt was proved unlike the costs herein which remain unproved.

12. The Applicants also seek and order for a forensic audit to be carried out in respect of the estate of the Deceased to establish the whereabouts of the assets thereof. Section 83(h) of the Law of Succession Act provides that an administrator has the duty to:

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, (emphasis added) 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;

13. The Court has powers to order the production of a full and accurate inventory of assets of the estate of the Deceased. It can do so on its own motion or on the application of a party interested in the estate of the Deceased. In view of my finding that the costs/debt claimed have not been proved, I draw the conclusion that the Applicants have no demonstrable interest in the estate of the Deceased to seek an order for a forensic audit in respect thereof.

14. Before I conclude I must say that I have noted with dismay that the 1st Respondent, who is an advocate of the High Court of Kenya has made some very disparaging, nay defamatory remarks about a sitting Judge in both her replying affidavit and submissions. She averred in her affidavit:

The so called Applicants through the same law firm and certain other parties organised a fraudulent auction of property known as Plot No. 1515/I/MN belonging to the deceased on the basis of an illegal and fraudulent consent order recorded in Industrial Cause No. 133N of 2008 between Mr. Kurauka and a Mr. Kabiru advocate. Mr Kurauka, Mr. Kabiru and the Judge that was involved in that fraud, the Honourable Mr. James Mathews Nderi Nduma, knew that the proprietor of that property was dead but they agreed amongst themselves that the property be sold to satisfy the Decree and to pay off a debt allegedly due to one Frank Neugerbauer. They did not involve the estate of the deceased in that criminal consent.

The 1st Respondent further stated in her submissions:

The Judge under discussion is facing a Petition for his removal from office because of this fraud, corrupt practices and misconduct in which Mr. Kurauka and the Applicants participated. Let that Judge go and defend himself when the tribunal is formed. Mr. Kurauka should not defend the Judge in these proceedings.

15. Whatever complaints the 1st Respondent has against the Hon. Judge, these proceedings are not the correct forum to give vent to the same. If indeed a petition has been filed against the Hon. Judge then the 1st Respondent is well advised to confine her sentiments to the same and await the outcome thereof. The matter before this Court is the issue of costs which the 1st Respondent was condemned to pay in Civil Appeal No. 314 of 2014. It has nothing to do with the legality or otherwise of the consent order. Besides, a party can always impugn a Judge's decision in review or appeal an avenue the 1st Respondent failed to make use of. For the 1st Respondent to make allegations of fraud, corrupt practices and misconduct against the Hon. Judge in these proceedings is just wrong. The 1st Respondent's conduct is unbecoming of an officer of the Court and depicts a lack of respect for the Hon. Judge, the ELRC in which he serves, this Court and the Judiciary as a whole.

16. Going back to the Summons dated 7.9.18, I find that the same lacks merits and is hereby dismissed. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of December 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicants**

..... **for the Respondents**

..... **Court Assistant**