REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. 1 OF 2017

LEMMY GACHECHE MIANO.....1ST APPLICANT

FRANCIS KIBE MIANO.....2ND APPLICANT

PURITY NYAGUTHII NJOGU.....3RD APPLICANT

FAITH MUCHIRU THEURI.....4TH APPLICANT

VERSUS

LYDIA NYACHANIA MAKORI.....1ST RESPONDENT

PATRICK MIANO MAKORI.....2ND RESPONDENT

DUNCAN MIANO WAMBUI.....3RD RESPONDENT

RULING

On 16th January, 2017, the applicants filed a summons in general form of the even date praying for several orders most of which revolve around what they claim to be the estate of one **Jerioth Waruguru Miano (deceased)**. As far as I understand them, the prayers are designed to protect the deceased's estate and by the same token, to restrain the respondents from intermeddling with the estate or dealing with it in any other way that tends to prejudice the applicants' interests as potential beneficiaries of this estate. They invoked **sections 45** and **47** of the **Law of Succession Act**, **cap 160** and **Rules 49** and **73** of the **Probate and Administration Rules** in their bid.

In a relatively lengthy affidavit sworn by the first applicant in support of the summons, the applicants and the first respondent are said to be the children of the deceased; the second respondent is the first respondent's son while the third respondent is one of the deceased's sons but who is deceased as well.

Amongst the assets that now comprise the deceased's estate, so the first applicant has sworn, is a parcel of land known as **Title No. Kirimikuyu/Thiu/58** which the first and second respondents are alleged to have conspired and fraudulently subdivided it into four different parcels registered as **Title Nos. Kirimukuyu/Thiu/817,818, 819** and **820**. Except for **Title No. Kirimukuyu/Thiu/819** which has been transferred and registered in the names of the first and second respondents, the rest of the parcels are registered in the name of the deceased. According to the applicants, the transfer and registration of **Title No. Kirimukuyu/Thiu/819** is the subject of a court dispute in the Environment and Land Court, being civil suit No. 170 of 2014 between the same parties.

Prior to her demise, the deceased cultivated or grew coffee apparently on the entire parcel and was registered as member number 190 of Tekangu Coffee Farmers Co-operative Society where she used to deliver the coffee. She held a bank account no. [particulars withheld] with Taifa Sacco Society Limited where the coffee proceeds would be deposited.

The applicant's case against the respondents is that they are interfering with all these assets without due regard to the applicants' interests and unless the court intervenes, they are likely to suffer in the ultimate. In a nutshell, all the applicants seek to achieve in this application is to have this court issue orders to preserve the deceased's estate pending the petition for grant of letters of administration of the estate.

The respondents opposed the summons and the first and third respondents filed separate replying affidavits to this effect. In her affidavit, the first respondent admitted that indeed **Title No. Kirimukuyu/Thiu/819** is registered in her name and that of her son and by the very fact that they own this particular property, so the first applicant has sworn, it does not form part of the deceased's estate; neither is the coffee growing on it.

As far as **Title Nos. Kirimukuyu/Thiu/817** and **Kirimukuyu/Thiu/818** are concerned, the first respondent has sworn that the first applicant has settled and developed the former parcel while the second applicant possesses the latter parcel though he does not physically occupy it. She has admitted, however, that these parcels of land form part of the deceased's estate.

The third respondent's replying affidavit is largely similar to that of the first respondent save that he added that **Title No. Kirimukuyu/Thiu/820** was registered in his name and not in the name of the deceased as suggested by the applicants. Accordingly, this parcel of land does not also form part of the deceased's estate.

Besides filing replying affidavits to oppose the application, the respondents also filed a preliminary objection in which they contended that the applicants have no *locus standi* to institute the proceedings herein because they have not obtained the grant of letters of administration in respect of the deceased's estate. They also contended that the issues in this summons are the same issues that are pending for determination in the **Environment and Land Court in Civil Suit No. 170 of 2014** at Nyeri and thus this court has no jurisdiction to entertain them.

The contestants filed and exchanged written submissions in support of the opposite positions they have taken on the issues at hand. Having considered these submissions, I found it imperative to address first, the preliminary point of whether the applicants have the necessary *locus standi* to lodge this cause.

According to the respondents, the furthest the applicants could go, was to make a report to their local chief apparently of the location in which the estate of the deceased is located, if at all any person or persons including the respondents are intermeddling with the estate. Without letters of administration, so the respondents have argued, the applicants cannot not hold themselves out as protecting or preserving the estate of the deceased. In this submission, counsel for the respondents invoked **sections 45 and 46** of the **Law of Succession Act**, cap 160 which in his view, specifically provides for the category of persons whom the law authorises to protect a deceased person's estate; the applicants, according to the learned counsel, do not fall into this category of people. He cited the High Court decisions in **Meru Succession Cause No. 223 of 2008, Joyce Munyungu versus Isaac M'barui & Others and Re Katumo & Another (2003) 2 EA 509** for these propositions. In the former decision, Ouko, J. as he then was, held that an intermeddler is answerable to the rightful executor or administrator and that where a grant has not been issued, **section 46** of the Act places the responsibility to preserve the estate on the police, chiefs or administrative officers. Nambuye, J. as she then was, similarly held in the latter case, that **section 46** of the Act gives power to administration officers to protect a deceased person's estate. The learned judge held further that the Act does not have a provision where a named beneficiary can move in and seek to protect the estate in the absence of a grant of representation. Again, in **Nairobi High Court Civil Case No. 111 of 2004** (OS) Nyamu, J., as he then was, ruled that potential beneficiaries have no standing to bring a suit in respect of a deceased person's estate if they have not obtained letters of representation.

The applicants' response to these submissions was that these decisions are of little relevance to their case and should be so distinguished. According to them, they have made out a clear case of intermeddling and as beneficiaries of the deceased's estate they have every right to seek its protection.

It is common ground that the deceased died sometimes in November, 2016 and, as far as I can gather from the applicants' and the first respondent's affidavits, the deceased had some properties, moveable or immoveable, which ordinarily would comprise her estate. The extent of this estate is, however, hotly contested but whatever the argument that carries the day, there is no doubt that the applicants have lodged this summons on the presumption that the deceased had property which has to be preserved pending the grant of letters of administration. It appears from the available material before me that the deceased died intestate and hence, unless there is any other evidence to the contrary, the administration of her estate would be subject to intestacy provisions of the Law of Succession Act which came into force long before the deceased's demise. **Section 2** of that Act states as follows:

> ***2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.***

Section 53 of the Act provides for succession, testate or intestate, to a deceased person's estate; in essence it provides that such succession is subject to the sanction of the court, which only can authorise one do deal with the estate. It says: -

> ***53. A court may –***
>
> > ***(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –***
> >
> > > ***(i) probate of the will to one or more of the executors named therein; or***
> > >
> > > ***(ii) if there is no proving executor, letters of administration with the will annexed; and***
> >
> > ***(b) if and so far as there may be intestacy, letters of administration in respect of the intestate estate***.

For avoidance of doubt, the Act in section 45 thereof prohibits dealing with a deceased person's estate without the authority of the court. Any such dealing which is short of the court's sanction amounts to intermeddling; intermeddling not only attracts penal sanctions against the intermeddler but it also requires him to account for any loss that the estate may have suffered as a result of the intermeddling. The section says: -

> ***45. (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.***

As the children of the deceased and, subject **section 66** of the Act as read with **rules 26 and 27** of the **Probate and Administration Rules** which provide some guide on whom the grant should be made, the applicants have every right to petition for grant of letters of administration intestate to administer and preserve their mother's estate. Such a petition would have been, in my humble view, the appropriate forum in which the questions which the applicants have raised in this summons would be determined. I have scoured through the applicants' application and the submissions by their learned counsel but I have not found any reason why they opted not to take the initiative and set in motion the appropriate process for grant of letters of administration of the deceased's estate.

Whatever their reason might be, I would agree with the learned counsel for the respondents that it is not in order for the applicants to simply file a summons in general form without a petition and seek issue of orders relating to the deceased's estate when they have not, at the very least, been authorised as by the law provided, to represent the deceased.

I must, however, hasten to note that it is quite possible that the applicants have a valid point that the deceased's estate is being wasted and there is an urgent need to protect it. If that be the case, it cannot be right, as counsel for the respondents urged, that all that the applicants could do in such circumstances is to report to the chief or other administration officers of such wastage or intermeddling. I do not understand section 46 of the Act to which counsel was alluding to say so. My appreciation of this provision of the law is that if it comes to the attention of a police or administrative officer that somebody has died, most probably away from his last known place of residence, then it is incumbent upon that officer to inform the chief or assistant chief of the area from which the deceased hails of this death. The reason for informing the chief or his assistant is so that he may take the necessary steps to ascertain the deceased's property and preserve it and also establish if there is any person who may have an interest in the property or its administration.

The fact that a report has to be made to the chief or his assistant or any other administration officer does not thereby deprive the court of its 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"* as provided under section 47 of the Act. As a matter of fact, when I consider this section alongside sections 2, 45 and 53 of the Act which I have already referred to, I cannot help but conclude that it would, in my humble view, be tantamount to abdication of its solemn duty to ensure due administration of and succession to a deceased person's estate in accordance with law if, in the face of a genuine concern of intermeddling or other forms of wastage, this court would simply fold its hands and tell a litigant, in particular a potential beneficiary of such an estate, who approaches it for its intervention "go and report to the chief or his assistant". If that were the case, it should have been so stated in clear and unambiguous terms.

The trouble with the applicants is not that they approached the court when they should have gone to the chief in whose jurisdiction the estate lies to ventilate their grievances and for the necessary interventions; the deficit in their application is the manner and the capacity in which they approached the court. They ought to have sought grant of letters of representation, even if the grant was to be restricted to filing suit for preservation of the estate only. Unfortunately for them, these deficiencies are fatal to their application to the extent that I have to rule that it is misconceived. Accordingly, I uphold the respondent's preliminary objection and in the same breath I strike out the applicants' summons dated 16th January, 2017 with no order as to costs.

Dated, signed and delivered in open court this 5th May, 2017

Ngaah Jairus

JUDGE