REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2243 OF 2012

(CONSOLIDATED WITH SUCCESSION CAUSE NO. 1222 OF 2013)

IN THE MATTER OF THE ESTATE OF A M K - (DECEASED)

RULING

1. The summons for determination is dated 17th March 2015. It seeks various orders, among them;-

a. ***That half of the funds held by Dr. Frank Kamunde Mwongera out of the sale of Kajiado/Kaputiei North/ [particulars withheld] and [particulars withheld] be deposited in court;***

b. ***That school fees arrears for the minor S C for the current school term be paid out of the money to be deposited in court by Dr. Mwongera; and***

c. ***That the court orders continuous provision of school fees for the minors S C and I K out of the estate during the currency of the instant matter and in any case pending distribution of the estate.***

2. The said application is predicated on the grounds set out on the face of the summons, as well as on the affidavit sworn in support by the applicant, R C.

3. The applicant avers that she had two (2) children with the deceased, born in 1998 and 1999, respectively. After the deceased died on the responsibility of raising the children fell solely on the applicant. She avers to be in financial difficulties, which is now impacting on the children's education. She fears that it may take a while before the estate is distributed due to the numerous pending applications challenging the grants of representation. She proposes that the two minors be provided for out of the estate of the deceased, at least so far as their education is concerned. She specifically targets funds that are said to be held by Dr. Mwongera. Dr. Mwongera is said to have had jointly acquired certain immovable assets with the deceased. He then sold the said assets after the demise of the deceased. She asserts that the deceased was entitled to one half of the sale proceeds, and prays that that one half share should be deposited in court for safe-keeping.

4. She has attached some documents to her affidavit in support of her case. There are two certificates of birth in respect of the two children, S and I, to show that they had been sired by the deceased. There are school documents as evidence that they are in school and that they both have school fees arrears. There is also letter from Family Bank to the applicant advising her that her loan was in arrears.

5. The application was served on both the executor of the will of the deceased and on Dr. Mwongera. Both have filed their respective responses. The executor filed grounds of opposition

dated 16th April 2015, while Dr. Mwongera filed a replying affidavit sworn on 28th April 2015. He also filed a list and bundle of authorities.

6. The executor argues in his grounds of opposition that the applicant has no legal standing to bring the application on behalf of the estate. He further states that the application is a design to obstruct and undermine the quicker determination of the matter. He asserts that the applicant has not accounted for the moneys she previously received unlawfully from the estate, neither has she justified the claim for support of the children's education.

7. On his part, Dr. Frank Mwongera explains his relationship with the deceased and what he knows about his family, in terms of his wife and children. He specifically mentions that the deceased had had a relationship with the applicant, which produced a child called S C, but states that the deceased had told him that he was not the father of I K. Although the deceased had made a will appointing him as one of the executors, he had renounced probate.

8. In the matter of Kajiado/Kaputiei North/ ***[particulars withheld]*** and [***[particulars withheld]***], he states that he had acquired the same jointly with the deceased. The ownership was a joint tenancy, and he argues that following the demise of the deceased, the former's interest united with his and he became entitled to dispose of the property as sole proprietor. He disposed of the two parcels to a Michael Kiarie, but the applicant brought in a mob that prevented the purchaser from taking possession, demanding to be paid a certain amount of money on the grounds that she had had a child with the deceased. He avers that the applicant used strong arm tactics to get him to pay her a sum of Kshs. 2,975,000.00. He states that the payment was not lawful for a grant of representation had not yet been made at the time and that the said payment amounted to intermeddling with the estate.

9. Dr. Mwongera has attached several documents to his affidavit. There is an agreement of sale dated 10th September 2011 between him and Mr. Kiarie in respect of the two parcels of land. There is also a letter dated 27th October 2011 from him to the applicant indicating that he had instructed the buyer to pay the applicant Kshs. 2,975,000.00. There are also copies of a bundle of cheques drawn on the account of M/s Premier Realty in favour fo the applicant. Finally, there is a settlement and release agreement executed on 27th October 2011 between the applicant and Mr. Kiarie in respect of the Kshs. 2,975,000.00.

10. I note that there is no response on record to the affidavit by Dr. Mwongera.

11. The application was placed before Muigai J, under certificate of urgency on 19th March 2015. It was certified urgent and the parties were directed to obtain hearing dates on priority. The application was argued before me on 29th April 2015. Miss Ng'ang'a for the applicant submitted largely on the facts as set out in the affidavits filed in the matter, and so did Mr. Masese for Dr. Mwongera and Mr. Mugambi Mungania for the executor.

12. The application is founded on section 47 of the Law of Succession Act and rules 49, 58(3) and 73 of the Probate and Administration Rules. Section 47 of the Act lays out the jurisdiction of the High Court in probate matters, which can be delegated to the resident magistrates by the Chief Justice in accordance with the proviso to the said provision. Rule 49 of the Probate and Administration Rules provides for applications that are not otherwise provided for under the rules, while rule 58(3) deals with titles and cause numbers of proceedings. Rule 73 of the Probate and Administration Rules saves the inherent power of the probate court.

13. The law cited does not have clear provisions on the circumstances under which funds, which are considered to belong to the estate, are to be deposited in court and how they are to be dealt with thereafter. The absence of such provisions no doubt leaves the court with wide discretion to make such orders as may be necessary for the ends of justice.

14. Whether the orders sought are available for granting is dependent on whether the property in question, that is to say Kajiado/Kaputiei North/ ***[particulars withheld]*** and [***[particulars withheld]***] or the proceeds of sale therefrom, formed part of the estate of the deceased. The applicant argues that the same is estate property, while Dr. Mwongera argues that it is not.

15. I have perused the petitions for grants of representation filed in the two causes. In **HCSC No. 2243 of 2012**, filed by the applicant, the two parcels are listed in the schedule of assets as forming part of the estate of the deceased. In the petition filed by the executor in **HCSC No. 1738 of 2013** the two assets are not listed in the schedule. Curiously, the will the subject of the petition disposes of the two assets in Clauses 2 and 4 thereof respectively. At confirmation of the two grants, the two assets were presented as available for distribution and were accordingly confirmed for distribution in the manner proposed in the applications. Both sides therefore treat the two parcels of land as forming part of the estate of the deceased.

16. Dr. Mwongera asserts in his affidavit of 28th April 2015 that the two parcels of land do not form part of the estate. He appears to rely on the doctrine of *jus accrescendi* or survivorship, which holds that property held in joint tenancy automatically passes to the surviving joint tenant in the event of the death of the other tenant. Curiously, he has not attached to his affidavit copies of the title deeds in respect of the two parcels of land nor search certificates to demonstrate that he was indeed registered with the deceased as joint tenants. None of the documents attached to his affidavit are in support of this central plank of his case.

17. I have taken time to peruse through the documents lodged in both cases to establish whether copies of the title deeds in respect of the two parcels of land or search certificates are anywhere exhibited. I have, in the affidavit of the applicant sworn on 12th August 2014 and filed in court on 13th August 2014 in support of the summons for revocation dated 12th August 2014 in **HCSC No. 1222 of 2014**, come across a copy of a green card in respect of Kajiado/Kaputiei North/ ***[particulars withheld***]. It reflects that on 9th July 1998 Dr. Mwongera and the deceased were registered as joint proprietors of the said property. There is a copy of a search certificate dated 28th September 2011 in respect of the same property in the replying affidavit of the applicant filed in court on 17th October 2014 in **HCSC No. 2243 of 2012**. According to the search certificate Dr. Mwongera and the deceased were registered on 9th July 1998 as the joint proprietors of the said property – Kajiado/Kaputiei North/ ***[particulars withheld]***.

18. I have not in both records come across any document relating to the registration of Kajiado/Kaputiei North/***[particulars withheld]*** – neither copy of a title deed nor search certificate nor green card. I have noted that Dr. Mwongera's averment as to the fact of joint tenancy in his affidavit of 28th April 2015 has not been contested by the applicant. The executor in his various affidavits that are on record acknowledges the co-ownership, but appears to assert that the tenancy in question was not joint but in common.

19. From the material before me, it is not in doubt that the two parcels of land were registered under the Registered Land Act, Cap 300, Laws of Kenya, now repealed. The law on joint tenancies and tenancies in common is stated in sections 118 and 119, respectively.

20. Section 118 states:-

> ***"If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register."***

Section 119 states that:-

> ***"(1) If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of***

the grant, shall be entitled to be registered by transmission as proprietor in place of the deceased with the addition after his name of the words "as executor of the will of … deceased" or "as administrator of the estate of deceased," as the case may be.

(2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission-

(a) any trustee to the personal representative;

(b) any surrender of a lease or discharge of a

charge by the personal representative.

(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate of the deceased or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor."

21. Dr. Mwongera and the deceased were registered, at least in respect of Kajiado/Kaputiei North/ ***[particulars withheld]*** where there is documentation in the record, as joint proprietors. The said property therefore is subject to section 118 of the Registered Land Act. Upon the death of the deceased the Land Registrar was obliged, by virtue of section 118, upon being satisfied as to the said death, to delete the name of the deceased from the register. Such deletion no doubt left Dr. Mwongera as the sole proprietor of the said property. Going by that provision there should not be any contest that following the death of the deceased Dr. Mwongera became the sole proprietor of Kajiado/Kaputiei North/ ***[particulars withheld]***. The same case would apply to Kajiado/Kaputiei North/ ***[particulars withheld]*** should it turn out that the registration details were similar.

22. As indicated in paragraph 19 above, the Registered Land Act has been repealed, by the coming into force of the Land Act 2012 and the Land Registration Act 2012. The provisions in sections 118 and 119 of the Registered Land Act are reproduced with minor alterations in sections 60 and 61 of the Land Registration Act, 2012.

23. For avoidance of doubt, sections 60 and 61 of the Land Registration Act state as follows-

"60. If any of the joint tenants of any land, lease or charge dies, the Registrar, on proof of the death, shall delete the name of the deceased tenant from the register by registering the death certificate."

"61.(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative, shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of … deceased" or " as administrator of the estate of deceased," as the case may be.

(2) Upon confirmation of a grant and on production of the grant, the Registrar may, without requiring the personal representative to be registered, register by transmission-

(a) any trustee to the personal representative;

(b) any surrender of a lease or discharge of a

charge by the personal representative.

(3) In this section, "grant" means the grant of probate of the will, the grant of letters of

administration of the estate of the deceased or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor."

24. From the foregoing I have no hesitation in finding that Kajiado/Kaputiei North/ ***[particulars withheld]*** became the property of Dr. Mwongera by the principle of survivorship or *jus accrescendi* following the death of the deceased. Consequently, the said property does not form part of the estate of the deceased. There is therefore no basis for grant of prayers 2, 3 and 4 of the application dated 17th March 2015 as it relates to the said Kajiado/Kaputiei North/ ***[particulars withheld]***.

25. No documents were placed before me regarding the registration particulars of Kajiado/Kaputiei North/ ***[particulars withheld]***. However, from the averments in the various afidavits of the executor, it is plain that the registration details for the latter property are similar to those in Kajiado/Kaputiei North/ ***[particulars withheld]***. In the absence of documentary proof, I am however reluctant to hold that the principle of *jus accrescendi* applies to Kajiado/Kaputiei North/ ***[particulars withheld]*** in favour of Dr. Mwongera. However, I do not think that the orders sought in prayers 2, 3 and 4 of the application dated 17th March 2015 ought to be granted relating to Kajiado/Kaputiei North/ ***[particulars withheld]***.

26. The disposal of prayers 2, 3 and 4 of the application leaves me with prayer 5, regarding provision of school fees for the two children of the applicant out of the estate.

27. From the material before me, the two children in question are treated by both sides as the children of the deceased, whether he sired them or not. They are listed in both petitions as survivors of the deceased. The disputed will likewise names them as the children of the testator and makes provision for them. There is also documentation relating to the **Nairobi Children's Court Case No. 2 of 2002** and **Milimani CMCCC No. 1839 of 2002** where the deceased swore affidavits expressly acknowledging the two children as his.

28. The only issue for me to determine is whether they should be provided for out of the estate of the deceased. There is ample material before me demonstrating that the said children depended on the deceased during his life time and that he used to provide for them. It follows naturally that after his demise the said children ought to be provided for out of his estate.

29. I am conscious of the fact that parental responsibility is shared. The deceased had his part to play in the lives of the two children, and so did the applicant. The law on this is notorious. The effect of this is that the estate should absorb a portion of the parental responsibilities while the rest of the responsibilities are to be borne by the applicant.

30. Concern was raised about depletion of the estate should the orders relating to payment of school fees be made. There was also concern that the two children might benefit overly from the estate to the detriment of the other survivors of the deceased. Whatever expense the estate incurs with respect to the maintenance of the two children should obviously be taken into account ultimately at the distribution of the estate.

31. In the end the orders that I am disposed to make on the disposal of the application dated 17th March 2015 are as follows-

a. **Prayers 2, 3 and 4 of the application are dismissed;**
b. **Prayer 5 of the application is allowed in the following terms:-**

   i. **that the executor, shall provide school fees for the two children – S C and I K – out of the estate of the deceased;**
   ii. **that the applicant shall meet all the other needs of the children; and**
   iii. **that the order in (i) shall apply as from the date of this ruling; and**

iv. **that any current outstanding fees balances or arrears are to be settled by the estate; and**

c. **Each party to bear their own costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of Ms. Ng'ang'a advocate for the Applicant.

In the presence of Mr. Nabua for Mr. Nasese advocate for Dr. Mwongua

Mr. Mugambi Mungania for Executor