



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MISC. APPLICATION NO. 10 OF 2011

ANTHONY M. MULEKYO ADVOCATESAPPLICANT

VERSUS

ESTATE OF JOHN MBITHI MASIKA (DECEASED).....RESPONDENT

R U L I N G

1. The application before me is dated 15th April 2015. It is brought by Renee Mbithi Masika, one of the seven beneficiaries of the Estate of John M. Masika (deceased). In the main she seeks orders that:

i. The proceeds due for distribution to the beneficiaries of this estate arising from the sale of L.R. Mavoko/12715/620, be distributed in accordance with terms No. 1 & 5 (1) and (ii) of the consent dated 4th September 2009 and filed in HCSC No. 748 of 1996 Estate of John M. Masika (deceased) on 5th October 2009.

ii. Erick Masika does indicate whether he intends to retain the house he is currently residing in, being Nairobi Block60/157 and in turn forego and/or pay a sum equivalent to the value of the house.

iii. The value of the house No. Nairobi Block 60/157 be agreed upon, or ascertained by a valuer to be agreed upon or appointed by the Court.

iv. Costs of this application be borne by the estate.

2. The application is premised on grounds that by a consent filed on 5th October 2009 the parties agreed on the distribution of all the deceased's assets among them, L.R. MAVOKO/12715/620 and Nairobi Block 60/157 at Moi Estate Langata, and gave Eric Masika the option of retaining Nairobi Block 60/157 which he was and still occupies. That Eric Masika though staying in Nairobi Block 60/157 at Moi Estate Langata, is yet to give his indication on whether he wishes to retain the said property or the same will revert to the estate.

3. The Applicant alleges that the sale of L.R. MAVOKO/12715/620 is at a very advanced stage and all the beneficiaries will soon get the proceeds they are entitled to. That it is only fair and just that the tenets of that agreement be enforced to avoid some of the beneficiaries benefiting more than others from the deceased's estate.

4. The Applicant filed a supporting affidavit dated 15th April 2015, and deponed that by a consent filed on 5th October 2009, the parties agreed on the distribution of all the deceased's assets among them L.R. Mavoko/12715/620 and Nairobi Block 60/157 at Moi Estate Langata and by so doing gave Erick Masika the option of retaining Nairobi Block 60/157 which he was and still occupies, on condition that the house be valued and in turn Eric fore goes and/or pay a sum equivalent to the value of the house.

5. She also averred that Eric Masika though staying in Nairobi Block 60/157 is yet to give his indication on whether he will take Nairobi Block 60/157, or let it revert to the estate. That the sale of L.R. Mavoko/12715/620 is at a very advance stages and all the beneficiaries will soon get the proceeds they are entitled to. As such she verily believes that it is only fair and just that the tenets of consent be honoured and enforced as against the parties to avoid a case of unfair benefit from the deceased estate by a beneficiary over and above all others.

6. Grounds of opposition were filed to this application by five out of the seven beneficiaries being Diana Waeni Mangeli, Erick Masika, Agnes Ndunge Mbithi, Florine Ngali Mbithi and Edward W Masika.

7. The opposition is premised on grounds that the Applicant has not been enjoined to these proceedings and therefore lacks competence and standing to lodge the application in question. That the issue of distribution of the proceeds of sale of the suit property, L.R. No.12715/620, was determined by a consent recorded on 10th July 2014 and the application is therefore *res judicata*.

8. The application is similarly said to be frivolous and vexatious on grounds that prayers 1 and 2 thereof had already been agreed upon in the consent dated 4th September 2009 in the primary file, NBI HCSC No.748 of 1996, and has not been reviewed. It is therefore *res judicata* and cannot be re-adjudicated in the present application.

9. The Respondents contend that there is therefore no legal basis for the application, and more particularly for the applicant to demand that a valuer be agreed upon or be appointed by this court. That similarly, there is no basis for the cost of the application to be borne by the estate of the deceased since it is the Applicant and the administrator who are running away from the obligation to give an account of the sale of the suit property and realized proceeds as directed by this court on 10th July 2014.

10. Mr. Makumi learned counsel for the Applicant reiterated the uncontested facts of the cause in his written submissions filed on 2nd July 2015. He specifically stated that the appellant is one among the seven children of the deceased to whom this proceedings relate and has been named as the 4th child. That the deceased's estate was distributed in HCSC No, 748 of 1996 Estate of John M. Masika (deceased). He argued that by a consent dated 4th September 2009 and filed in Court on 5th October 2009 the parties agreed on the distribution of all the deceased's assets, among them L.R. Mavoko/12715/620 and Nairobi Block 60/157 at Moi Estate Langata.

a) Mr. Makumi urged that Eric Masika was given the option of retaining Nairobi Block 60/157 which he was and still occupies to date, with the condition that the house be valued so that he would either forego and/or pay a sum equivalent to the value of the house. After recording the consent the estate did not pay their then advocates who later initiated these proceedings and forced the sale of L.R. Mavoko/12715/620 as earlier agreed on. Part of the proceeds to this estate has gone to clearing the estate liabilities.

11. In specific response to the grounds of opposition and in particular the first ground Mr. Makumi argued that although it is true that Renee Mbithi Masika has not been formally enjoined to these proceedings her *locus standi* is that this proceedings relate to her late father's estate to which she is a NAMED beneficiary. As such she is as much of a beneficiary as those (formerly) enjoined to it. That the other siblings enjoined themselves (formally to these proceedings) so as to have a say in the dispute with the firm of Anthony M. Mulekyo Advocates which was then pending. He contends that whether they enjoined themselves to these proceedings or not, they would still have a say in the division of L.R.

Mavoko/12715/620 (L.R. No.12715/620). What they would not have a say in is the dispute with the firm of Anthony M. Mulekyo Advocates which dispute has long been settled.

12. Mr. Makumi submitted that as such, formally enjoining the Applicant to this cause would be a wasted effort since the dispute with Anthony M. Mulekyo Advocates has long been settled. The only issue now before the Court relates to an issue that arose in HCSC No. 748 of 1996 Estate of John M. Masika (deceased) to which she has an automatic right to respond on.

13. Of course the other position would be for her to apply in HCSC No. 748 of 1996 Estate of John M. Masika (Deceased) through her new advocates. Since her current advocates did not participate in those proceedings they would be entitled to instructions fees based on the value of the estate. Such a position would only serve to burden the estate which *per se* has no pending dispute and has been substantially distributed.

14. In response to the second ground of opposition counsel urged that although it is true that the issue of distribution of the deceased estate is *resjudicata*, Erick Masika's decision on what he will do is not. That since his decision will determine how the proceeds from the sale of L.R. MAVOKO/12715/620 will be distributed, it is necessary that the same be made, more so with some urgency as the administrator's advocate need not hold the estate's money more than he has to.

15. In reply M/s Musinga learned counsel appearing for the Respondent and four other beneficiaries filed written submissions on 23rd July 2015 and set out the chronology of events that have transpired in this cause. Counsel pointed out that: Misc. Civil Applications Nos. 9 and 10 of 2011 were instituted by two previous firms of advocates: in NBI HC P&A No. 748 of 1996. Eventually, the title deed comprising part of the deceased's estate, (L.R. No. 12715/620), was surrendered in Court, and this court ordered that the property be sold to settle the legal fees of the two firms of advocates above.

16. On 8th May 2014, this court ordered that the property above be sold for not less than Kshs57 million and the proceeds there from be used in the 1st instance to settle the advocate's costs. At that time, the envisaged costs were for the two advocates above, and for M/s. J. Makumi who was representing the administrator and M/s. Musinga & Co. who was representing five of the beneficiaries. On 5th June 2015, the administrator's advocates reported that the sale was ongoing and by consent, the 5 beneficiaries represented by M/s. Musinga & Co. Advocates were enjoined into the proceedings as interested parties.

17. On the 10th July 2014, the Court, by consent of parties, allowed prayers 2, 3 and 4 of the Notice of Motion by the interested parties dated 2nd July 2014. The net effect was that the net proceeds of sale of the property above, of which the 6 beneficiaries/interested parties would be entitled to, would be released through M/s. Musinga & Co. Advocates for onward transmission to each and every one of them.

18. On 18th September 2014 in Court, Mr. J Makumi, the administrator's advocate, confirmed that part of the sale price, being 20% thereof, had been paid by the vendor and M/s Mulekyo Advocates and M/s Ojukwu Bosire Advocates had each been paid Kshs.2,529,862/= as legal fees payable by virtue of the two causes now before this Court. He also stated that the auctioneer had been paid though he never stated the figure. The Court then ordered that the title deed be released to the administrator's advocates, M/s Makumi Advocates, and further that there be a mention on 23rd October 2014 to present the file, NBI HC P&A 748 of 1996.

19. In the premise Counsel urged that the application lacked merit for reasons that M/s Renee Mueni Mbithi lacks the competence to lodge it in these proceedings, without first being enjoined to these proceedings as the interested parties had been. That she also lacks the capacity to bind the estate for costs of the application; hence the prayer that costs be borne by the estate has no legal basis. That prayer No.1 is *res judicata*, frivolous and vexatious as the beneficiaries had, *vide* the consent dated 4th September 2009 in NBI HC P&A No. 748 of 1996, settled the issue. In a sense, the beneficiaries had agreed on the mode of distribution hence that prayer was not needed.

20. That prayer No. 3, in which it is prayed that Erick Masika should indicate whether or not he elects to retain Nairobi Block 60/157 similarly lacks merit because a subject of distribution which can only be canvassed in the main file, NBI HC P&A No. 748 of 1996, which for expediency, can be brought to this Court as previously ordered on the 18th September 2014; that issue had also been dealt with at clauses 5(i) and (ii) of the consent dated 4th September 2009 in NBI HC P&A No. 748 of 1996 as it gives Erick Masika the right, without being directed by the Court, to elect whether or not to retain Nairobi Block 60/157 and how to deal with either option vis a viz the proceeds from the sale of the suit property now in issue.

21. That prayer No. 4 had also been agreed upon at Clause 4 of the same consent dated 4th September 2009 in NBI HC P&A No. 748 of 1996 as it allows all family members to agree on a valuer at the cost of the estate. Lastly that the applicant has no lawful authority to bind the estate for costs, and that the application was unnecessary since all the prayers sought had been dealt by the consent dated 4th September 2009 in NBI HC P&A No. 748 of 1996.

22. I have perused the proceedings in Misc. Civil Application No. 9 and 10 of 2011 and note that there is an order dated 18th September 2015, in Misc. Civil Application No. 10 of 2011 directing that there be a mention on 23rd October 2014, during which the principal succession cause would be brought up together with the Misc. Civil Application files now before the court for directions. Without complying with this order the Applicant herein filed the instant application dated 15th April 2015.

23. After a careful consideration of the application the supporting affidavit together with the grounds of opposition and the rival submissions, I find that the application is lacking in merit. Renee Mbithi being a beneficiary of the estate has every right to participate in the succession cause in Nbi HC P&A No.748 of 1996. Indeed she has not been enjoined in Misc. 10 of 2011 which in any case has long been determined. She has also not been appointed the Administratrix of the estate and cannot purport to usurp the duties of the legitimate Administrator by filing application on behalf of the Estate. Her frustration should be directed at the Administrator if she is of the view that he is not moving with speed to distribute the estate.

24. On the other hand it is the duty of the Administrator to move the court appropriately if he finds that Erick Masika has become an impediment in the distribution of the Estate. The Applicant has not filed a protest to the mode of distribution or summons for the revocation of the grant issued to the Administrator. She admits that a consent was entered into by all beneficiaries in the cause and filed on 4th September 2009 in Succession Cause No. 748 of 1996 regarding the distribution of the Estate.

25. In the premise the court finds that the application dated 15th April 2015 is lacking in merit and orders as follows:

- i) The application is accordingly dismissed.
- ii) The court hereby orders the Administrators of the Estate to move with alacrity and comply with the orders of Hon. Muchelule J, granted on 18th September 2014 in Misc. Civil App No. 10 of 2011.
- iii) In any case the orders of Hon. Muchelule J be complied with within the term beginning on 15th September 2015.
- iv) Costs be in the cause.

SIGNED DATED and DELIVERED in open court this 5th day of **October 2015**.

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L. A. ACHODE

JUDGE

In the presence of for the Applicant

In the presence of for the Respondent