



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2623 OF 2013

IN THE MATTER OF THE ESTATE OF HELENA WANGECHI NJOROGE (DECEASED)

RULING

1. This matter relates to the estate of Helena Wangechi Njoroge. She died on 12th April 2013 at Karen Hospital in Nairobi.
2. A petition dated 9th October 2013 was lodged herein on 11th October 2013 by one Njoroge Obadiah Kimani, in his capacity as husband of the deceased, for a special limited grant limited to the purpose of renewing the fixed duration of an account in respect of moneys held in the account in the name of the deceased. The petition was placed before me on 11th October 2013, and I allowed it. A certificate of the grant to that effect was issued on the same date.
3. On 25th March 2014 another petition, this time dated 21st March 2014 was lodged in the same cause by Njoroge Obadiah Kimani for a special limited grant for the purpose of legal proceedings with respect to the aircraft, being registration numbers 5Y-CBN, 5Y-CBS and 5Y-CAI. The petition was presented before Kimaru J. on 26th March 2014 who too allowed it. A certificate of the special limited grant to that effect was duly issued on the same date.
4. On 25th March 2014 a Summons dated 21st March 2014 was lodged in the cause to protect and get in the true property of the deceased person. It sought orders against Skylink Flight Services Limited to have the company release specified aircraft and records related thereto to the applicant, Njoroge Obadiah Kimani.
5. In the affidavit in support was sworn on 21st March 2014, he deposes to be the administrator of the estate of the deceased, who was the registered owner of the aircraft in question. The aircraft had been allegedly leased to Skylink Flight Services Ltd, who were said to have had refused to release the aircraft together with their records to the applicant.
6. He has attached to his affidavit copies of a death certificate in respect of the deceased, certificates of airworthiness of 5Y-CBS and 5Y CBN, an affidavit sworn by a person who allegedly imported the aircraft, a letter from the Assistant Chief of Ol-Keri Sublocation, a consent to the making of a grant of letters of administration and a certificate of marriage.
7. The reply to the application took the form of an affidavit sworn by Suleiman Amur Hamud, sworn on 23rd April 2014. He concedes that the aircraft in question belonged to the deceased and had been leased to the company, save for 5Y-CBN which he deposes belonged to him. He explains the circumstances under which he claimed ownership. He alleges too that the deceased and the applicant were indebted to him on repairs incurred in respect of the aircraft. He deposes that there was an existing court case, **HCCC No. 136 of 2014** over these matters.

8. He has attached copies of several documents to his affidavit. There is an agreement of sale of 5Y-CBN between him, the deceased and the applicant dated 6th February 2014. There is also a memorandum of understanding between him and the deceased on the aircraft, dated 29th September 2012. There is also an importation agreement dated 6th April 2012 between the applicant and the deceased, and pleadings in **HCCC NO. 136 of 2014** between him and the applicant relating to the same aircraft. There are also documents relating to the repair of the aircraft and a lease agreement on aircraft 5Y-CBN.
9. To the issues raised by the respondent, the applicant swore a further affidavit on 4th June 2014. The gist of his response is that the aircraft 5Y-CBN did not belong to Suleiman Amur Hamud, but it belonged to the deceased. Regarding 5Y-CBN and 5Y-CBS, he deposes that the same were bought by the deceased in a process facilitated by Suleiman Amur Hamud and Onesmus Ngunjiri Njenga. He also asserts that the claims by Suleiman Amur Hamud were unwarranted and unjustified. He has attached copies of the grant made to him on 26th March 2014 and certificates of registration of aircraft relating to 5Y-CAI, 5Y-CBS and 5Y-CBN depicting the deceased as owner thereof. There is also attached a bundle of documents on the purchase and importation of the aircraft.
10. On 9th June 2014, the respondent filed a Notice of Preliminary Objection on the grounds that the application dated 21st March 2014 was fatally and incurably defective, bad in law, frivolous, vexatious and an abuse of the court process.
11. Directions were given on 28th July 2014 that the said application and the Preliminary Objection be disposed of by way of written submissions. Both parties filed their respective written submissions. The applicant filed his on 22nd September 2014, while the respondent's submissions were filed on 7th October 2014. They were highlighted before me on 21st October 2014, with Mr. Isindu stating the case for the applicant and Mr. Osiero for the respondent.
12. The deceased in this cause died intestate. A full grant of letters of administration intestate is yet to be made, in fact it has not even been applied for. What the applicant holds are three limited grants, one issued in **HCSC No. 1645 of 2013** and the other two in this cause. One limited to accessing a bank account of the deceased, the other is for the purpose of renewing license in respect of aircraft 5Y-CBS and the last limited to filing suit.
13. The application dated 21st March 2014 is predicated on Sections 45, 79, 82 and 83 of the Law of Succession Act. Section 45 outlaws intermeddling with the estate of a dead person unless the person meddling has legal authority. Section 79 vests the property of the estate in the personal representative, that is the person appointed under the grant of representation as administrator. Sections 82 and 83 state the powers and duties of personal representatives.
14. Section 79 vests the property of the deceased in the personal representative, so that the latter can then exercise the powers set out in Section 82 and discharge the duties set out in Section 83 of the Act. It should be pointed out that the provisions in Section 82 can only be fully exercised by a substantive administrator, that is the person holding, not a limited grant, but a full grant. Likewise, the duties imposed by Section 83 are to be discharged to their fullest by the holder of a substantive grant of representation.
15. The provisions cited above ought to be read together with Section 80(2) of the Law of Succession Act. This is particularly important as the deceased died intestate. Section 80(2) of the Act states as follows-

“A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.”

16. As the deceased died intestate, any limited grant made in respect of her estate can only be of the

nature of the grant made in the event of intestacy, that is a grant of letters of administration intestate.

17. The effect of Section 80(2) of the Act is that the person appointed under a grant issued upon intestacy takes office or assumes duty as administrator with effect from the date of appointment, that is to say from the date the grant is made. A grant made in intestacy does not relate back. It does not authenticate any acts of the administrator done prior to its making. It does not legitimize anything done before its making.
18. As stated earlier, three (3) limited grants have been made in respect of the estate herein. There is the one dated 11th October 2013, which allowed the applicant to renew the duration in a fixed account. The grant obviously did not vest the aircraft on the applicant, and therefore he cannot possibly assert any authority to protect the aircraft based on that grant.
19. The grant of 11th October 2013, made in **HCSC No. 1645 of 2013**, was for the limited purpose of renewing the licence of aircraft 5Y-CBS. The said grant vested the said aircraft in the applicant for the limited purpose only of renewing its license. This means that the said grant could not be used for any other purpose. Its life ended with the renewal of the licence. It did not vest the other aircraft in the applicant for any purpose. It could not be used for the purpose of protecting or preserving all the three aircraft either, and the applicant cannot possibly assert authority to protect all the three aircraft based on the said grant.
20. The grant of 26th March 2014 was made in this cause. It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration *ad litem*. The suit envisaged to be filed on the strength of a grant *ad litem* is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defend the estate against third parties.
21. It would appear that the applicant herein obtained the grant *ad litem* of 26th March 2014 in order to prosecute a suit against Skylink Flight Services Ltd over the aircraft that is alleged to belong to the deceased. He should have filed a civil suit against the said company, instead of a summons in this cause.
22. The probate process is not designed for the handling of highly contested matters. It is not designed to be litigation as such, where one party sues another. Rather, it is a process where a cause is initiated by a person who seeks the distribution of the estate of another who has died. The process should be non-contentious, until someone challenges the status of the administrator or raises issues concerning their exclusion from the proceedings. The challenges within the cause then turns otherwise non-contentious proceedings into contentious proceedings. Contentious proceedings are however limited to disputes within the family.
23. Issues that touch on third parties would require that the dispute be handled elsewhere, in suits properly instituted. The infrastructure in the probate process is not ideal for disputes between the estate and third parties. The proper place for such disputes should be under the Civil Procedure Act, where the third party can be sued and where he can properly defend himself, and where the parties can obtain decrees that can then be enforced under the very elaborate provisions in the Civil Procedure Rules.
24. Even if it were to be held that an action can be initiated against a third party in a probate cause, and I am persuaded that that should not be the case, the grant obtained on 26th March 2014 cannot possibly clothe the applicant with authority to prosecute the application dated 21st March 2014 in view of the very clear provisions of Section 80(2) of the Act. It was a grant of letters of administration issued a day after the filing of the application, it cannot possibly relate back to the application.

25.I have said enough. The application dated 21st March 2014 is incompetent. I do hereby strike it out. The respondent shall have the costs.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE