



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1324 OF 2013

IN THE MATTER OF THE ESTATE OF

FAITH MUITA (DECEASED)

CAROLINE KIRIGO MUITA.....1ST PETITIONER/APPLICANT

ISABELLA NYAMBURA MUITA...2ND PETITIONER/APPLICANT

VERSUS

WELLMAN GROUP LTD (AKA NEW DOWN

WEALTH MANAGEMENT LTD.....1ST RESPONDENT

MIRIAM ODHIAMBO.....2ND RESPONDENT

CHARITY KINGORI.....3RD RESPONDENT

RULING

1. The deceased FAITH MUITA died intestate on 9th February 2013. She left her minor son, EDGAR KINYUA, sister, CAROLYNE KIRIGO MUITA and mother, ISABELLA NYAMBURA MUITA, as persons surviving her. On 15th August 2013 this court appointed CAROLYNE KIRIGO MUITA and ISABELLA NYAMBURA MUITA (the petitioners/applicants) to be the administrators of the estate of the deceased.
2. On 8th October 2013 the applicants filed a chamber summons against the respondents claiming Kshs.5,000,000/= on behalf of the estate. The amount, if got, was going to be available to the estate for distribution to the beneficiaries. The application was opposed by the respondents who also filed a notice of preliminary objection dated 28th October 2013 whose grounds were that:-
 - a. *the court lacks jurisdiction to entertain a suit whose subject matter is based on contract and on the provisions of the Insurance Act (Cap 487);*
 - b. *the court lacks jurisdiction to entertain the matter which is partly a contractual transaction;*
 - c. *the 1st respondent is a limited liability company capable of suing and being sued in its own name,*

- and that no application had been made to lift the veil of incorporation before joining the 2nd and 3rd respondents;*
- d. *the application was incurably defective for offending sections 3(1) and 45 of the Law of Succession Act (Cap 160); and*
 - e. *the application was an abuse of the process of the court.*

3. It should be pointed out that the chamber application sought the following orders:-

- a. *freezing of the bank accounts of the respondents;*
- b. *the respondents to deposit Kshs.5,000,000/= in a fixed deposit account in the name of the advocates for the estate, and that this should be done within three months;*
- c. *depositing into court of 28,010 sterling pounds;*
- d. *prohibiting the respondents from interfering with the estate;*
- e. *the 2nd and 3rd respondents to account for the monies being held in respect of the estate of deceased;*
- f. *the respondents be punished.*

4. From the affidavit filed by the applicants and replying affidavit by the 2nd respondent, on her behalf and that of the other respondents, it is not in dispute that the deceased was a director/shareholder of the 1st respondent. The other directors/shareholders included the 2nd and 3rd respondents. The 1st respondent had taken out a Group Life Insurance Policy for its members, who included the deceased. Under the Policy, the beneficiaries were entitled to Kshs.5,000,000/=. The deceased had nominated her minor son EDGAR KINYUA (under the guardianship of the 1st applicant and the 2nd applicant in the ratio of 80:20) to benefit from the Policy on her demise. The Policy was with the Jubilee Insurance Company of Kenya Limited. When the deceased died the amount was paid to the 1st respondent for onward transmission. On 9th July 2013 an agreement was signed between the applicants and the 1st respondent under which the 1st respondent was to transfer the Kshs.5,000,000/= to an account in the joint names of the applicants as soon as the Insurance Company paid the sum assured to it. This was before the applicants had obtained the grant. The Insurance Company subsequently paid the money to the 1st respondent, but the sum has not been remitted to the applicants. The respondent's position is that it has since calculated what was owed to the deceased and found that the deceased had liabilities (the company owed her 28,010 pounds but she owed it 33,111.31 pounds) and a decision was made to offset the difference against the sum assured (the Kshs.5,000,000/=). The applicants consider this action of offsetting the amount to be intermeddling with the estate of the deceased. It is denied that the deceased had any liabilities. They rely on **section 45 of the Law of Succession Act** which provides that:-

“no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of the deceased person.”

Free property is defined under **section 3(1)** to be the:-

“property of which the person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

5. The respondents response to the claim is contained in paragraphs 8, 9 and 10 of the replying affidavit which state as follows:-

“8. THAT I am informed by my advocates on record which advice I verily believe to be true that the Group Life Insurance Policy is not a right but a benefit that the employer advances to the employee and upon the unfortunate demise of the said employee, the Sum Assured is paid out to the employer (The Assured) for the benefit of the declared nominee.

9. THAT I am further informed by my advocates which information I verily believe to be true, that the Sum Assured being a benefit and not a right, renders it perfectly in order for the employer to deduct any amounts that the deceased employee may have owed before any balance thereof, if any, is remitted to the declared nominee(s).

10. THAT it is therefore not true that the Respondents have in anyway interfered with the estate of the deceased in any way as alleged by the Applicants/Administrators.”

6. In my view, therefore, the substantive questions that the chamber application seeks to resolve are whether the Kshs.5,000,000/= was the true property of the deceased's estate; and whether the money was subject to any liabilities that the deceased may have had with the respondents. If the 2nd and 3rd respondents' case is that they were directors of the 1st respondent who cannot legally pick its bill, that will be discussed during that hearing. To say that this is an insurance or commercial claim, or that the claim is an abuse of the process of the court, would be a red herring. It would be to trivialise what is otherwise a legitimate complaint by the applicants. This is not a matter that can be resolved by a preliminary objection as there are issues of fact and law that the court will have to concern itself with. The legitimate complaint cannot be dismissed without a hearing as the applicants are exercising the powers of an administrator as provided for under **Sections 82 and 83 of the Act.**

7. I find that the objection raised by the respondents is not sustainable and hereby dismiss it with costs.

DATED and DELIVERED at NAIROBI this 6th October 2014.

A.O. MUCHELULE

JUDGE

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