



REPUBLIC OF KENYA

High Court of Kisii

Succession Cause 100 of 2010

IN THE MATTER OF THE ESTATE OF:

GEORGE OTIENO OCHOLA DECEASED
AND

IN THE MATTER OF A/C NO.0084528544 AND A/C NO.2023211478 BARCLAYS BANK OF
KENYA HOMA BAY BRANCH BEING PART OF THE DECEASED ESTATE

AND

IN THE MATTER OF PROTECTION OF THE DECEASED ESTATE AND BENEFICIARIES

AND

IN THE MATTER OF LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

BETWEEN

ALICE AKINYI OTIENO 1ST PETITIONER/APPLICANT

VERSUS

JACKTONE SUJU ORENDE RESPONDENT

RULING

1. The 1st petitioner/applicant filed a notice of motion dated 24th November 2011 under **Rules 47, 59, 63, 73 and 76 of Probate and Administration Rules** and **section 55 of the Law of Succession Act Cap 160** seeking:-

i) *That the Honourable Court do certify this application urgent and same be dispensed with in the first instance.*

ii) *That pending the hearing and determination of this application, the Honourable Court be pleased to grant an order of Inhibition, Inhibiting the respondent to cause transfer, charge, encumbrances and/or any other dealings whatsoever, in respect of A/C No.(s) 00845228544 and A/C NO.2023211478 Barclays Bank Homa Bay Branch being part of the estate of the deceased as he is only an administrator and not a beneficiary whatsoever.*

iii) *That this court be pleased to make a declaration that JACKSON SUJU ORENDE is just an administrator and not a beneficiary of the deceased estate which part involves A/C No.(s) 00845228544*

and A/C NO.2023211478 Barclays Bank Homa Bay Branch.

- iv) *That this Honourable Court be pleased to null the administrative duties of JACKTONE SUJU ORENDE the 2nd petitioner and appoint the Deputy Registrar of this court as a co-administration as the said JACKTONE SUJU ORENDE has since caused the deceased estate to waste by taking the manager of the said Barclays Bank Homa Bay Branch to court to allow him meddle and/or misappropriate the estate of the deceased in lieu of the 1st petitioner (Alice Akinyi Otieno).*
- v) *That this honourable court be pleased to grant an order directing the Bank Manager Barclays Bank Homa Bay Branch to replace the names of Jacktone Suju Orende with the Deputy Registrar's Office as the Co-account holder A/C NO.2023211478 which the respondent has since withdraw Kshs.120,000/= and caused the said account to be blocked from accessibility of the widow and the deceased children from the proceeds thereon.*
- vi) *That the said Jacktone Suju Orende, the respondent to pay back the Kshs.120,000/= he unlawfully withdraw from the A/C NO.2023211478 after he obtained an ex parte order in Homa Bay Misc. Civil Case No.119 of 2011.*
- vii) *That this honourable court grant stay of proceedings in Homa Bay SRM, Misc. Civil Application No.119 of 2011 till the hearing and determination of this application.*
- viii) *That this honourable court to call for the said Homa Bay SRM's Misc. Civil Application No.119 of 2011 to be consolidated with this cause since all cases emanates from the deceased estate.*
- ix) *That the Honourable Court do confirm the grant in the names of the 1st petitioner/applicant and the Deputy Registrar of this Honourable Court as this would enhance the protection of the estate of the deceased and the rights of the deceased and the rights of the deceased beneficiaries as the statutory period has since expired since the grant was issued.*
- x) *That this Honourable Court be pleased to make such other and/or further orders as may be just and expedient in the circumstances.*
- xi) *That costs of this application be provided for.*

2. The above application was supported by an affidavit sworn by the 1st petitioner/applicant in which she avers that she is the only surviving widow of the deceased in this case George Otieno Ochola who was survived by 7 children all of whom are minors. She also avers that a grant of letters of administration intestate was issued to her and the respondent on 29th October 2010.

3. She further avers that upon issuance of the Grant of Letters of Administration, they were advised by the Insurance Company where deceased was an employee to open a joint bank account so that the deceased's employer could factor the deceased's benefits to such an account. The applicant and the respondent subsequently opened a joint Bank Account No. 2023211478 with Barclays Bank of Kenya Limited Homa Bay Branch. The applicant also states that before then she had a personal Account with the same bank being A/C NO.008428544. She states further that as soon as the deceased's benefits were paid into the joint account, the respondent went and withdrew a sum of Kshs.60,000/= on 20th June 2011 and that on realizing this she went to the Bank and transferred Kshs339,000/= to her personal Account for its security and to guard against the misuse or misappropriation by the respondent.

4. She further avers that the respondent vide Homa Bay SRM's Misc. Civil Case No.119 of 2011 obtained temporary orders which he used to withdraw a further Kshs.60,000/= from the deceased's estate after the same court order reverted the said monies to the joint account. The said case was pending for hearing on 2nd December 2011. The applicant contended that if the case was allowed to proceed without her participation in it, the deceased's estate would be liable to waste by people who are not beneficiaries and she prayed that the case be stayed pending the hearing and determination of these proceedings.

5. She further prays that Homa Bay SRM's Misc. Civil NO.119 of 2011 be joined/consolidated with this case since it is all about the estate and beneficiaries of the deceased. She also asks the court to bar the bank from giving information of her personal account No.0084528544. The applicant prays that the grant be confirmed and deceased's estate be distributed as follows:-

- a) *All deceased children to get equal share of the estate to be used in their school fees and general upkeep.*
- b) *That the children's share be preserved by herself and deputy registrar of this honourable court.*
- c) *That the said respondent after refunding Kshs.120,000/= should get no share of the deceased estate since he is not in any way a deceased beneficiary or dependant of the deceased.*

6. The respondent on his part filed a lengthy replying affidavit dated 19th December 2011 in which he says that the beneficiaries and survivors of the deceased estate were never listed when grant of letter of administration was issued by the honourable court. He says that the list of supposed beneficiaries is an afterthought on the part of the applicant, that Kshs.600,000 was to be disbursed to her account of which Kshs.399,000 was directed to his account which was jointly held, that the said Kshs.399,000 was to be part of his disbursements which he was entitled to as part of his expenses which he incurred pursuing this matter.

7. He further averred that the 1st petitioner/applicant fraudulently transferred Kshs.399,000 to her own personal account which he was not aware of and that at no time had he and the 1st petitioner ever talked about confirmation of grant and distribution of the deceased's estate. That as a result of the fraudulent transfer, he wrote to the bank manager stopping any further withdrawal from account and that he filed Misc. Application No.119 of 2011 before SRM in Homa Bay for court to allow him to withdraw Kshs.60,000/= being amount rightfully held as his share as co-administrator of the estate.

8. He further averred that there is no waste or cause for alarm sine the stated sum of Kshs.120,000/= was used to pay part of his expenses which he incurred in following up the deceased benefits and filing the succession cause; that miscellaneous case No.119 of 2011 should not be recalled or be consolidated with this matter which is yet to take off. It is the respondent's contention that the instant application is brought in bad faith and should be dismissed with costs.

9. The parties herein also testified. The 1st petitioner/applicant stated that she is a teacher by profession and widow of the late George Otieno Ocholla who died while working with Madison Insurance Company as an agent. That when she followed up on his benefits she was advised by Madison Insurance to take out letters of administration and since all her children were minors she was advised to have a witness. That the respondent agreed to be her witness and they got a temporary grant which was accompanied by an affidavit. She further told the court that the company paid the deceased's benefits in form of a cheque, which was deposited in a joint account and after the cheque matured they wanted to buy 4 oxen for ploughing and the respondent on convincing the whole family that he would buy the oxen he was given Kshs.60,000/=, but he never bought the oxen.

10. On realizing that the respondent had not bought the 4 oxen as agreed, she informed the bank manager of what had transpired and it was then that the bank manager agreed to transfer the balance of the proceeds to her salary account. The respondent then lodged a complaint with the bank alleging that the 1st petitioner/applicant had stolen money from the joint account, as a consequence of which the bank froze her account.

11. On 19th November 2011 when she went to check the account balance in the joint account there was only Kshs.629/= and on enquiring with the bank she was referred to Homa Bay court where she obtained proceedings and realized that the respondent and the bank manager had obtained a fraudulent order which led to withdrawal of all the money from her account. She further told the court that the respondent was her deceased husband's cousin and prayed that the court order the respondent to refund Kshs.120,000/=,

the cost of the petition and for the court to give her a full grant.

12. Under cross examination by the respondent she maintained that Kshs.60,000/= was transferred to the account of the respondent, and that she was not aware of any expenses incurred by the respondent and that she recognizes the respondent as a witness and not administrator of the deceased's estate and that he was given Kshs.60,000/= to buy cattle while Kshs.60,000/= was for her children.

13. The respondent on his part told the court that on 13th February 2010 the 1st petitioner/applicant went to him and asked him to be one of the administrators of her deceased husband's estate; that on 29th October 2010 they were issued with a letter of administration and on 20th April 2011 they received 2 different cheques in their joint names totaling up to Kshs.110,000/=. He further told the court that because of the 1st petitioner/applicant's personal needs the 2 cheques were deposited in her personal account with Barclays Bank limited. That on 5th May 2011 they opened a joint account and on 10th June 2011 they got another cheque of personal accident policy for Kshs.999070/=. That on 17th June 2011 they withdrew Kshs.660,000/= and the 1st petitioner took Kshs.600,000/= and himself Kshs.60,000/= for travelling cost and accommodation to and from Nairobi.

14. He further told the court that on 30th June 2011 the 1st petitioner/applicant went to Barclays Bank Homabay and transferred Kshs.339,000/= from the joint account and on discovering the above transfer, he saw the manager who froze the 1st petitioner/applicant's account. He told the court that he wants the children of the deceased to get their rights and to be paid Kshs.132,800/= as balance of expenses incurred and to be released from being administrator after payment is made. On examination by court on what scale he used to arrive at a sum of Kshs.132,800/= he stated that he went to Nairobi many times though he did not have documents to support this claims.

15. On cross examination by the 1st petitioner/applicant he maintained that he was an administrator and since the 1st petitioner was busy he did the work; that the 1st petitioner owed him money for expenses; that he withdrew Kshs.60,000/= from the joint account as part of his agreed costs. According to the Replying Affidavit, the respondent said he incurred costs and that he did not know why the bank has not sued the 1st petitioner for forgery nor does he know the name of the bank officer with whom she forged the transfer of the funds from the joint account to her personal account.

16. After the close of oral evidence the 1st petitioner/applicant obtained leave to file further affidavit where she admitted that the 2nd respondent was an administrator and not a beneficiary of the account. She also said that the respondent was not involved in tracing and/or following up the deceased benefits and did not go to Madison Insurance head office in Nairobi. She attached a letter by one Mr. Mathias G. Sabala the Head of Underwriting & Claims at Madison Insurance Company.

17. The respondent replied to the further affidavit and maintained that he took responsibility of tracing the deceased's benefits in Nairobi Head Office of Madison Insurance until claims were paid and he only wants the expenses he incurred tracing the claims paid. From the above facts the following are the issues of determination.

- *What is the role of an administrator? Does the respondent deserve to be compensated for the expenses incurred, if any?*

18. With regard to the first issue of intestacy a grant of letters of administration must be made to more than one person where a continuing trust arises, that is where the deceased is survived by a minor child or children by virtue of **section 58 of the Law of Succession Act**. This is intended to safeguard the interests of the minor children in the estate of the deceased.

19. Secondly, the duties of an administrator are well spelt out under **section 8 of the Law of Succession Act** which include:-

a) ----

c) *Within six months from the date of the grant to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto the date of the account.*

m) to produce to the court, if required by the court either of its own

motion or on the application of any interested party in the estate, a

full and accurate inventory of the assets and liabilities of the

deceased and a full and accurate account of all dealings therewith up

to the date of the account.

20. It is an undisputed fact that the 1st petitioner/applicant was the wife to the deceased (who died intestate) and she had minor children. She could not take out grant of letters of administration alone pursuant to **section 58** of the **Law of Succession Act**. The respondent was then appointed as a co-administrator by the family of the deceased (in his capacity as a cousin to the deceased). The 1st petitioner/applicant has adduced evidence as to how the respondent has abused his position as a co-administrator of the deceased estate by squandering the deceased estate and by virtue of the letter dated 15th May 2012 produced by the 1st petitioner/applicant from one Mathias G. Sabala in his capacity as the Head of Underwriting and Claims in Madison Insurance which letter clearly states in paragraph 4 that they have never asked the 1st petitioner/applicant to pay anyone on behalf of the Insurance Company or in following up the claim. In addition this court notes that the respondent did not produce any receipts to back up the allegations of the expenses he allegedly incurred while pursuing the recovery of the deceased's benefits from Madison Insurance Company. This court therefore rejects the respondent's evidence that he incurred expenses in his attempts to claim money from the deceased's insurance company.

The respondent as the co-administrator of the deceased estate was supposed to administer the estate in accordance with **section 83** of the **Law of Succession Act** but in this case it seems he took advantage of his position as a co-administrator and squandered the money he was supposed to safeguard. It appears to the court that he is bent on continuing to waste the deceased's estate.

21. In the result, I make the following orders:

a) *Prayers iii, iv, v, and ix of the Notice of Motion dated 24th November 2011 be and are hereby granted.*

b) *Prayers (vii) and (viii) of the application are spent while prayer (vi) is declined.*

c) *The respondent shall bear the 1st petitioner's/applicant's costs for the application.*

d) *The respondent's demand to be paid Kshs.132,000/= for alleged expenses incurred by himself in connection with payment of the deceased's benefits from Madison Insurance Company Ltd. be and is hereby rejected.*

22. It is so ordered.

Dated and delivered at Kisii this 1st day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for 1st Petitioner/Applicant

Present in person for 2nd Petitioner/Respondent

Mr. Bibu- Court Clerk

RUTH NEKOYE SITATI

JUDGE.