



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1805 of 2008

IN THE MATTER OF THE ESTATE OF STEPHEN KIBERA GATHUKU- (DECEASED)

RULING

The application dated 7th February 2013 seeks restraining orders. It seeks orders that the respondent be banned from interfering with the applicant as she digs trenches and connects waste pipes to the main water sewerage system within **LR No: Dagoretti/Riruta/1189** in compliance with directions of the City Council of Nairobi. There are additional prayers that the police or the local chief be ordered to supervise execution of the said order.

The application is premised on the facts deposed in the affidavit of the applicant, Virginia Njeri Njoroge. She alleges that she is named as the executrix of the will of the deceased which has not yet been proved. The respondent is the administrator of the estate as she has obtained a grant of letters intestate although the deceased died testate. There is a dispute on the question whether the deceased died testate or not and that issue is before the court in this cause. Both parties are widows of the deceased. They have rental houses on the property in question. The applicant has been notified by the City Council of Nairobi to stop discharging waste water to a public road and has been directed to connect all waste to the sewerage system and to repair a dilapidated toilet structure. Her attempts to comply with the directions of the City Council of Nairobi have been frustrated by the respondent who has stopped the applicants workers from digging the trenches for the laying of the pipes to connect them to the sewerage system. It is for this reason that she seeks restraining orders.

The question which arises here is whether this probate court can grant the orders sought. The application is grounded on **Section 47** of the Law of Succession Act, Rules 63 and 73 of the Probate and Administration Rules, and **Sections 1A, 1B 3** and **3A** of the Civil Procedure Act.

Section 47 of the Law of Succession Act provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders there in as way be expedient”.

On the face of it, it would appear that this provision gives to the court a very wide discretion, **“to entertain any application and determine any dispute”**. This would appear to mean that the court can entertain any application under the sun and likewise determine any dispute under the sun. It must be noted that this provision relates to **“any application and... any dispute under the Act”**... This means the applications that can be entertained and the disputes that can be determined by the court must be applications and disputes that are envisaged or contemplated under the Law of Succession Act. An application on any matter that falls outside the contemplation of the Act cannot be entertained by the probate court nor can a dispute on matters falling outside the ambit of the Act be determined by the probate court.

The Law of Succession Act contemplates application and disputes in certain provisions. The relevant provisions are:-

- (a) Section 26, on reasonable provision.*
- (b) Section 35, on the exercise of the power of appointment.*
- (c) Sections 61 and 75, following discovery of a codicil.*
- (d) Section 67, on applications for grants of representation.*
- (e) Section 68, on objection to making of grants.*
- (f) Section 71, on confirmation of grants*
- (g) Section 74, on rectification of grants*
- (h) Section 76, on revocation of grants*
- (I) Section 77, on resealing of grants.*

The procedure to be followed for the contemplated applications and disputes is set out in the Probate and Administration Rules, which is subsidiary legislation made by the Rules Committee as empowered by **Section 97** of the Law of Succession Act. The jurisdiction granted by **Section 47** can only relate to such applications and disputes as contemplated in the Act, and any application which is not so contemplated ought not be entertained by the probate court.

This application is predicated on rule 63 of the Probate and Administration Rules. This rule imports into probate practice certain provisions of the Civil Procedure Rules. The provisions of the Civil Procedure Rules imported include orders **V, X, VI, XV, XVIII, XXV, XLIV** and **XLIX** of the old Civil Procedure Rules. They deal with service of summons, interrogatories, discovery, inspection and consolidation of suits, summoning and attendance of witnesses, affidavits, security for costs, review and computation of time. The Civil Procedure Rules were reorganized in 2010 and the matters are now covered/governed by new provisions. Only those applications envisaged in the Civil Procedure Rules that have been imported into probate practice under Rule 63 can apply in succession causes. Civil processes that have not been so imported are of no application in succession matters. The rationale is that the succession regime set out in the Law of Succession Act is designed to be a special jurisdiction, complete with its own procedures and forms. This special jurisdiction has been saved in **Section 3** of the Civil Procedure Act. That being the case, the civil procedure as envisaged in the Civil Procedure Act and Rules applies in probate causes to such extent as is allowed by the Law of Succession Act and the Probate and Administration Rules. Where there is no application of a civil process by the Law of Succession Act, then the Probate court has no jurisdiction to allow or embrace that civil procedure.

Rule 73 of the Probate and Administration Rules has also been cited. Rule 73 saves the inherent powers of the probate court and it is cited or invoked for the ends of justice and to prevent abuse of the court process. However, a probate court invoking the inherent powers can only exercise its inherent powers in the context of the Law of Succession Act. It cannot invoke Rule 73 to order the doing of something which is outside the contemplation of the Law of Succession Act. This is so because the Law of Succession Act creates a special jurisdiction and a special procedure.

The provisions of the Civil Procedure Act upon which this application is premised are not relevant, except for **Section 3**, as they relate to civil procedures as opposed to probate practice. **Section 3** is relevant as it saves the special jurisdiction of the probate court inclusive of its procedures and forms.

The Orders sought in this application are prohibitory or restraining in nature. They are of the sort governed by the old **Order XXXIX** of the Civil Procedure Rules, now **Order 40**. **Order XXXIX** was not imported into probate practice by Rule 63 of the Probate and Administration Rules, and therefore **Order 40** is of no application. An application for restraining orders is not a matter within the contemplation of the Law of Succession Act, and therefore such application cannot be entertained under **Section 47** of the Law of Succession Act. The dispute before the court is of a nature that the probate court cannot determine, and therefore this probate court lacks competence to deal with it.

Restraining orders can only be properly given in a civil matter properly brought under the provisions of the Civil Procedure Act and Rules, since such order is contemplated in **Section 63(1)** of the Civil

Procedure Act and **Order 40** of the Probate and Administration Rules. The applicants should have sought restraining orders in such a suit. A grant has been made to the respondent. **Section 79** of the Law of Succession Act has vested the property of the deceased on the respondent, and she, the respondent, can sue or be sued on behalf of the estate as she holds the legal title to the property. The Civil Procedure Act and Rules have elaborate rules on how suits may be commenced against estates or administrators of such estates. The dispute in this application should have been commenced under those rules.

It is the finding of this court that it lacks jurisdiction to entertain this application for the reasons given above. The application is therefore struck out with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5th DAY OF MARCH, 2013.

W. M. MUSYOKA

JUDGE