



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 1057 OF 2011

IN THE MATTER OF THE ESTATE OF MUTISO KIMUYU ITUMO (DECEASED)

REBECCA MUNEE MUTISO APPLICANT

VERSUS

PHOEBE MUTHOKI MUTISO RESPONDENT

R U L I N G

The **summons** dated 10/5/2012 is brought under **sections 4, 82 and 83 of the Law of Succession Act, Cap 160 of the Laws of Kenya** and **sections 1A, 1B and 3A of the Civil Procedure Act Cap 21**.

The application seeks orders that:-

- 1. The Respondent by herself, her servants, agents, employees be and is hereby compelled by way of a mandatory injunction to avail the shareholding certificate numbers, membership numbers, title deeds, receipts and any other documents relating to all the property owned by the deceased pursuant to his demise and subsequent developments as a result of the estate of deceased pending the hearing and determination of this cause.**
- 2. That Officer Commanding Police Division (OCPD) Machakos to ensure compliance with the court orders.**
- 3. That the costs of this application be provided for.”**

The background facts are set out in the affidavit in support sworn by the Applicant, **Rebecca Mune Mutiso** on 10/3/2012. The Applicant has described herself as the first wife of the deceased and the holder of a Limited Grant of Letters of Administration *ad litem*. The Applicant’s complaint is that the Respondent has held the documents in question in a manner that is adverse to the interests of other beneficiaries.

In opposition to the application, the Respondent swore a replying affidavit on 3/7/2012. The Respondent has described herself as the second wife to the deceased. The Respondent’s contention is that the Applicant obtained the Limited Grant of Letters of Administration *ad litem* without the consent of the other beneficiaries. The Respondent denied that the documents requested by the Applicant are in her possession. The Respondent further stated that the Limited Grant of Letters of Administration *ad litem* cannot be used to distribute the estate of the deceased.

The Respondent also filed a Notice of Preliminary Objection dated 22/4/2013 on the following grounds:-

- 1. THAT the proceedings herein are spurious, incompetent and an abuse of the process of this Honourable Court and should be dismissed with costs to the Respondent.**

2. **THAT the summons herein is hopelessly misconceived, frivolous and totally devoid of merit.**
3. **THAT the reliefs sought herein touch on property estate of a deceased person and hence are a preserve of Order 37 of the Civil Procedure Rules.**
4. **THAT the Applicant herein should have applied for a Grant Letters of Administration and *Colligenda Bona* to collect and preserve the assets of the deceased before the making of full Grant and not Limited Grant Letters of Administration *Ad litem* for the purpose of filing civil suit.**
5. **THAT the Respondent herein being a wife to the deceased Mutiso Kimuyu Itumo and or her children did not consent to the said Letters of Administration, *Ad litem* and hence the Applicant has no *locus standi* before this Honourable Court to obtain the orders sought. The proceedings herein are nullity and a non-starter for the reasons above adduced.**

Both the application and the Preliminary Objection were canvassed simultaneously.

The bone of contention herein is whether the Limited Grant of *ad litem* empowered the Applicant to file the application at hand.

The said grant which is exhibited herein (**annexture “RMM 1”**) is limited only for the purpose of filing/prosecuting suit. The grant was therefore issued for a special purpose. The Applicant cannot therefore purport to go outside the powers given by the said grant.

The Applicant’s application seeks injunctive orders. The application cannot be described as a suit. Under **section 2 of the Civil Procedure Act**, a ‘**suit**’ means all civil proceedings commenced in any manner prescribed. The application herein is not anchored in any suit.

With the foregoing, I agree with the Respondent’s counsel that the application is incompetent. Consequently, I strike out the same with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 4th day of July 2013.

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JUDGE