



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 635 OF 1985

IN THE MATTER OF THE ESTATE OF DR. TOMASIO RWAKI MAKONNEN (DECEASED)

RULING

This application is brought by Chamber Summons dated 19th October, 2011 and taken out under Order 19 Rules 2, 6 and 9 of the Civil Procedure Rules, Rule 63 of the Probate and Administration Rules and all other enabling provisions of the law. The Applicant thereby seeks orders-

1. (spent)
2. That this honourable court be pleased to order the attendance in court of Lorenzo Kojo Makonnen for cross-examination on the contents of his affidavit sworn and filed in court on 22nd August, 2011 during the hearing of the Summons dated 27th July, 2011.
3. That this honourable court be pleased to strike out paragraphs 16, 21, 22,25,27 and 28 of the affidavit of Lorenzo Kojo Makonnen sworn and filed in court on 22nd August, 2011.
4. That the costs of this application be provided for.

The application is supported by the annexed affidavit of Eliud Nganga Njoroge, one of the executors with the authority of his co-executor, and also by a further affidavit of T'Shai R. Makonnen, one of the beneficiaries in this matter. It is based on the grounds that-

- (a) The affidavit of Lorenzo Kojo Makonnen sworn and filed in court on 22nd August, 2011 makes unsupported allegations against the executors of the estate herein that need further probing in court.
- (b) Paragraphs 16, 21, 25, 27 and 28 of the said affidavit are scandalous, irrelevant and oppressive on the part of the executors.
- (c) The executors herein are Advocates of many years standing and one of them is currently serving as a Judge of this Honourable Court. Their integrity has been compromised by the allegations contained in the said affidavit which allegations are not supported both in law and fact.
- (d) Lorenzo Kojo Makonnen is one of the beneficiaries named in the Will herein and has never complained about the conduct of the executors since they were appointed in the year 1985. He has continued to enjoy the proceeds of the investment made herein without any objection.
- (e) It is in the interest of justice that integrity of executors is upheld.

In response, the Respondent filed the following grounds of opposition-

- (i) The depositions made in the replying affidavit of Lorenzo Makonnen sworn on the 22nd August, 2011 are clearly supported by the documents annexed thereto.**
- (ii) The depositions made in paragraphs 16, 21, 22, 25, 27 and 28 of the replying affidavit are founded in law and fact and supported by the documents annexed to the said affidavit.**
- (iii) In any event, the Applicant herein had already responded to the said paragraphs by filing in court the following:-**
 - (a) Further affidavit by Eliud Nganga Njoroge sworn on the 19th October, 2011**
 - (b) Further affidavit by T'Shai R. Makonnen sworn on the 18th October, 2011.**
- (iv) Directions were already issued by the court on the 17th July, 2006 that the hearing of the objection (main hearing) will be heard by way of oral evidence. At that time the Applicant will get the opportunity to cross examine Lorenzo Makonnen on the depositions.**
- (v) This application only serves to escalate the family dispute instead of making steps towards solving the same.**

Whereas the Applicant filed written submissions, the Respondents filed only the above grounds of opposition. After considering the pleadings, the submissions and grounds of opposition, I find that the only issues for determination are whether paragraphs 16, 21, 22, 25, 27 and 28 of the Replying affidavit sworn by Lorenzo Kojo Makonnen are scandalous, irrelevant and oppressive to the reputation of the executors and, if so, whether they should be struck out.

The rules governing affidavits are set out in **Order 19** of the **Civil Procedure Rules. Rules 3(1)** and **6** thereof state as follows-

“3.(1) Affidavits shall be confined to such facts as the

deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

6. The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.”

In a nutshell, with regard to paragraph 16 of the subject affidavit, the same raises a very serious argument as to whether the executors had knowledge of the matters referred to in Dr. S. G. Gatere's letter regarding the medical condition of the testator. By the necessary implication, the said paragraph casts serious aspersions at the executors whose details I need not go into. Regarding paragraph 21, the executors are accused of negligence in failing to diligently manage the estate property or collect rent arrears. Consequently, the executors are accused of failing to collect 3.6 million by way of rent, yet the executors are the one who informed the beneficiaries of the outstanding amount of rent. That paragraph is argumentative as to whether the executors were diligent or not and the same argument continues in paragraph 22.

With regard to paragraphs 25 and 27, I find that these are but an extension of the averment in paragraph 24. Since paragraph 24 is not contested, I find that paragraphs 25 and 27 can safely perch on it. Finally, and without going into unnecessary details, the allegations contained in paragraph 28, I think, ought to be canvassed at another forum but not in the context of an application filed by the executors and to which the

replying affidavit sworn by Lorenzo Makonnen responds.

By reason of the foregoing, I am satisfied that paragraphs 16, 21, 22 and 28 would be oppressive to the Applicants and they are accordingly struck out. The Applicants will be at liberty to cross-examine the deponent of the affidavit in respect of the other paragraphs if they so wish, at the hearing.

As the application partly succeeds, each party will bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this 10th day of July, 2012.

L. NJAGI
JUDGE