



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Joel Atako Makokha (Deceased) (Succession Cause E019 of 2022) [2024] KEHC 1739 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE E019 OF 2022
SC CHIRCHIR, J
FEBRUARY 22, 2024
IN THE MATTER OF THE ESTATE OF JOEL ATAOKA MAKOKHA (DECEASED)**

RULING

1. The Objectors Notice of Motion dated 8.6.2023 seeks for the following orders:-
 1. Spent.
 2. That a preservatory orders be issued over all the property comprised in the estate of the deceased herein Joel Atako Makokhaas listed in the will and below against all manner of waster and /or Alienation howsoever by the petitioner herein Adelide Nabwile Osyanjuand/ or her agents, servants' employees' relatives or anyone else claiming and/or acting through her pending the hearing and determination of this causes;
 - i. Land parcel No. Butsotso/Shikoti/10298
 - ii. Land Parcel No. Butsotso/Shikoti/14106
 - iii. Land Parcel No. S/Wanga/Lureko/1908
 - iv. The decease's ha re of inheritance in land parcel No. E/Wanga/Isongo/2214
 - v. Mercedes Benz car Reg. No. KBK XXXX
 - vi. Toyota Cresta car Red. No. KAQ XXXX
 - vii. Mumias Sugar Co. Ltd retirement benefits of Kshs.1,265,555 stated in the HCCA No. 59 of 2018 Kisumu Judgment
 - viii. Personal property, shares, stocks, funds, money, securities and all other investments or property of whatsoever nature and whosoever situate.
3. That an order be issued to the petitioner herein Adeliade Nabwile Osyanjuto surrender the Mercedes Benz car Reg. No. KBK XXXX to the objector herein Seruya Serriet Netiafor her and her children use pending hearing and determination of this cause.



4. That letters of administration ad litem be issued to both petitioner and objector herein and upon granting this order half of the kshs.2,165,555 in the judgment in Kisumu HCCA No. 59 of 2018 be released to the petitioner and objector in equal shares for the subsistence, medical cares, school fees, food and clothing pending hearing and determination of this cause.
2. It is premised on the grounds appearing on the face of the application and the supporting affidavit sworn by the Applicant
3. It is the applicant's case that she is the wife of the deceased having married him in 1992. She has attached a marriage certificate in support.
4. She further states that she was wholly dependent on the deceased. That the respondent has put all the deceased's properties to her use and those of her children, leaving her and her children with no means of upkeep.
5. That she and her children are in dire need of upkeep. She further states that she contributed substantially to the property that has now been solely left to the respondent. Finally, she states that Title No. Butso/14106, on which her matrimonial home stands is under risk of sale by National Bank of Kenya and the respondent is the one who had consented to the charging of the said property to the said Bank.
6. The application is opposed through the replying affidavit of the petitioner dated 3.7.2023. She states that all the 4 parcels of land referred to in the application are in the names of the deceased and are not under any threat of alienation or disposal
7. She further states that though the deceased initially owned Motor Vehicle KAQ XXXX and KBK XXXX, he later sold them before his demise, even though he had included them in the will. She has attached a sell agreement with a date of 9.9.2021 endorsed on it. That, consequently, she does not have the vehicles.
8. That any other properties will be dealt with as per the will and the applicant should wait for prove of probate.
9. On the proceeds of the case in Kisumu HCCA No. 59/2018, the respondent states that the decree is supposed to be executed against Mumias Sugar Company which is currently under receivership.
10. In a further reply by way of supplementary affidavit, the applicant states that she would want to take part in the management of the deceased's estate and cannot wait for the Deceased 's will to be proved.

Applicant's Submissions

11. In her submissions, the Applicants reiterated the averments in her affidavit. However, she has attached and additional documents. Attaching documents in the submissions is irregular. The objector ought to have sought leave of the court if there was a need to submit more documents. In any event, by sneaking in more documents at the point of submissions, the respondent has been denied a chance to respond to the content of the said documents. For purposes of this ruling therefore, I will ignore the additional documents.
12. The Respondent did not file any submissions.

Determination

13. The Applicant and the Respondent are widows of the deceased. While the Respondent herein petitioned for Grant of probate in this case, the Applicant applied for letter of Administration intestate



under Succession Cause No. 617 of 2022. On 6.2.2023 the court (Musyoka J) consolidated the two petitions and designated this case as the lead file. The court directed that the Application for Grant of probate be heard first. This hearing is pending.

14. The Applicant has brought this application, effectively, seeking the aforesaid orders pending the hearing of the main cause.

Determination

15. I have considered the application. In respect to prayer for preservation of the immovable properties, that is Title Nos. Butso/So/Shikoti/10298, Butso/So/Shikoti/14106 and south Wanga/Lureko/1908, I have taken note of the fact they are all registered in the name of the deceased. This is as per the copies of certificates of official search filed by the objector on 29.3.2023.
16. Further in respect to Title No. Butso/So/Shikoti/14106, there is an order of temporary injunction registered against the Title issued by the Chief Magistrate court in Kakamega CMCC No. 198 of 2021. That property is already encumbered, an additional order serves no purpose.
17. Further, three (3) of the Titles namely south wanga/ Lureko/1908, Butso/So/Shikoti/14106 and Butso/So/Shikoti/10298 are charged to Barclays Bank, National Bank and Family Bank respectively. Unless and until these properties are discharged, these properties are not free property within the context of the Law of succession Act, and therefore not available for distribution, in any event.
18. As for the deceased's alleged share of inheritance in Parcel No. East wanga/ Isongo/2214, there are no further and better particulars provided about this property. What was the deceased share for instance? Are there any other people having a stake in the said land, and if in the affirmative, should the court then be issuing a preservatory order over a property while ignoring the interest of innocent third parties? Such an order is not tenable. It cannot be granted.
19. Further, the property of a deceased person is safeguarded by the law and does not need for intervention by the court. Section 45 of the Law of Succession Act provides as follows;

“Except so far as expressly authorized by this act, or any other written Law, or by a grant of representation, under this act, no person shall for any purpose take presentation or dispose of or otherwise intermeddle with any other property o a deceased person.
Any such intermeddling attracts criminal sanctions as according section 45(2) of the same act.”
20. In respect of immovable property, further shielding is provided by section 82 (b)(11) which bars any sale of immovable property of the deceased prior to confirmation of a grant. Confirmation for the grant is yet to be done in this case and hence the deceased property is not available for disposal by any one, in any manner. Any intermeddling or disposal of the deceased's property at this stage has adverse consequences on the proposed seller and/ or purchaser.
21. In short, the Law provides enough safeguards in as far as the property of a deceased's person is concerned. Court orders are meant to serve a particular purpose(s). Courts do not issue orders in vain. They are not for academic pursuits. Consequently, I decline to grant prayer 2 of the application.
22. With respect to prayed 3, while the objector insist that the vehicles are with the petitioner, the petitioner alleges that the deceased sold them after making the will, but before his demise. I have perused a copy of the will. Though it has not been proved, its validity is presumed until and unless proven otherwise. According to the will motor vehicle registration No. KAQ XXXX was given to Timson



Masakhwe Atako while KBK XXXX was given to the petitioner. Until probate is proved, they cannot be taken away from the two persons. Again, in any event pending prove of probate, the two vehicles are safeguarded as per section 45 as aforesaid. It is premature to delve into whether the vehicles had been sold or no at this point. This prayer is equally dismissed.

23. Finally, as regards proceeds of Kisumu HCCA No. 59 of 2018, from the averments, there is common ground that the funds were Pension benefits for the deceased which he was recovering from his former Employer. Retirement benefits do not form part of the deceased's Estate.
24. Section 36A of the *Retirement benefits Act* provides as follows: Upon Death of a member of a scheme the benefits payable from a scheme shall not form part of the Estate of the member for the purpose of Administration , and shall be paid out by the Trustees in accordance with the scheme Rules”.
25. From the documents attached, it is clear that the funds are yet to be released by the Employer. I hold the view that to that extent, the funds are still subject to the pension Regulations notwithstanding that it has been a subject of a court case.
26. In a nutshell, Pension is not part of the Estate and therefore not available for distribution as part of the estate. They are not “free property” within the context of the *Law of succession Act*. The two contestants are at liberty to pursue their claim with the deceased's employer outside of these proceedings or outside of the management of the Estate
27. In conclusion, the entire application fails. It is hereby dismissed.
28. Each party to meet own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF FEBRUARY, 2024

S. CHIRCHIR

JUDGE

In the presence of:-

Godwin – Court Assistant

The respondent

