



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Boniface Mutinda Kabaka (Deceased) (Succession Cause E185 of 2021) [2022] KEHC 12031 (KLR) (Family) (27 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE E185 OF 2021

MA ODERO, J

MAY 27, 2022

IN THE MATTER OF THE ESTATE OF BONIFACE MUTINDA KABAKA (DECEASED)

VASCOLINE KATANU MWANZIA.....APPLICANT

VERSUS

JENIFFER MUENI MUTINDA KABAKARESPONDENT

RULING

1. Before this Court for determination is the chamber summons dated July 23, 2021 by which Vascoline Katanu Mwanzia (hereinafter 'the Applicant) seeks the following orders:-
 1. Spent.
 2. Spent
 3. That the Honourable court do grant the Petitioner/Applicant herein with Grant of letters of Administration *Ad Colligenda bona defuncti* limited to the management and administration of the Deceased's rights as a director and proprietorship of 996 Ordinary shares: to enable the Applicant to undertake the following duties and responsibilities as the Administrator (and/or as co-administrator together with Rachel Jennifer Mueni (1st widow), John Bosco Kioko Mutinda, Paul Nzuki Mutinda and Amos Washington Kabaka who hold 1 share each separately of the Deceased's shares)-
 - (i) To manage and administer the rights as a shareholder held by the deceased or arising from his ownership as the owner of 996 ordinary shares (while only four (4) shares are held by the 1st widow and three (3) sons respectively that belonged to the deceased.
 - (ii) To jointly with the other shareholders and Directors, participate in the management and also access the assets of Bonavacantia Properties (Kenya) Limited, Bank Account who account number is 001001009140401 held by Eco Bank Kenya Ltd Located at



Eco-Bank Towers: for purposes of accessing and withdrawing the sum of Kshs 3,383.00 (Kenya Shilling Three Million, Three Hundred and Eighty-three thousand) and/or such sum of money as she may be found sufficient to meet educational expenses, housing, medical cover and basic maintenance for her and the deceased's minor children for a whole year.

- (iii) Contact the debtors to the estate, as concern the extent of the deceased's shares and interests as a shareholder in Bonavacantia Properties Kenya Limited to the estate requesting them to pay the money owing to Bonavacantia Properties (Kenya) Limited.
 - (iv) To contract, sue, or institute legal proceedings, where necessary to protect and conserve the interests and properties of the deceased's estate, as concerns the shareholding in Bonavacantia properties (Kenya) Limited.
 - (v) To undertake any other functions as may be prudent, necessary and for the best interest of Bonavacantia Properties (Kenya) Limited.”
2. The summons was premised upon Sections 67 (i), Rule 36 of the Law of Succession Act, the Probate and Administration Rules Cap 160 Laws of Kenya and Section 499 and 500 of the Company Act No 17 of 2015 Laws of Kenya and was supported by the Affidavit of even date and the undated Further Affidavit both sworn by the Applicant.
3. The Respondent Jeniffer Mueni Mutinda Kabaka opposed the application by way of her Replying Affidavit dated September 2, 2021. The summons was canvassed by way of written submissions. The Applicant filed the written submissions dated December 17, 2021 whilst the Respondent relied upon her written submissions dated February 14, 2022.

Background

4. This Succession Cause relates to the estate of Boniface Mutinda Kabaka (hereinafter referred to as 'the Deceased') who died intestate at the Nairobi Hospital on December 11, 2020. A copy of the Death Certificate Serial Number 1027952 is annexed to the Petition for Grant of letters of Administration Intestate dated February 2, 2021 filed by the Applicant.
5. The Deceased was survived by the following –
- i. Jeniffer Mueni Mutinda Kabaka – 1st wife
 - ii. Amos Washington Kabaka – son
 - iii. John Kioko Kabaka – son
 - iv. Paul Nzuki Mutinda –son
 - v. Vasoline Katanu Mwanzia – 2nd wife
 - vi. Abraham Kabaka Mutinda – son
 - vii. Mary Yula Mutinda – Daughter
 - viii. Yula Kavaka Mbawa – mother
6. Among the assets left behind by the Deceased were shares in a company known as Bonavacantia Properties (Kenya) Ltd (hereinafter referred to 'the Company'). It is conceded that Bonavacantia Properties (K) Ltd is a Limited Liability Company duly registered under The Companies Act No 17, 2015 and that the Company is run in compliance with the aforementioned Act.



7. The Applicant who is the 2nd wife of the Deceased avers that following the demise of her husband she tried to involve the Respondent who is the 1st wife in applying for Grant of letters of Administration. That the Respondent was unco-operative forcing the Applicant to file citation proceedings against the Respondent together with a Petition for letters of Administration. A citation order was issued to the Respondent requiring her to file any objection to the Applicants Petition.
8. The Respondent acknowledged that the Applicant was her co-wife but stated that it was too soon to apply for letters of Administration as she was still mourning her late husband.
9. The Applicant states that due to lack of co-operation from the Respondent, she was left with no option but to file this application seeking access to the Bank Account held at Eco Bank Ltd registered in the name of Bonavacantia Properties (Kenya) Ltd (a company in which the Deceased was a share-holder) in order to access funds to provide for the education and upkeep of her minor children. The Applicant states that she is unemployed and lacks means to provide for the children. She seeks to withdraw a sum of Kshs 3,383,000 from said account to enable her provide for the education, housing, medical and maintenance for the minor children for a period of one year.
10. The Applicant seeks a limited Grant to enable her collect in and preserve the estate of the Deceased, which she avers is in imminent danger of wastage if she is not permitted to take part in the management and operations of the company.
11. As stated earlier the application was opposed.

Analysis and Determination

12. I have carefully considered the application before the court the Affidavit filed in Reply as well as the written submissions filed by both parties.
13. The duties of the Probate Court is to supervise and oversee the distribution of the estate to the rightful beneficiaries.
14. The Applicant has indicated that she requires the limited Grant to enable her collect and preserve the estate of the Deceased. Generally such Grants are issued where urgent action is required in relation to assets of the Deceased to preserve the estate for the benefit of the lawful beneficiaries. In *Majaria vs A Abdalla* [1984] eKLR the court held that a Grant *Ad Colligenda bona defuncti* is normally issued where the estate of the Deceased is of “a perishable or precarious nature” and require quick attention. The Applicant has not indicated which particular assets belonging to the estate is under threat of intermeddling and/or imminent dissipation.
15. It is quite evidence that the real reason why the Applicant is seeking a limited Grant is to enable her participate in the management of the company and to gain access to the Company Account.
16. The Deceased is said to have held 996 shares in the company known as Bonavacantia Properties (Kenya) Ltd. He was a shareholder in the company. The fact that the Applicant is one of the widows of the Deceased does not entitle her to step into the shoes of the Deceased in the running of the Company.
17. The Applicant submitted that it was the Deceased who the Deceased who formed the company for purposes of managing her investment in real estate. The Applicant further submits that the properties which have been listed as assets belonging to the company were purchased/acquired through contributions made by herself and as such she is a beneficial owner of the same, and is entitled to benefit from the proceeds (rental income) accruing from said properties. That may well be the case but these are not matters, which this court sitting as Probate Court has jurisdiction to determine. Any claim the Applicant may have to company assets can only be ventilated before a Commercial Court.



17. In law there exists a distinction between shares held by a shareholder and the assets (including Bank Accounts) and property of said company. In the celebrated case of *Salmon vs Salmon & Co Limited* [1897] ACC it was held that:
- “a limited company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued, and it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders”. (own emphasis)
18. In *Victor Mabachi & Another vs Nurtun Bates Limited* [2013] eKLR the court held that -
- “This being the case Mediacom as a body corporate is a person jurisca’ with separate independent identity in law; distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.
19. The company therefore in law is an entity separate and distinct from the Deceased. The fact that the Deceased held 996 ordinary shares in the company does not make him the owner entitled to company property. In her submissions the Applicant concedes that the assets in question are in fact listed as belonging to the company.
20. *In the matter of the Estate of Gitere kabura & another (both Deceased)* [2018] eKLR the court stated that:-
- “The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company were the shares. It is the said shares that are available for distribution herein amongst the survivors of the deceased. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquid it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with distribution of the shares, but not the liquidation of the company or the distribution of its assets.” (Own emphasis)
21. In CA 126 of 2016 *in the matter of the Estate of Charles Karuga Koinange* [2017] eKLR, court held that:-
- “that shares held in a limited liability company by the deceased person are assets which the deceased’s family has power to distribute in the succession cause relating to such deceased’s estate.”
22. From the above case law it is clear that it is only the shares held by the Deceased that form part of the estate. The Applicant is seeking to be issued with a limited Grant to enable her participate in the management and Administration of the company. This court cannot make such orders. As stated earlier the Applicant cannot use the fact of the Deceased having been a shareholder in the company to insinuate herself into the affairs of said company. There would have to be a company resolution allowing the Applicant to participate in the management of the company.
23. The Applicant is also seeking a limited Grant to enable her access the company Bank Account No. 0010015009140401 held at Eco Bank (K) Ltd at Eco Bank Towers. A bank account constitutes the property of the company. The question is whether this Probate Court has the jurisdiction to make any



orders against a Limited Liability Company. It is trite law that “Jurisdiction is everything, without it a court has no powers to make one more step”. [See *Owners of the Motor Vessel “Lillian S” – vs Caltex Oil (Kenya) Limited*].

24. Is Bonavacantia Properties (Kenya) Ltd a party in this Succession Cause? In *James Mubu Kangari vs Mubu Holdings Ltd & Serah Mweru Mubu* [2019] eKLR Hon Justice Musyoka observed that:-

The said Company is not a party to the succession cause. It is in a sense an asset for distribution, to the extent that the deceased’s shares in it are distributed in the will the subject of these proceedings. The Company is a separate legal entity from the persons who hold shares in it. The law which governs limited liability Companies is the *Companies Act*, Cap 486, Laws of Kenya, in terms of the formation, operations and liability of Companies. Any Orders against a limited Company by persons who claim entitlement to shares in and directorship of the Company can only be properly brought within the framework of the *Companies Act*, in proceedings properly brought before a Commercial Court as opposed to a Probate Court. I need not say more”. (Own emphasis)

25. It is manifest therefore that the shares held by the Deceased are assets which are available for distribution to the beneficiaries of his estate. The shares do not entitle the widow to involve herself in the running of the company. I find that the Probate Court has no jurisdiction in a Succession Cause to grant orders as against a Limited Liability Company. Any claims the Applicant may have to company property can only be properly ventilated in the Commercial Division.

26. Moreover, this issue is in my view ‘res judicata’. The Applicant had previously filed an Application dated March 10, 2021 seeking orders of provision for the education and upkeep of the minor children of the Deceased from the rental income derived from two properties owned by the company. In a Ruling delivered on July 19, 2021 Hon Justice Muchelue held as follows: -

“ the last question relates to whether the application and the deceased’s children by her should get provision from the bank account of the limited liability company in which the deceased was a shareholder. It is basic that properties, including bank accounts of a limited liability company, are separate from the property of the company’s respective directors, shareholders or members. There was no formal request to lift the veil of incorporation of Bonavacantia Properties (Kenya) Ltd to be able to touch the money held by the company at Eco Bank”. (Own emphasis)

27. The present application is an attempt by the Applicant to obtain from these court orders which had already been denied by Justice Muchelule. This amounts to abuse of court process.

28. I find that this court has no jurisdiction to grant the Applicant orders allowing her to deal with company property and/or assets. Whilst the minor children of the Deceased are entitled to maintenance from the estate, that maintenance cannot be derived from company assets as there are separate and distinct form the assets of the Deceased.

29. Finally, I find no merit in this Application for a limited Grant. The summons dated July 23, 2021 is dismissed in its entirety. This being a family matter there will be no orders on costs.

DATED IN NAIROBI THIS 27TH DAY OF MAY 2022.

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MAUREEN A ODERO

JUDGE

