

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISCELLANEOUS CIVIL APPLICATION NO. 39 OF 2002

KANGETHE & COMPANY ADVOCATES.....APPLICANT

VERSUS

WILSON KERIAKO KISIRI.....RESPONDENTRULINGR. SHEIKH, J.

The applicant KANGETHE & COMPANY, ADVOCATES of P.O. Box 74854, Nairobi Kenya are by this application seeking the following orders:-

1. That an order be granted ex parte discharging M/S Kangethe & Company, Advocates of P.O. Box 74854, Nairobi in matters relating to the estate of Mathias Keriako.
2. That letters of Administration issued on the 12th September, 2002, be stayed for resealing as the estate of the late Mathias Kisiri, is no longer in Kenya.

3. That National Microfinance Bank Limited be ordered to furnish a statement of Account in respect of the A/C Number 6814026821, for the sum of T.shs. 4,167,752.02 in the name of KERIAKO KISIRI LUKUMAY and LOISUJAKI KERIAKO.

The application is brought under the provisions of Section 50 of the Probate and Administration Ordinance Cap 445 and Section 95 of the Civil Procedure Code 1966 and is supported by the affidavits of NYANDORO YABESH KAMBI an advocate of the High Court of Kenya practicing as such in the applicant firm of Advocates.

The respondent WILSON KERIAKO KISIRI resisted the application. A counter-affidavit was filed.

On 14/04/2004 the day set for the hearing of the application neither the respondent nor his advocate appeared in court, accordingly the hearing of the application proceeded ex parte. In his submission Mr. Mahatane who had then appeared for the applicant adopted the affidavits supporting the application. He submitted that the applicant firm had in the past acted as advocates for the respondent in a claim to recover compensation in respect of an accident, due to the estate of the late Mathias Kisiri, and that in fact

was able to secure an out of court settlement for a sum of K.shs 869,400/=, on behalf of the respondent.

Upon the appointment of the father and brother of the deceased, namely KERIAKO KISIRI and LOISUJAKI KERIAKO as the administrators of the estate of the late Mathias Kisiri by this court in Probate and Administration Cause No. 4 of 1997 the applicant had released and credited to the account of the aforesaid joint administrators the sum received and due to the estate of the late Mathias Kisiri Keriako, and a receipt was thereupon duly issued to the applicant. Mr. Mahatane asserted that the applicant firm is entitled to be discharged from all matters relating to the estate of the late Mathias Kisiri.

In the applicant's affidavit and further affidavit it is stated that the applicant firm was in 1991 instructed by the respondent to pursue a claim for compensation, on behalf of the beneficiaries of the deceased's estate, for injuries sustained by the deceased in a motor-vehicle accident that occurred in Kenya, that in October 1994 the applicant was able to secure an out of court settlement for a sum of K shs. 869,400/= on behalf of the estate of the deceased which sum

was inclusive of legal costs payable to the applicant firm, and that the applicant could not release to the respondent the sum recovered as compensation for failure by the respondent to produce letters of administration evidencing his appointment as the legal representative of the estate of the late Mathias Kisiri. According to the applicant's affidavit evidence the respondent was on 7/08/95 granted letters of administration in respect of the estate in question by Enaboishu Primary Court, which grant was later nullified, that the appointment of the respondent and grant to him of the letters of administration in Enaboishu Primary Court Probate and Administration Cause No. 9 of 1995 was revoked by this court on 30/04/97. According to the affidavit evidence of the applicant on 24/06/99 KERIAKO KISIRI (the father of the deceased) and LOISUJAKI KERIAKO obtained letters of administration of the estate of the late Mathias Kisiri in this court's Probate and Administration Cause No. 4 of 1997, and on 9/11/99 the aforesaid letters of administration were re-sealed by the High Court of Kenya. In the applicant's affidavit the deponent has stated that following the appointment of KERIAKO KISIRI and LOISUJAKI KERIAKO as the administrators of the estate of the late Mathias Kisiri

on 8/12/99 he sent to the said administrators a sum of T.shs 4,167,752.02 less the balance of legal costs and expenses due to the applicant, which was credited to the Administrator's Account Number 6814026821 in the name of KERIAKO KISIRI LUKUMAY and LOISUJAKI KERIAKO KISIRI in the National Microfinance Bank Limited and on 15/09/99 the administrators signed a discharge voucher thereby discharging the applicant firm of all claims, demands, actions, causes of action or suits at law or in equity in respect of the deceased's estate. It is on the basis of such evidence that Mr Mahatane then acting as counsel for the applicant had forcefully submitted and argued that the applicant is entitled to the discharge sought in prayer 1 of the Chamber Summons, and that the resealing in Kenya of letters of administration obtained by the respondent on 12/09/2000 had been overtaken by events, that there is no longer any estate of the deceased to be administered in Kenya.

The respondent had in his counter- affidavit basically stated that the signing of the discharge voucher by the administrators of the estate of the late Mathias Keriako Kisiri was obtained by fraud, that the appointment of the aforesaid administrators was later revoked by

this court on 12/09/2000, and that following the aforesaid revocation the respondent and the widow of the late Mathias Kisiri were appointed administrator and administratrix respectively of the said estate and in the course of discharging their duties as administrators of the estate, the administrators of the aforesaid estate had discovered that the applicant had actually retained illegally a sum of K Shs 4,526,248/= which sum was payable to the estate of the deceased. The counter-affidavit further states that the respondent had instructed M/s Edward Moonraker Mwangi Advocates to reseal the letters of Administration issued by this court on 12/09/2000, with a view to filing a civil proceeding against the applicant to recover the said sum, interest and other dues to the estate.

I have carefully considered the affidavit evidence of the respective parties even though the hearing of the application proceeded ex parte.

Indeed it is evident from the record of this court's Misc Civil Application No 57 of 2000 that the appointment of Keriako Kisiri and Loisujaki Keriako was revoked on 12/09/2000, and following such revocation the respondent and one RAHIL MATHIAS KERIAKO were

appointed administrators on 12/09/2000 in Probate and Administration Cause No 4 of 1997.

I will begin by saying that I have noticed certain defects in the counter-affidavit which I shall endeavour to consider in the course of this ruling. In the first place, I will disregard the accusation of fraud stated in paragraph 2 of the counter-affidavit, since the statement about the signing of the discharge voucher by the administrators of the estate having been obtained by fraud, et cetra, is in my opinion hearsay and not admissible in evidence. In any case in my opinion fraud cannot be proved by affidavit. It requires a high standard of proof, beyond reasonable doubt. I will also disregard paragraph 6 of the counter affidavit stating that the Complaints Commission of Kenya had written a letter to the applicant in which the Commission had allegedly "formed an opinion that the applicant had mishandled the issue of compensation on behalf of the respondent who had given him the Power of Attorney" for apart from the statement being hearsay and extraneous matter, this letter from the Complaints Commission does not demonstrate how the alleged complaint was finally resolved.

Section 50 of the Probate and Administration Ordinance provides as follows:-

"50-(1) Where any probate is, or letters of administration revoked, all payments bona fide made to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same.

(2) The executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself out of the assets of the deceased in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made."

The applicant has in its affidavit stated that it has discharged its duty to the estate in question by payment of the money it was holding on behalf of the estate and beneficiaries of the estate to the lawful administrators of the estate. Upon careful consideration of the affidavit evidence of both parties I am satisfied that the applicant had in 1994 secured a sum of K. shs 869, 400/= on behalf of the estate

of the deceased Mathias Keriako Kisiri which sum was inclusive of legal costs payable to the firm and that on 8/12/1999 a sum of T.shs 4,167,752/02 was paid by the applicant and credited to Bank account No 6814026821 in the National Microfinance Bank Limited Arusha in the names of the then administrators of the deceased's estate, namely KERIAKO KISIRI and LOISUJAKI KERIAKO, who had instructed the applicant to pursue the claim for compensation on behalf of the estate, and that the sum paid to the administrators was less the balance for the legal costs and expenses which had accrued in the matter. It is also evident from a copy of the Discharge Voucher annexed to the applicant's affidavits that on 15/12/99, in the legal capacity as administrators of the estate of the late Mathias Kisiri, Keriako Kisiri and Loisujaki Keriko had signed a discharge voucher discharging the applicant of all claims arising from the accident claim in question. According to the applicant's affidavit evidence the aforesaid administrators had accepted the legal fees paid to the law firm amounting to a sum of K.shs 1,112,709 as full and final settlement of their fees. By reason of the foregoing I am satisfied that notwithstanding the undisputable revocation of the

letters of administration granted to KERIAKO KISIRI and LOISUJAKI KERIAKO, the payment made to them as administrators by the applicant as evidenced in the applicant's affidavit evidence was indeed made, on a balance of probabilities, and hence sufficient to entitle the applicant to a legal discharge. On a balance of probabilities I find the evidence in the applicant's affidavits more credible. Indeed in the counter-affidavit the respondent does not dispute that the administrators had signed the discharge voucher, only he stated that the signing was obtained by fraud. This statement as said earlier is hearsay, and more importantly, can best be proved in a substantive proceeding such as a suit, etc. Allegations of fraud cannot stand in applications of this nature.

I have taken note of the fact that new administrators have been appointed one of them being the respondent and that an application for the resealing of the letters of administration granted by this court on 12/09/2000, has been filed in Kenya and is perhaps still pending in court. However a discharge of the applicant by this court cannot in my view prejudice Application No. 1395 filed in the High Court of Kenya if indeed it is still pending.

In the final result prayer (1) in the applicant's Chamber Summons is granted and in terms of S. 50 of the Probate & Administration Ordinance the applicant is hereby discharged in all matters relating to the estate of the late Mathias Keriako Kisiri.

However prayers 2 and 3 are in my view defective. In prayer 2 one of the parties that is RAHIL MATHIAS KERIAKO has not been made a party to the instant application, while in prayer 3 the parties against whom the order is sought to be made have not been joined as parties/respondents. The court cannot make any order against them as they are not parties in this application. Secondly in this application the applicant has not cited the material provisions of the law relied upon to move the court to grant the orders sought in prayers 2 and 3. Due to the non-citation of the law empowering the court to grant prayers 2 and 3, this court has not been moved to grant the aforesaid prayers 2 and 3; and hence this application is undoubtedly incompetent with respect to prayers 2 and 3. Accordingly I strike out prayers 2 and 3 of this application (See the Court of Appeal of Tanzania decision in Naibu Katibu Mkuu (CCM) and Mohamed Ibrahim Versi (ZNZ) Civil Application No. 3 of 2003).

I make no order as to costs.

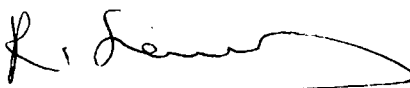

R. SHEIKH

JUDGE

9/08/2006

Ruling read this 2nd day of November 2006 in the presence of Mr. L. Ojare learned advocate for the applicant (replacing Mr Mahatane) and the respondent, and Vero B/C




R. SHEIKH

JUDGE

2/11/2006

/mm