



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**SUCCESSION CAUSE NO. 176 OF 2013**

**IN THE MATTER OF THE ESTATE OF ABDALLAH SEFU NYAGONE (DECEASED)**

**JENIPHER MASEKE WEREMA .....1<sup>ST</sup> PETITIONER**

**AMINA WANJALA NYAONGE .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**STANDARD CHARTERED BANK OF KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**UNCLAIMED FINANCIAL ASSETS AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. A grant of letters of administration in the estate of the deceased were issued to the petitioners on 30<sup>th</sup> October 2013 and confirmed on 10<sup>th</sup> October 2014. This court, differently constituted, revoked the grant when the advocate on record failed to prosecute an application dated 12<sup>th</sup> April 2018. This prompted the petitioners to file a similar application dated 16<sup>th</sup> July 2021. In the application, the petitioners urged this court to reinstate the grant and compel the respondents to disclose the amounts in the deceased's account to enable them distribute the same. The application was supported by the grounds set out at the foot thereof and the petitioners' affidavit sworn on even date. The orders sought in the application were that;

a. Spent

b. This Honorable court be pleased to direct the Standard Chartered Bank Kenya Limited to disclose by b. way of account statements from the date of opening of the deceased's accounts to the petitioners the amount due to the dependents of the deceased's ABDALLAH SEFU NYAGONE in account No. 015/01/xxxx and 012/xxxxx;

c. This honorable court be pleased to direct the Unclaimed Financial Assets Authority to disclose to the Petitioners the amount due to the dependents of the deceased that was surrendered to them by Standard Chartered Bank Kenya Limited from Account No.015/01/5xxx and 012/xxxx;

d. This honorable court be pleased to reinstate the grant dated 10<sup>th</sup> October 2014;

e. Upon granting prayers 2, 3 and 4 this honorable court be pleased to direct the 1<sup>st</sup> and 2<sup>nd</sup> respondents to transfer the amount due to the estate of the deceased to the petitioners' joint account

f. Costs of this application be provided for.

2. Davidson Mwaisaka, the 1<sup>st</sup> respondent's Head of Legal, Kenya and East Africa, swore an affidavit on 15<sup>th</sup> September 2020 opposing the petitioners' application. He averred that he had interrogated the 1<sup>st</sup> respondent's computer systems and records and there was no account number 012-02-xxx in the books. He had however ascertained that the deceased was the 1<sup>st</sup> respondent's customer and held account number 01501-xxxx until 19<sup>th</sup> June 2001, when he withdrew Kshs. 4,568. 40 and closed the account. He annexed a copy of the statement of the account to his affidavit.

3. The officer added that the Proceeds of Crime and Anti-Money Laundering Act and the Central Bank of Kenya Prudential Guidelines required a customer's records to be maintained for 7 years following the termination of the account after which, the records could be destroyed. He maintained that 1<sup>st</sup> respondent was not holding any monies belonging to the deceased.

4. Godfrey Wambugu, the acting Head of Legal for the 2<sup>nd</sup> respondent, also swore an affidavit in response to the application. He deposed that the petitioners had not made a claim to the 2<sup>nd</sup> respondent to be furnished with the accounts in the deceased's name. Upon an inquiry of the 2<sup>nd</sup> respondent's database, the only monies they found attributed to the deceased were Kshs. 5/= which had been remitted by Safaricom Limited and Kshs. 333.75 which had been remitted by Barclays Bank of Kenya.

5. In a further replying affidavit, the 1<sup>st</sup> petitioner countered that the indication by the 1<sup>st</sup> respondent that account number 012-01-53132-004 did not exist was not factual since the deceased had received money from his employer, the Ministry of Health, through the 1<sup>st</sup> respondent from his first day of employment in the 1980s. She annexed a copy of a deposit slip dated 30<sup>th</sup> November 1990 to show that the deceased had deposited money in the account. She accused the 1<sup>st</sup> respondent of failing to disclose the fact that the deceased held an account with it before 11<sup>th</sup> July 1997.

6. The petitioner added that the indication that the deceased had opened an account on 11<sup>th</sup> July 1997 tallied with a letter by the 1<sup>st</sup> respondent indicating a change in technology which had introduced the new account. The petitioner claimed that through its Kisumu Branch, the 1<sup>st</sup> respondent wrote to the deceased indicating that they were changing his bank account from 012/01/xxxx4 to the new account 015/01/xxxx and thereafter the money in his initial account ceased to exist. She claimed that the 1<sup>st</sup> respondent had sought to defraud the deceased of his money and that the deceased had written a letter to the Governor of the Central Bank on 2<sup>nd</sup> October 2009 seeking his assistance on the matter. The petitioner had been advised that all unclaimed assets had to be remitted to the 2<sup>nd</sup> respondent. She asserted that the 1<sup>st</sup> respondent's response was maligned with half-truths and ought to be struck out.

7. On 5<sup>th</sup> August 2020, this court allowed prayer (d) of the application to enable the petitioners pursue the prayers sought in their application. The matter was thereafter canvassed by way of oral submissions.

#### **PARTIES' SUBMISSIONS**

8. Counsel for the petitioners, Ms. Cherotich reiterated the petitioners' claim that the deceased had been the respondent's client since the 1980s. She stated that when the respondent changed his account, the monies in the initial account were not transmitted to the new account. She submitted that they had brought in the 2<sup>nd</sup> respondent to find out if the 1<sup>st</sup> respondent had received any funds due to the deceased and if no monies had been remitted then the 1<sup>st</sup> respondent still had the money or there could have been fraud. She thus urged the court to compel the respondent to furnish them with statements of the accounts.

9. Mr. Ondeki for the 1<sup>st</sup> respondent submitted that after some time records were destroyed and in this case the petitioners alleged fraud which had taken place more than 28 years prior. He submitted that the claim for fraud against the 1<sup>st</sup> respondent was a claim to be made by way of a plaint and not within the succession cause. To support this position, he referred to the case of *In Re Estate Alice Mutua 2007 eKLR* where Musyoka J. had held that a claim against a party who was not a beneficiary of the estate or personal representative was to be made within the Civil Procedure Rules. He therefore urged the court to disregard the evidence for the reason that the claim for fraud needed to be tested by the High Court. He also claimed that the claim was beyond the limitation period.

10. Mr. Wambugu who was appearing for the 2<sup>nd</sup> respondent, submitted that they had not received any amount on behalf of the deceased other than what was indicated. He therefore urged the court to dismiss the application against the 2<sup>nd</sup> respondent.

11. In brief rejoinder, Ms. Cherotich, asserted that the statements were vital to the determination of the succession matter. She referred to Article 35 (1) (b) to support her argument that the petitioners had a right to the information sought and the case of *In Re Estate of Christopher Kipnetich Biwott (Deceased) Succession Cause No. 22 of 2018 [2020] eKLR* where the petitioners had similarly sought statements for several bank accounts, and the court had granted the orders. On opposing counsel's contention that the matter was time barred, Ms. Cherotich stated that there were no time limits for matters relating to fraud under Section 26 of CAP 22.

### **ANALYSIS AND DETERMINATION**

12. The petitioners have sought statements for account nos. 015/01/xxxx and 012/xxx from the 1<sup>st</sup> petitioner and a disclosure by the 2<sup>nd</sup> respondent of the amounts remitted to it by the 1<sup>st</sup> respondent from those accounts. The 1<sup>st</sup> respondent attached the statements relating to account no. 015/01/xxx in its response to the application. The 2<sup>nd</sup> respondent also revealed the monies that had been remitted to it in the deceased's name. The main outstanding issue arising from the application, the responses and the parties' submissions is whether the petitioners should be furnished with statements for account no. 012/xxxx.

13. The petitioners are convinced that the 1<sup>st</sup> respondent is in possession of the deceased's funds. They are adamant that the deceased held account no. 012/xxx with the 1<sup>st</sup> respondent. They claim that the deceased had been receiving monies in the account from his employer and attached copies of pay slips dating as far back as 1994 and a deposit slip dated November 1990 to support of their averments.

14. For its part, the 1<sup>st</sup> respondent maintains that there are no records for account number 012-01-xxx in its books and that it holds no funds for the deceased. The respondent claims that the deceased had account no. 01501-xxxx which he closed in June 2001 after withdrawing funds from the account.

**15. Section 83 (b) of the Law of Succession**, provides that personal representatives have the duty to "to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death." The petitioners are therefore duty bound to pursue the claim on behalf of the estate of the deceased and ensure that the deceased monies are brought in and distributed to his rightful heirs.

16. In the case of *In Re Estate of ENK (Deceased) Succession Cause No. 2423 Of 2010 [2015] eKLR* Musyoka J. ordered a bank to disclose the amounts held in the deceased's account thus;

"I will first deal with the issue of the disclosure of the bank balances by Family Bank. It is common ground that the bank has been reluctant to disclose the balances before the grant is confirmed. Yet it is legitimate for the administrators to know the amount of money being held in those accounts. As administrators they require funds to meet administration expenses. It would be useful for them to know where they can draw funds from to meet those expenses. There are debts too to be paid. Some debts are statutory and the law is quite clear that debts take priority over distribution. In an ideal situation the application for confirmation of grant should be filed or heard after settlement of all debts and liabilities. What should be available for distribution should be the net estate, that is after debts and liabilities have been dealt with. The bank stands to suffer no prejudice from such disclosure."

17. A similar position was taken by the court in the case of *In Re Estate of Christopher Kipnetich Biwott (Deceased) Succession Cause No. 22 of 2018 [2020] eKLR* which was cited by the petitioners' learned counsel. In that matter, it was alleged that the petitioners were collecting rental income generated out of the estate's properties. The court ordered several banks to furnish statements for several accounts in order to give a full account of the dealings with the estate of the deceased for just and equitable distribution of the estate.

18. The issue in the present case is distinguishable from the issues arising in the foregoing authorities for the following reasons. First, the dispute in the instant application pits the personal representatives of the estate against the 1<sup>st</sup> respondent, which is a third party to the estate. Second, there is no consensus between the petitioners and the 1<sup>st</sup> respondent on whether the deceased had a bank account no. 012-01-xxxx.

19. The court in the case of *In Re Estate Alice Mutua 2007 eKLR* expressed itself thus on the jurisdiction of the probate court;

26. It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who [are] neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

20. Disputes arising against parties who are not beneficiaries of the estate of a deceased are decided outside the regime of the law of succession. The 1<sup>st</sup> respondent is not a survivor or beneficiary in the estate of the deceased. It does not admit the petitioners’ claim that it holds funds on behalf of the deceased. The petitioners claim that at the time of his demise, the deceased was still pursuing the matter. In a letter said to be written by the deceased to the Governor of the Central Bank of Kenya, the deceased complained that he had been unable to access a substantial amount of money credited to his account. It is evident that at the time of his demise, the matter had not been resolved.

21. The 1<sup>st</sup> respondent denies that the funds exist. It claims that it has no records for account no. 012/xxx and has put up a defence of limitation of actions and its entitlement to destroy records after a certain period of time. Those are matters that fall outside the jurisdiction of the probate court. This court lacks the mandate to hear and determine the issues raised in the application. Accordingly, the application dated 16<sup>th</sup> July 2021 is hereby dismissed.

22. Each party shall bear his own costs of the application.

**DATED, SIGNED AND DELIVERED AT KISII THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2021**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**1<sup>st</sup> & 2<sup>nd</sup> Petitioners Absent**

**Mr. Ondiek For the 1<sup>st</sup> Respondent**

**Mr. Wambugu For the 2<sup>nd</sup> Respondent**

**Ms. Rael Court Assistant**



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