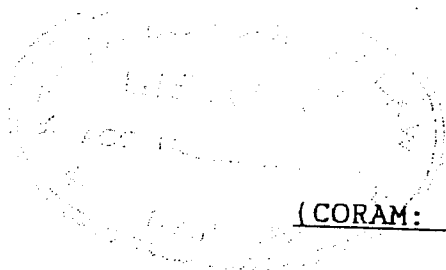


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IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: AKIWUMI, BOSIRE & OWUOR JJ.A)

CIVIL APPEAL NO.162 OF 1999

BETWEEN

THE ADMINISTRATORS OF THE ESTATE OF MAXWELL
MAURICE OMBOGO (DECEASED) APPELLANT

AND

STANDARD CHARTERED BANK KENYA LTD 1ST RESPONDENT
THE LAW SOCIETY OF KENYA 2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of
Kenya at Nairobi - Mr Justice A.I. Hayanga given on 26th
February, 1998

in

H.C.C.C. No.520 of 1997)

JUDGMENT OF THE COURT

This is an appeal from the order of the superior court (Hayanga J.) given on 26th February, 1998, in which, pursuant to interpleader proceedings under Order 33 rule 1 of the Civil Procedure Rules by Standard Chartered Bank Kenya Ltd (the Bank), he ordered that two nominees of the Law Society of Kenya (the LSK) be the signatories of two bank accounts in the name of one Maxwell Maurice Ombogo (deceased) instead of the administrators of the deceased's intestate estate.

The deceased, who at the time of his death, on 5th July 1995, was an advocate of the High Court of Kenya, was a member of LSK, and on account of such membership and pursuant to the Advocates (Accounts) Rules, made under the Advocates Act, Cap 16 Laws of Kenya, he maintained two bank accounts with the Bank respectively

designated "clients" and "office" accounts. Acting pursuant to The Law Society of Kenya (General) (Amendment) Regulations, 1995, which were published in the Kenya Gazette as Legal Notice No. 279 of 1995, the LSK advised the Bank in writing to stop all transactions in the two bank accounts until advised otherwise by it. Soon thereafter the Bank also received letters from the advocates of the administrators of the deceased's estate to the effect that the said administrators and not LSK had the legitimate right to operate the two accounts. The suit which gave rise to this appeal was thus provoked.

The aforesaid suit was commenced by originating summons in accordance with Order 33 rule 1 of the Civil Procedure Rules. No oral evidence was considered necessary as the facts were not in dispute. The deceased died intestate leaving behind a widow and children. We were told from the bar that the widow was initially the legal representative of the deceased's estate, but no evidence of that fact was presented to us nor can we find any on record. We, however, have on record a copy of a limited grant of letters of administration which was issued to Laura Ombogo and Miriam Ombogo, on 1st November, 1996, more than one year after the death of the deceased. It is shown at the bottom as having been amended on 1st November 1996, but the nature of the amendments have not been shown. Be that as it may, the suit was filed in court sometime in March, 1997. From the affidavits filed and the arguments which were made before the trial Judge, the main, if not the only issue, was, who between LSK and the administrators of the deceased's

estate is legally entitled to administer the two bank accounts in issue.

LSK's case is based on Legal Notice No. 279 of 1995 which was promulgated by its Council, pursuant to a special resolution of the members under section 27 of the Law Society of Kenya Act, Cap 18 Laws of Kenya. The Legal Notice as material to this matter provides as follows:

"(2) A member carrying on practice alone shall name in his application for the annual practising certificate one or two other members, none of whom shall be less than seven years standing to administer his firm in the event of his death, disbarment, imprisonment or any other disability to practice.

(3) Where a member dies testate, the administrator or administrators shall deal with his firm as may be stated in his will; but in case of intestacy, the Council of the Society shall give such directions or instructions to the administrator(s) as may be necessary for the proper management and disposal of the firm.

(4) No person shall be nominated administrator without his consent, but where such consent cannot be obtained, the applicant shall state that fact in the application for a practising certificate.

(5) Where no person is nominated in the application for lack of consent or for any other reason, or where an administrator or administrators refuse(s) or neglect(s) to act, the Chairman of the Society shall make the nomination which shall for all intentions and purposes be as effectual as if made by the deceased or the incapacitated member.

(6) A reasonable remuneration for services rendered shall be paid out of the income or proceeds of the firm to the administrator or administrators.

Made on the 5th July, 1995.

P.M. Mwangi
Secretary, LSK".

LSK's submissions before the trial court were that by reason of the fact that the deceased was a member of the LSK at the time of his

death the aforesaid Legal Notice applied to him and on that account, the Chairman of the LSK was empowered to appoint one or two administrators to manage his legal firm for purposes of winding it up; that notwithstanding that the Legal Notice came into force after the deceased's death, its wording and the fact that it is only procedural and a subsidiary type of enactment, it operated retrospectively; and that in any event the deceased's law firm being a specialized operation needed a qualified and practising advocate to manage and wind it up.

On the other hand, the administrators of the deceased's estate contended, in the main, that the law that applied to the deceased's estate, including his law firm, after his death, was the Law of Succession Act, Cap 160 Laws of Kenya, and that to the extent that L.N. 279 of 1995 made provision for the administration of part of the deceased's estate by people, other than those appointed under the Act, it was inconsistent with the Act and to the extent of the inconsistency, was void. Besides, the Legal Notice having been promulgated after the deceased's death and in the absence of express words that it would operate retrospectively, it had no application to the deceased.

Hayanga, J. held that L.N 279 of 1995, was a retrospective legislation in relation to the deceased's estate; that it was not inconsistent with any of the provisions of the Law of Succession Act, more particularly sections 79, 82 and 83 thereof; that the Chairman of LSK was, therefore, legally and legitimately entitled to appoint two advocates, Messrs Nzamba Kitonga and Okwach,

pursuant to that Legal Notice, to manage and wind up the law firm of the deceased; and that the two nominees and not the administrators of the deceased's estate, were entitled to freely and in accordance with the terms of the Legal Notice, manage the aforesaid two bank accounts and to render an account to the administrator or administrators of the deceased's estate if appointed within six months. The administrators of the deceased's estate were aggrieved and hence the appeal.

The memorandum of appeal has seven grounds, but at the hearing of the appeal Mr Owino Okeyo for the appellant abandoned the last two. In a nutshell, the remaining grounds are concerned with the applicability of L.N. No.279 of 1995 to the estate of the deceased and more specifically to his law firm. Before we consider the rival arguments on those grounds, it is important to consider, in brief, the background to the promulgation of the said Legal Notice. We were told by Mr Okwach, for the LSK, that due to the recurrent deaths of practising advocates, the members of the LSK, pursuant to what they perceived as one of the objectives of the LSK enshrined in section 4 of the Law Society Act, empowered the Council of the LSK to promulgate the aforesaid legal notice with a view to protecting the interests and rights of the clients of deceased advocates or of those advocates who for one reason or another, had been disbarred or suspended from legal practice. According to him the appointment of the LSK's administrators to manage and wind up law firms of, inter alia, deceased advocates was in furtherance of that objective.

In his submissions before us, Mr Owino Okeyo submitted on the authority of Carson v. Carson and Another (1964) ALL ER 681, that a retrospective intent of a piece of legislation can only be discerned from the wording of the legislation or by necessary implication. In his view, a plain reading of L.N. 279 of 1995 clearly shows that it was not intended to operate retrospectively. Besides, he added, the wording of the Legal Notice also clearly shows that, contrary to what the learned trial Judge held, it is not nor was it intended to be a procedural legislation. It affects existing rights of other people, more particularly the beneficiaries of the deceased's estate whose rights are protected by the Law of Succession Act, and to the extent that those rights are so affected, the Legal Notice is in conflict with the said Act.

Mr Okwach, on the other hand, submitted, inter alia, that since the deceased was a member of the LSK at the time of his death, and in view of the fact that he held a current practising certificate which had been issued to him under section 23 of the Advocate Act, Cap 16 Laws of Kenya, he was subject to the disciplinary and supervisory procedures for advocates. The Council of the LSK had, and always has, the right to interfere with the management of any law firm including that of a deceased advocate to ensure that it is run in accordance with the Advocates Act. In his view, L.N. 279 of 1995 was legitimately promulgated under section 27(k) of the Law Society Act and to the extent that the said Legal Notice did not purport to amend or repeal any existing law, and notwithstanding that it was not perfectly drafted, it was merely a

procedural enactment, and by dint of the provisions of section 28 of the Interpretation and General Provisions Act, Cap 2 of The Laws of Kenya, which recognizes the making of subsidiary legislation to have retrospective effect, the Legal Notice was intended to be and is retrospective in its operation. Additionally, he urged, where the language of any legislation is silent as to whether or not it is to operate retrospectively, the Court has the power to determine the issue. He cited the case of Patel v. R. [1968] EA 97 at P.99H, in support of that proposition.

As regards the issue whether or not the Legal Notice in issue was in conflict with the Law of Succession Act, Mr Okwach submitted that because, in his view, administrators appointed under the aforesaid Act, have no powers over trust funds like those normally held by advocates in a "clients account" and the same not being part of the said advocates' free estate, the Law of Succession Act, did not apply to such trust funds. Accordingly, he added, the provisions of the Act cannot possibly be in conflict with L.N 279 of 1995.

There is no doubt whatsoever that before his death on 5th July, 1995, the deceased held a valid practising certificate as an advocate, was subject to the provisions of the Advocates Act and to the mandatory membership of LSK as required by section 5(a) of The Law Society Act. But can it be said that after his death, the deceased continued to be subject to the provisions of both The Advocates Act and The Law Society Act?. Mr. Okwach seemed to imply that with the object of protecting the interests of the clients of

the deceased advocates the provisions of both the aforesaid legislations applied to their respective practices. With due respect to him both legislations are geared to ensuring proper conduct on the part of practising advocates, and it would be irrational to suggest that the said legislation can be extended to cover the legal practice itself after the practitioner has died. Admittedly, upon the death of a practising advocate his clients may and often suffer if his law firm is not wound up soonest and properly. There is the undeniable risk of their money, where applicable, being dissipated by beneficiaries of a deceased advocate's estate on the mistaken belief that it is part of the personal free estate of the advocate. It is the concern to protect such clients which, as we stated earlier, prompted the Council of LSK to promulgate Legal Notice No. 279 of 1995: That was a laudable idea, but does its provisions accord with the Law of Succession Act? Mr Owino Okeyo does not think so, while Mr Okwach thinks otherwise.

Section 45(1) of the Law of Succession Act provides, in pertinent part, as follows:

"Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

Sub-section (2)(a) of this Section prescribes penalties for any contravention. The Law of Succession Act according to its preamble is a consolidating statute of the law relating to intestate and testamentary succession and the administration of estates of

deceased persons. Contrary to what Mr Okwach said, it does not exclude the affairs of law firms of deceased advocates notwithstanding the definition of the term "estate" which tends to suggest that all that the Act covers is the personal property of a deceased person and not any other property he could be holding as trustee. However, Jowitts Dictionary of English Law 2nd Ed. Vol 1 at P.725, suggests that the definition of the term "estate" is not confined only to what a person owns, but it includes property held in trust. The term is described therein in the following terms:

' "property"; thus we speak of real and personal estate, of partnership estate, trust estate, etc, especially with reference to questions of administration, as in the case of the estate of a deceased person, a bankrupt, or dissolved partnership.'

In view of the foregoing it is our view that the phrase "free property" of a deceased advocate is not limited to his personal estate only but extends to property held by him in trust, because by the definition of the phrase in the Law of Succession Act, it is property which he was legally competent freely to dispose off in his capacity as an advocate. It will do violence to the intention of the legislature in enacting the said Act, if a restricted meaning is given to the phrase, more so, as we earlier said, when the preamble to the Act, is closely looked at.

If further authority is necessary, there is section 58 of the Act, which makes provision for the number of administrators in respect of continuing trusts. By necessary implication it means that the Act does also cover trust property. Besides, section 46 of the Act empowers "any" police officer or administrative officer

who becomes aware of the death of any person to report the death either to an Assistant Chief or Chief of the area the deceased resided, who, on receipt of such report, is obliged to take specific steps to protect the free estate of the deceased, including, if no application for representation of the estate has been made within one month after the date of death, the ascertainment of the deceased's free property. There are of course, certain preconditions which must first be satisfied. The significance of that section is clearly that the Act authorises persons other than advocates to take all necessary steps to preserve all the free property found in a deceased person's residence, and also to ascertain all persons appearing to have any legitimate interest in succession to or administration of his estate. The section does not distinguish between professionals and ordinary people, rural and urban people, except that for those who dwell in municipalities a report of the death must first be made to the Public Trustee before any action is taken as aforesaid.

Pausing here for a moment, it would appear to us that the Council of LSK by enacting Legal Notice No 279 of 1995 must have acted on the mistaken belief that there was a lacuna in the Law of Succession Act, with regard to the administration of a deceased advocate's law practice. Section 46 aforesaid, does seem to provide an answer. It may not be satisfactory to LSK, but that is a different matter. Perhaps the only way out for it is to seek an amendment to that section to provide for the making of a report of the death of an advocate to it instead of the Public Trustee, and

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further for the empowering of the Council of the LSK to make rules for the management and winding up of such advocate's legal practice.

Coming back to the definition of "free property": in view of what we have stated above, it is quite clear that the phrase connotes not only the personal property of a deceased person, but also, all the property which was in his possession or control or under his power, and the disposal of which, would legally have required his authority, but for his death. Money held in a deceased advocate's "client account" falls into that category. It then follows that the late Ombogo's two bank accounts were part of his free property and, therefore, subject to the provisions of the Law of Succession Act. LSK not being among the people who, under section 46 aforesaid, have the power to take all necessary steps to protect the deceased's estate, it had no right to direct the deceased's bankers to freeze the two bank accounts. Even if it had such right it would not have priority over the administrators of the deceased's estate under the Law of Succession Act (see Section 66). We recognize the real danger of a lay administrator appointed under that Act, dissipating money in a "clients account" in the mistaken belief that it is the deceased's money. However, as the law now stands, only the Public Trustee and in case he does not act, an assistant chief, chief or an administrative officer, are empowered to take all such steps as are necessary to protect the estate of a deceased person, including deceased advocates, from dissipation.

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Having come to the foregoing conclusion, it will be academic to consider the issue whether or not L.N. 279 of 1995 is a retrospective legislation and whether or not it is a procedural enactment. We must however add that in view of what we have stated above, the legal notice is in conflict with the Law of Succession Act, to the extent that it seeks to establish a parallel law and procedure to that in the Law of Succession Act, for the management and administration of law firms of deceased advocates without express legal provisions in that regard in the parent Act. Section 20 (K) of the Law Society Act, must be read in that context. The objects of the LSK do not include the management and winding up of law firms of deceased advocates. The paragraph must be read eiusdem generis with the preceding paragraphs of that section. Section 4(e) of the Act which was cited as the basis for promulgating L.N. No. 279 of 1995, is, with respect, being overstretched to cover situations which are reasonably catered for under the Law of Succession Act.

In the result, and for the foregoing reasons, we allow the appellant's appeal, set aside the ruling and order of the superior court given on 26th February, 1998, and substitute therefor an order that the deceased's two accounts at Standard Chartered Bank, Kenyatta Avenue branch, being accounts Nos. 014-42-255 327 and 014042 025 5327-00 be managed and operated as shall be directed in the final grant of letters of administration or as the court seised of the application for grant of letters of administration of the estate of the late Maxwell Maurice Ombogo, shall direct.