



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Stanley Omambia Ogero (Deceased) (Probate & Administration
228 of 2015) [2024] KEHC 9521 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION 228 OF 2015**

WA OKWANY, J

JULY 30, 2024

BETWEEN

VITALIS NYACHIRO OMAMBIA 1ST APPLICANT

EVANS MONG'ARE OMAMBIA 2ND APPLICANT

STEPHEN GESURA OMAMBIA 3RD APPLICANT

AND

WILSON KAISANGO OGERO RESPONDENT

AND

PETER KEBABI OMAMBIA INTERESTED PARTY

RULING

1. This ruling is in respect to the Originating Summons dated 28th July 2023 wherein the Applicant seeks the following orders: -
 1. Spent
 2. That pending the hearing of this Application, the Honourable Court do issue orders restraining the Respondent from transferring, selling, sub-dividing, charging or dealing with the property known as L.R. No. North Mugirango/Ikongge/146 in any manner that is inconsistent with the grant issued on the 17th day of July 2008 and the Orders of 23rd March 2023.
 3. Spent
 4. Spent
 5. Spent



6. That this Honourable Court be pleased to issue orders cancelling the title issued by the Land Registrar to the Respondent herein on the 21st day of April 2020.
 7. That this Honourable Court be pleased to issue orders to the Officer Commanding Station Nyamira Police Station to provide security during the sub-division process that is to be undertaken on L.R. North Mugirango/Ikonge/146, in accordance with the Grant.
 8. That this Honourable Court do issue any other orders that it may deem just, fit and expedient in the interests of justice.
 9. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of the Originating Summons and is supported by the Affidavit sworn by Evans Mong'are (the 2nd Applicant) who avers that the Respondent was appointed an Administrator of the Estate of the deceased on 17th July 2009 and that it was agreed that L.R. North Mugirango/Ikonge/146 (hereinafter referred to as "the suit property") was to be distributed equally amongst the two houses of the deceased. He further avers that it was however discovered that the Respondent had illegally obtained title to the suit land (copy of Search marked 'EM-2') in violation of the law and the agreed mode of distribution which was tantamount to intermeddling with the Estate of the deceased. He urged the Court to intervene and cancel the title to restrain the Respondent's actions.
 3. The Respondent did not oppose the Application and at the hearing on 18th March 2024, Mr. Migiro Learned Counsel for the Administrator/Respondent, conceded to the Application and submitted that the Respondent had erred in transferring the title to himself. He also intimated that he would not file any submissions in the matter.
 4. The Respondent subsequently, filed an Application dated 7th June 2024 seeking to be removed as an Administrator of the Estate of the deceased citing hostility and threats from the Interested Party.
 5. The Interested Party, on the other hand, filed a Replying Affidavit dated 15th September 2023 in which he averred, inter alia, that the Estate was distributed to the widows of the deceased; namely, Martha Bwari Omambia and Serebina Nyamechi Omambia who were now also deceased and that none of the parties litigating in the suit was entitled to the Estate of the deceased in terms of the confirmed Grant unless fresh succession proceedings were instituted for the Estates of the two deceased widows.
 6. He further averred that the Court became functus officio the moment it confirmed the Grant and that any subsequent proceedings should be determined by a court of competent jurisdiction. He also stated that the present Application is an abuse of the court process and that the Law of Succession does not provide for commencement of an application of such a nature by way of Originating Summons.
 7. It was the Interested Party's case that the orders sought cannot be granted unless viva voce evidence is presented. He maintained that the claim is Res Judicata and that the Application did not meet the threshold of Sections 40, 47 and 73 of the Act.
 8. The applications were canvassed by way of written submissions.

The Applicants' Submissions

9. The Applicants submitted that the Court has jurisdiction to determine the application under Rules 41 (2) and (5) together with 73 of the *Probate and Administration Rules* because the suit property is still in the name of the deceased even though the dispute revolves around land ownership. It was submitted that the Court has power to intervene in acts of intermeddling and wastage of the deceased's estate



and that an objection to the Court's jurisdiction is akin to denying the litigants justice in a succession matter.

10. The Applicant argued that the Court has powers to issue injunctive orders in a Probate matters as was stated in *Floris Piezzo and Another vs. Giancarlo Falasconi* (2014) eKLR where it was held that Section 47 and Rule 73 empower the Court to make necessary orders including injunctions where appropriate, to safeguard the Estate of the deceased and to meet the ends of justice or prevent abuse of the court process.
11. It was submitted that the Respondent acquired title to the suit property without informing any of the beneficiaries and before the distribution of the said estate in terms of the confirmed Grant. Reference was made to Section 45 (2) (a) of the Act and *In the Estate of Veronica Njoki Wakagoto (deceased)* (2013) eKLR and *In Re Estate of John Gakunga Njoroge* (2015) eKLR where the court held that the deceased's property could only be dealt with by a person authorized by the law and that anything contrary constituted the crime of intermeddling with the estate of the deceased.
12. For the above reasons, it was submitted that the Respondent should be removed as an Administrator or, in the alternative, a co-administrator be added from the 2nd house. The Applicant cited the decision in the cases of *Re Elijah Mbono Ntbeketha* (2017) eKLR and *Re Estate of William Nzyoka Mutisya (Deceased)* (2018) eKLR where the court outlined the circumstances and manner of removal of an administrator through revocation of Grant under Section 76 of the Act.

The Interested Party's Submissions

13. The Interested Party submitted that the Court is functus officio in this matter as it had already determined the matter when it confirmed the Grant. It was the Interested Party's case that the said Application does not meet the threshold set under Sections 40, 47 and 73 of the Act. The Interested Party observed that since the Estate was distributed to the two widows who were now also deceased, and further, since the widows did not hold the property in trust for any of their children, the parties could not seek for the redistribution of the Estate of the deceased.
14. It was submitted that the Applicants had no known legal obligations to the beneficiaries of the Estate of the deceased and that the Applicants ought to have demonstrated that they were beneficiaries of the Estate of the deceased but even so, the appropriate approach would have been to move the Court to revoke the Grant under Section 76 of the Act.
15. It was the Interested Party's case that if the Applicants were wrongfully before the Court they should have instituted separate proceedings to allow them to act on behalf of their mother, the deceased's second widow. It was submitted that even if the Court were to grant the Orders of the Application as prayed and substituted the Administrator, the Estate would still end up being distributed to the two deceased widows as the sole beneficiaries since the Applicants had not obtained Limited Grant of Letters of Administration to enable them to act in the place of their deceased mother.

Analysis and Determination

16. I have carefully considered the pleadings filed herein and the parties respective submissions together with the authorities that they cited. I find that the main issues for my determination are: -
 - i. Whether the Respondent/Administrator intermeddled with the Estate of the deceased.
 - ii. Whether the Applicants have locus standi to move the Court in the present Application and whether the Application is merited.



Intermeddling with the estate of the deceased

17. The Record contains Certificate of Confirmation of Grant dated 17th July 2009 issued by this Court (differently constituted). The same was attached to the Application and marked as annexure ‘EM-1’. The said Certificate reveals that the deceased’s estate comprising of the suit land was distributed equally between Martha Bwari Omambia and Seribina Nyamechi Omambia. I find that even though the confirmed Grant was yet to be actualized through the transfer of title documents to the deceased widows, the Respondent, as an Administrator did not have the right to transfer the title to the said property to his name to the exclusion of all the other beneficiaries. It is my humble view that the mere fact that the Respondent was an administrator of the said estate did not give him a carte blanche to transact with the deceased’s property whimsically. It is trite that any transactions carried out by an administrator must be in respect of realizing the liabilities and expenses of the estate of a deceased and any titles obtained are only to be held in trust for the beneficiaries.
18. The role of an administrator was succinctly explained in the case of *Re Estate of Julius Mimano (Deceased)* [2019] eKLR, where it was held thus: -

“ 58. The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the *Law of Succession Act*. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been under were they to be alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.

59. Secondly, personal representatives administer estates on the strength of legal instruments made to them by the probate court. The vesting of the estate of the deceased on the personal representatives by virtue of section 79 of the Act, flows from the instrumentality of the grant of representation. Upon representation being made, the grant holder then becomes entitled to exercise the statutory powers conferred upon personal representatives by section 82 of the Act and incurs the duties imposed on them by section 83 of the Act. Additional powers flow from and duties are imposed by other statutes, such as the *Trustee Act*. Under section 82 of the Act, there are powers to enforce and



defend causes of action on behalf of the estate, to sell or convert estate assets, to assent to vesting of bequests and legacies on the beneficiaries, among others. Acts done or actions taken on behalf of the estate or for the benefit of the estate would have to be accounted for. In other words, the personal representatives are bound to account for every action they take on behalf of the estate, for they exercise the powers on delegation.”

19. In the present case, it was not clear why the Respondent transferred the contentious parcel to his name contrary to the clear terms of the Confirmed Grant. It is also clear that he did so without the knowledge of the beneficiaries and other dependants of the deceased. I find that he is guilty of the offence of intermeddling with the Estate of the deceased as defined in Section 45 of the *Law of Succession Act*, which states as follows: -

45. (1) 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.

(2) Any person who contravenes the provisions of this section shall

- a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine imprisonment; and
- b. be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

20. It is my finding that the Respondent unlawfully transferred the parcel to his name contrary to the requirements of the *Law of Succession Act* and that prayers No. 2nd and 6th of the Application are merited.

Locus Standi

21. It was not disputed that the deceased died intestate and was survived by two widows who also had children. It however emerged that at the time of obtaining and confirming the Grant, only the two widows were listed as the beneficiaries of the Estate of the deceased. It can be concluded that the Applicants were therefore before the Court as children of the deceased from the 2nd household. Section 29 of the *Law of Succession Act* defines a dependant as: -

29. Meaning of dependant

For the purposes of this Part, "dependant" means—

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b. such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.



22. Having regard to the above provision, I am satisfied that although the Applicants were not listed as beneficiaries of the estate of the deceased as the dependants of the deceased, the law permits them to seek redress.
23. The Law of Succession is clear on the process of distribution of a deceased person's estate. Once a Grant has been confirmed, it is the duty of the Administrator to distribute the Estate in accordance with the Certificate of Confirmation of Grant. Where any of the dependants of the deceased is dissatisfied with the said confirmation, he/she is not under Section 74 of the Act at liberty to seek a rectification or a Revocation or annulment of the Grant under Section 76.
24. I find that as it presently stands, the deceased's Estate was properly distributed to his widows and that following the death of the said widows before the actualization of the confirmation, the law allows parties in a succession cause to rectify Grants under Section 74 which provides: -
74. Errors may be rectified by court
- Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.
25. I find that the Applicants in this case should have applied for a rectification of Grant to enable them substitute the deceased widows in the Estate of the deceased because the Estate and particularly the suit property was still vested in the deceased as the legal owner. I therefore decline to grant prayer No. 7 which calls for a subdivision of the contentious parcel.
26. Turning to the Respondent's Application dated 7th June 2024 for his removal as an administrator of the Estate, I note that Rule 73 of the Probate and Administration Rules allows for the exercise of the inherent powers of the court as follows:-
- “Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court”.
27. *In Re Estate of Njue Kamunde (Deceased)* [2018] eKLR it was held:-
- “The applicant contends that the respondent has acted contrary to the law in carrying out her duties as the administratrix and feels that on account of that, she should be suspended and leave her as the sole administratrix of the estate of the deceased who is her late son ... I agree with the applicant that Section 47 *Law of Succession Act* and Rule 73 Probate and Administration Rules can be invoked to remove or suspend him/her ... I also agree that personal representatives are subject to supervision of this court and this court will not shy away from making any orders that may be expedient and necessary for the ends of justice and to prevent abuse of powers conferred to them under Section 53 and 79 of the *Law of Succession Act*.”
28. Section 66 of the *Law of Succession Act* provides that:-
66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made.
29. The above provision connotes that the Court has the ultimate authority over who becomes an administrator of the estate of a deceased person and that such authority entails court's supervision an



existing administrator to satisfy itself that they are performing their duties diligently and in accordance with the law. The authority extends not only to the appointment but also the removal of a person as an administrator.

30. In the present case, the Administrator/Respondent cited hostility as his reasons for the application to be removed as an administrator. Courts have had occasion to outline the circumstances under which an administrator may be removed. *In Re Estate of William Nzioka Mutisya (deceased)* [2018] eKLR it was held thus:-

“It is however my view that the administrators may be removed from their duties where, due to wrangles and disagreements amongst themselves, it is impossible for them to proceed diligently with the administration of the estate ... In my view if the Court finds that the administrators are unable to properly administer the estate due to their disagreements, nothing stops the Court from removing them from the administration and appointing new administrators notwithstanding the issue of priority or preference.”

31. Guided by reasoning in the above cited case, this Court has no reason to doubt the Administrator/Respondent's claims that the Interested Party had turned hostile and was issuing threats over his life. Even assuming that the Respondent's claims were not factual, it is clear that he is not willing to continue in his position as the administrator of the subject estate. This Court is of the view that it cannot impose the duty of an administrator on a party who has already expressed his unwillingness to act as one. To do so would be to stall the succession process and hinder the conclusion of this matter thereby defeating the ends of justice. I therefore find that it will be in the interests of justice that the Application for removal of the Respondent as an administrator be allowed and the parties be allowed to consider an alternative administrator to complete the distribution of the Estate.

32. In the final analysis, I make the following final orders: -

- i. The Respondent is hereby restrained from transferring, selling, sub-dividing, charging or dealing with the property known as L.R. No. North Mugirango/Ikonge/146 in any manner that is inconsistent with the grant issued on the 17th day of July 2008 and the Orders of 23rd March 2023.
- ii. The title for L.R. No. North Mugirango/Ikonge/146 issued by the Land Registrar to the Respondent herein on the 21st day of April 2020 is hereby cancelled and revoked and the suit property shall revert back to the name of Stanley Omambia Ogero (deceased).
- iii. The Respondent has been discharged as the administrator of the Estate of the late Stanley Omambia Ogero (deceased).
- iv. The parties are hereby directed to agree upon and appoint two administrators representing each household. The said administrators shall be at liberty to file for rectification of Grant to reflect the wishes of the beneficiaries only in respect of the disputed parcel L.R. No. North Mugirango/Ikonge/146.
- v. As this is a family matter, each party shall bear its own costs.

33. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DAY OF JULY 2024.

W. A. OKWANY



JUDGE

