



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION NO. 944 OF 2019

IN THE MATTER OF THE ESTATE OF ESTATE OF DAUDI OWINO OLAK (DECEASED)

FRANCIS PHILIP ODUOR OWINO.....1ST EXECUTOR

MICHAEL ONDONDO OWINO.....2ND EXECUTOR

GODFREY OCHIENG OWINO.....3RD EXECUTOR

VERSUS

JUDY AWUOR OWINO.....BENEFICIARY

RULING

1. The record herein shows that the Daudi Owino Olak died testate on 15.2.19, having made a will dated 25.2.15. In their application for a grant of probate, the Executors Francis Philip Oduor Owino, Michael Ondondo Owino and Godfrey Ochieng Owino herein who are sons of the deceased, indicated that the deceased was survived by 2 widows, 5 sons and 6 daughters. A grant of probate of written will was on 18.11.19 issued to the Executors, who seek confirmation thereof vide their summons dated 19.2.2020.

2. By her Summons dated 19.4.21, Judy Awuor Owino, the Applicant herein seeks:

1. THAT prior to the confirmation of the grant issued by this Court on 18th day of November 2019, order the Executors to produce to the Court a full and accurate inventory of the assets and liabilities of the late Daudi Owino Olak Deceased's and a full and accurate account of all dealings therewith up to the date of the account.

2. THAT costs of this application be in the cause.

3. In her affidavits in support of the Application sworn on even date, the Applicant who is a daughter of the deceased averred that under Section 83(h) of the Law of Succession Act, the Executors are obligated, prior to confirmation of the grant, to render a full inventory of the assets and liabilities of the estate of the deceased and a full and accurate account of all dealings therewith since the demise of the deceased.

4. The Applicant also filed an affidavit of protest of even date. Her grounds are that the Executors have failed to render accounts. She also claimed that there is no full disclosure of the number of shares held by the deceased in both private or public companies, bank statements and certificates of official search of immoveable properties have not been exhibited. The Applicant further claims that Lake Dry Cleaners Limited should be excluded as the deceased did not hold any shares therein. Additionally, the Applicant stated that there is uncertainty as to whether various immovable properties have been transferred to Owino Olak Investment Limited. Additionally, the Applicant averred that the proposed distribution proposes to create a trust in perpetuity whose terms are not disclosed and further that the proposal regarding the share of the late Peres Odhiambo Owino is contrary to clause 7 of the last Will of the deceased.

3. In his replying affidavit sworn on 15.7.21, Michael Ondondo Owino averred that the Executors have not deviated nor interfered with the provision for distribution of the estate and that they will abide by the Will of the deceased. He further stated that a full inventory of assets of the estate was annexed to the application for confirmation of Grant. The Executors further confirmed that they are ready and willing to provide a full statement of account once the grant is confirmed and the distribution of the estate as per the Will. The deponent argued that the Protestor has not put forth allegations of impropriety, deceit or negligence on the part of the Executors and therefore he does not see the reason for the Court denying them confirmation of the Grant.

4. In her further affidavit sworn on 4.8.21, the Applicant reiterated her earlier averments. She stated that her only interest in filing the Application is accountability and transparency with regards to the affairs of the estate of the deceased.

5. Parties were directed to file submissions but only the Applicant complied. The Court has duly considered the Application, rival affidavits and the Applicant's submissions. The only issue for determination is whether the Executors should render accounts prior to confirmation of the Grant.

6. The Applicant contended that she has reservations with regards to the general state of affairs of the estate of her late father. She therefore seeks full disclosure of the assets and liabilities, and the Executors' dealing with same, to ascertain its net worth, prior to confirmation. The Applicant further submitted that there is a statutory obligation on the part of the Executors to produce accounts, of which they Executors admitted being aware.

7. The duties of personal representatives are clearly stipulated in the Law of Succession Act. These including the production of accounts. Section 83 of the Ct provides *inter alia*:

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

8. Under Section 79 of the Act, the property of a deceased person vests in his personal representative as follows:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

9. Further, the wording in the grant of probate issued to the Executors on 18.11.19 is instructive. The grant indicates that the same is made to the Executors named in the *“Will having undertaken faithfully to administer such estate according to law and to render a just and true account thereof whenever required by law so to do.”*

10. To support her case, the Applicant placed reliance on the case of In re Estate of Julius Mimano (Deceased) [2019] eKLR, where Musyoka, J stated:

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.

11. From the foregoing, it is evident that the role of a personal representative as bestowed by the Court, is fiduciary in nature. A personal representative is appointed by the Court, to collect in and manage the assets of the estate of a deceased person as trustee, for the benefit of its beneficiaries in accordance with the law. A personal representative thus owes a fiduciary duty to the beneficiaries. Indeed, when applying for a grant of representation, a personal representative undertakes and to render a just and true account thereof whenever required by law so to do. Further, the dealings of a personal representative with the estate of a deceased person, are of great interest to the Court, which has the responsibility of ensuring that the estate is not mismanaged or wasted. The production of a full and accurate inventory of assets and liabilities as well as accounts is the tool provided by statute, to monitor the dealings, by the personal representatives, with the estate of the deceased.

12. In the case of In re Estate of David Kyuli Kaindi (Deceased) [2015] eKLR Musyoka, J. had this to say on the obligation of personal representatives to render account:

The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.

13. In the instant case, the Executors herein, owe a fiduciary duty to the beneficiaries of the estate of the deceased and indeed the Applicant, for whose benefit they hold the assets of the estate, to account for their dealings with the same. Thus under the provisions of Section 83 of

the Act, the Executors are required to produce to Court, accounts within 6 months from issuance of the grant and also within 6 months from confirmation of the grant or after completion of the administration of the estate. Accounts must also be produced when the Court of its own motion or on the application of an interested party requires the same either before or after completion of administration of the estate.

14. It is to be noted that failure to render accounts as required is one of the statutory grounds for revocation of grant. Section 76(d)(iii) of the Act provides in part:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either –

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular;

15. In light of the provisions of Sections 79 and 83 of the Act, the Applicant, being a beneficiary of the estate of the deceased, is well within her right to apply for accounts notwithstanding that the grant is yet to be confirmed. She has raised concern as to the Executors' dealing with the estate. She has further stated that some properties to be distributed do not belong to the estate of the deceased. In the premises, the Court must prior to confirmation of the grant, satisfy itself that the Executors have thus far, faithfully dealt with the estate of the deceased. It must also be demonstrated to the satisfaction of the Court that the assets it is asked to distribute in the application for confirmation of Grant, do in fact belong to the estate of the deceased.

16. In the result, I do find that the Application dated 19.4.21 has merit and the same is hereby allowed on terms that:

- i. The Executors shall within 21 days of the date hereof, produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.
- ii. Proof of ownership of all assets of the estate of the deceased shall accompany the inventory that will be filed.
- iii. Mention for directions on 23.3.22.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25TH DAY OF FEBRUARY, 2022

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

.....**for the Respondents**

..... **Court Assistant**