



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION NO. 2044 of 2010**

**IN THE MATTER OF THE ESTATE OF ESTATE OF GODFREY ALATI OLUKOYE (DECEASED)**

**EMILY DOROTHY OSENA.....APPLICANT**

**VERSUS**

**JUDITH BETTY AYUMA.....PROTESTOR**

1. The deceased herein Godfrey Alati Olukeye died intestate at the M. P. Shah Hospital on 25.3.10 at the age of 44. The deceased was survived by 2 wives and 5 children. Following the deceased's demise, a grant of letters of administration, was on 13.5.11, was issued to his 2 widows, Judith Betty Ayuma (the Protestor) and Emily Dorothy Osen (the Applicant).

2. By a Summons dated 10.8.2020, the Applicant, moved this Court seeking the confirmation of the Grant. The consent was only signed by three children of the deceased, Stella Awinja Olukeye, Gerry Alati Olukeye and Gertrude Amisi Olukeye, leaving out two beneficiaries, Isabel Kahalechi Olukeye and Robinson Anambo Olukeye.

3. The Protestor opposed the Summons by her Affidavit of Protest dated 25.2.21. She accused the Applicant of seeking confirmation of grant without consulting her as co-administrator and without the consent of all the beneficiaries. The Protestor further stated that without her involvement and consent of some beneficiaries, the Summons was defective. She accused the Applicant of ignoring the proposal for distribution which she had sent to her and went ahead and filed a totally different distribution schedule. She urged the Court to order that both Administrators agree on the mode of distribution of the estate and file a fresh summons for confirmation of grant.

4. In her replying affidavit sworn on 15.3.21, the Applicant accused the Protestor of dishonesty. She denied receiving a proposal for distribution and averred that in 2012, the Protestor sent her blank documents for signature and has since never communicated with her on the matter. The reason the Applicant gave for going it alone is that in 2019, she sent documents for confirmation of grant to the Protestor for her signature and that of her children but she did not respond. In February, 2020 the Protestor was served with summons by the Applicant's Advocate through email but again, she did not respond nor acknowledge receipt. The grant remained unconfirmed to date due to the Protestor's failure to cooperate.

5. The record shows that the estate of the deceased comprises the following assets:

- a. Kajiado/Kitengela/11057
- b. Kajiado/Kitengela/11058
- c. Nairobi Block 82/2835
- d. Kahawa Sukari Limited Plot No. 1277
- e. Maragua Township unsurveyed residential plot No. 37
- f. L.R. No. 24854, Makuyu
- g. Motor vehicle KAD 390S
- h. CMC shares

- i. KCB shares
- j. Evereadyshares
- k. Kengen shares
- l. Mumias Sugar Co. shares
- m. Safaricom shares
- n. Pension from Kenyatta University

6. A look at the proposals made by the Applicant and the Protestor for distribution of the estate indicates that they are both generally in agreement. They only differ in relation to 2 properties, namely Kajiado/Kitengela/11057 and Maragua Township unsurveyed residential Plot No. 37. The Applicant proposed that the Protestor gets Kajiado/Kitengela/11058 and Maragua Township unsurveyed residential Plot No. 37 to hold in trust for Robinson Anambo Olukoye and Isabel Khalechi Olukoye in equal shares, while Stella Awinja Olukoye gets Kajiado/Kitengela/11057 and Nairobi Block 82/2835. The Protestor on the other hand proposed that she gets both Kajiado/Kitengela/11057 and Kajiado/Kitengela/11058 while Stella Awinja Olukoye gets Nairobi Block 82/2835 and Maragua Township unsurveyed residential Plot No. 37. The 2 widows were unable to agree.

7. In her submissions, the Applicant simply restated the averments in her replying affidavit. Notably, the Applicant did not in her replying affidavit respond to the Protestor's proposal for distribution of Kajiado/Kitengela/11057 and Maragua Township unsurveyed residential Plot No. 37, which was different from her own. She also made no submissions on the same.

8. In her submissions, the Protestor argued that a grant cannot be confirmed without the consent of all the beneficiaries of the estate. The Protestor also contended that the 2 Kitengela Plots are adjacent to each other and that she bought the same with the deceased. She has also put up a mansion on the said pieces of land. She urged the Court to allow distribution of the estate in accordance with her proposal. According to the Protestor, no prejudice will be suffered by any of the beneficiaries of the estate.

9. Rule 40(6) of the Probate and Administration Rules provides that a person seeking to object to confirmation of a grant is required to file an affidavit of protest as follows:

***Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.***

10. The Protestor, being unhappy with the Applicant's proposed mode of distribution has filed her affidavit of protest to object to the same, stating her grounds of objection. The Court notes that the proposal by the Protestor was not objected to by the Applicant or any of the other beneficiaries who are all adults.

11. It is noted that the Applicant did not explain the rationale of the distribution. The protestor however sought to explain the same, but in her submissions. She contended that she purchased the properties with the deceased and has even built a mansion on the same. This is a new issue raised in submissions and is not supported by evidence. It is well established that new issues cannot be raised in submissions and any issues so raised, are best ignored. This was well articulated by Korir, J. in Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR where he stated:

***The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.***

12. In the present case, not all beneficiaries have signed the consent and an affidavit of protest has been filed. The law requires that in such circumstances, the affidavit of protest shall be heard. Rule 40(8) of the Probate and Administration Rules requires that:

***Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protestor and to such other persons as the court thinks fit.***

13. Where an estate has more than 1 administrator, such administrators are required to act together in all matters relating to the estate including filing the summons for confirmation of grant. Where joint administrators are not able for whatever reason, as in the present case, to jointly file a summons for confirmation of the grant issued to them, then any one of them may do so in order to move the matter forward. At the time of filing the summons herein, the Applicant was required to obtain the consent of all dependants and all persons beneficially entitled to the estate of the deceased. She was however not able to obtain the consent of the Protestor and her children. Whereas failure to obtain the consent of beneficiaries would render proceedings leading to confirmation of a grant defective, it is necessary for the Court to look at the circumstances. It is apparent to the Court that the Administrators herein have not been cooperating with one another. This is clearly what led to the filing of the Summons herein by the Applicant alone.

14. As indicated, the issue in contention herein is Maragua Township unsurveyed residential plot no. 37 and Kajiado/Kitengela/11057. The

Court notes that the Applicant did not file any affidavit in opposition to the Protestor's proposal regarding these 2 properties. The Court is however mindful of the fact that the Applicant proposed that Stella gets Kajado/Kitengela/11057 which the Protestor also wants. Notably, Stella has not filed any affidavit to state her position regarding the Protestor's proposal, nor has she been made a party in this Application. Any decision by this Court is likely to affect her.

15. The legal imperative of hearing a person who is likely to be adversely affected by a decision before the decision is made, cannot be gainsaid. The principles of natural justice will not allow a party to be condemned unheard. In the case of J M K v M W M & another [2015] eKLR, the Court of Appeal sitting in Malindi observed:

***The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.***

16. Our Courts have been steadfast in upholding the principles of natural justice, and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. To allow the proposal by the Protestor without notice to, or the participation of Stella is to go against the principles of natural justice.

17. In the end, I make the following orders which are necessary for the ends of justice:

- i) The summons for confirmation dated 10.8.2020 and the affidavit of protest dated 25.2.21 shall be served upon all beneficiaries of the estate by 11.3.22.
- ii) The beneficiaries are at liberty to file responses which must be filed by 25.3.22.
- iii) Mention on 11.4.22 further directions.
- iv) This being a family matter, each party shall bear own costs.

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

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**M. THANDE**

**JUDGE**

**In the presence of: -**

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

..... **for the Protestor**

..... **Court Assistant**