



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

SUCCESSION CAUSE NO.106 OF 2014

IN THE MATTER OF THE ESTATE OF RAPHAEL CHARLES MAKOKHA (DECEASED)

ZILPAH CHEPKEMOI BETT.....PETITIONER/RESPONDENT

VERSUS

PAULINE MAKOKHA.....OBJECTOR/RESPONDENT

MATHEWS TONADO OKECH.....INTERESTED PARTY/APPLICANT

R U L I N G

[1] It is discernable from the record that after the death of the deceased, **Raphael Charles Makokha**, on the 30th April 2013 at the age of seventy eight (78) years, the present succession cause was instituted by his widow, **Zilpah Chepkemoi Bett**, vide the petition filed herein on the 28th March 2014 for grant of letters of administration intestate respecting the deceased's estate comprising of land parcels **No.Bukhayo/Mundika/10024, Bukhayo/Mundika/9772, Nairobi LR 2/24** and a m/vehicle **Reg No.KAC 542W Honda Accord**. These were listed as the assets belonging to the deceased as at the time of his death. The liabilities included nine (9) million in favour of Mathews Tonado Oketch and ksh.50,000/= in favour of Markline Agesa. Those in favour of Gedion Syenga Mulonzya and Jarel Nyongesa Oloo were not specified. The petition was accompanied by the Chief's letter dated 18th March 2014, indicating that the deceased was survived by his widows, Zilpah Chepkemoi Bett and Pauline Mary Makokha and his four children, a son, Thomas Makokha and three daughters, Ashleen Makokha, Sheila Makokha and Salome Makokha.

The letter indicated that Pauline Mary Makokha was the deceased's estranged wife.

[2] The consent to the letters of administration of the deceased being granted to Zilpah Chepkemoi Bett was filed herein on 27th June 2014. It was dated the 11th June 2014 and was signed by Zilpah and the four children of the deceased i.e. Thomas, Ashline, Sheila and Salome.

On the 8th July 2014, the grant was issued by the Court to Zilpah Chepkemoi Bett, who therefore undertook to administer the estate according to the Law and to render a just and true account thereof whenever required by Law.

However, this grant was invalidated by the issuance of a fresh grant on the 23rd March 2015 pursuant to a consent order made in court on 1st October 2014 in which the two widows of the deceased were co-opted as administrators of the deceased's estate.

The consent order was essentially a compromise of an application for revocation of the initial grant dated 5th September 2014 made by Pauline Mary Makokha.

[3] By dint of the fresh grant, **Zilpah Chepkemoi Bett** became the first administrator/petitioner while **Pauline Mary Makokha** became the second administrator/petitioner. They were also beneficiaries of the estate along with the deceased's four children, but before they could distribute the estate amongst all beneficiaries they were required under **S.71 (1) of the Law of Succession Act**, to apply for confirmation of the fresh grant after the expiry of six (6) months from the date of issue.

A confirmed grant empowers an administrator to distribute the estate in accordance with the Law, and/or the agreed mode of distribution. Indeed, the primary function of a succession court is distribution of the estate of a deceased person (see, **Estate of GKK(deceased) [2011]eKLR**).

[4] Apparently, the two administrators failed to take out within the prescribed time the necessary summons for confirmation of grant. The delay appears to have been occasioned by several interlocutory applications relating to the inclusion of additional property to the estate and

exclusion from the estate of part of the property purchased from the deceased during his life time by the interested party who was enjoined in these proceedings after filing a Notice of Motion dated the 8th October 2015 on the basis of **S.93** of the **Law of Succession Act**.

Ultimately, on the 20th November, 2019, the court made its ruling on the pending applications and ordered that the interested party, **Mathew Tonado Oketch**, purchaser of part of the estate property be included as a beneficiary of the estate.

[5] In the concluding paragraph (8) and (9) of the ruling, the court rendered itself thus:-

“8 - It would not be prudent for me to issue an order in favour of one administrator where there are more than one. This application does not appear to be made in good faith. I am making an order that the administrators herein to move with speed and distribute this estate so as these kind of “games” are eliminated altogether.

9 - The administrators ought not to compete on the issue of which assets should form part of the deceased’s property.

The law is very clear. These are all the assets which were owned by the deceased herein whether located in Busia, Nairobi or elsewhere. I am therefore making an order for a complete compilation of the assets of the deceased and be available for distribution. The administrators herein are given 60 days to file in court the said list of assets for distribution.”

[6] The foregoing paragraphs were broadly reminding the administrators of their duties as administrators of the deceased’s estate and directing them to discharge their lawful mandate expeditiously and in good faith. Such duties are clearly set out in **S.83** of the **Law of Succession Act**. **S.83 (e)** was most relevant in the present circumstances as it resonated with the directions given by the Court in its aforementioned ruling.

The provision provides as follows:-

“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.”

[7] The court gave the administrators a period of sixty (60) days from the date of the ruling to file in court the list of assets for distribution.

The direction amounted to a court order but was clearly not complied with within the presented period. Under **S.95 (1) (b)** of the **Succession Act**, an administrator would be guilty of an offence if she/he willfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of **S.83** of the Act. Instead of complying with the direction given by the court and more so, to file a list of the assets available for distribution the second administrator filed the present summons for confirmation of grant dated 24th March 2021, in which she lists the assets available for distribution and propose her own mode of distribution which is clearly skewed against the first administrator and the interested party.

The first administrator responded to the summons by filing an affidavit of protest dated 6th August 2021 in which she lists additional assets available for distribution and proposes a mode of distribution which is incompatible with **S.40** of the **Law of Succession Act** given that the intestate deceased was a polygamous man.

[8] It is instructive to note that both administrators have included the property known as **Bukhayo/Mundika/10024** as a whole single unit available for distribution among the rightful beneficiaries including the interested party by dint of the court ruling made on 20th November 2019, yet part thereof had been sold to the interested party by the deceased prior to his death and could not therefore be listed as part of the assets available for distribution especially considering that the interested party took possession almost immediately after the transaction and carried out development thereon prior to a formal transfer. It is without doubt that the interested party acquired a beneficial interest in the portion of the property that was sold to him by the deceased who then discharged it from his possession to that of the interested party. In the circumstances, that portion of land was clearly not available for distribution in this cause, but having been included by both administrators, the interested party became a beneficiary for purpose of having the part of the estate acquired by him as a “*bona fide*” purchaser distributed to himself.

[9] For all the foregoing reasons, it would follow that the present application for confirmation of the grant is pre-mature. The parties have not filed an inventory of the assets available for distribution as ordered by the court on 20th November 2019. Most importantly, they do not seem to have agreed on the mode of distribution and are reading from different scripts as may be deciphered from their distinct proposals made herein on the mode of distribution.

In any event, under **S.71 (2)** of the **Succession Act**, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled. This court is not herein satisfied as to the assets available for distribution and as to the shares of each beneficiary in the respective assets.

In sum, the present application is dismissed with orders that parties bear their own costs and take out fresh summons for confirmation of grant only after filing accurate inventory of all the assets available for distribution within the next thirty (30) days from this date hereof.

For avoidance of doubt, the duty to file the inventory is vested in the two administrators jointly. They must agree and give a common inventory of the assets failure to which it shall be construed that they have failed and will fail to administer the deceased’s estate in accordance with the law, in which case they may be relieved as administrators or co-administrators in this matter and a fresh administrator or administrators be appointed by the court pursuant to the provisions of **S.66** of the **Succession Act**.

[10] Matter be mentioned on the 28th March 2022 for directions and/or way forward.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Dated & Delivered this 24TH day of FEBRAURY 2022]