



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1112 OF 2010

IN THE MATTER OF THE ESTATE OF ESTON MAINA KIMERE (DECEASED)

DAMARIS WANJIRU MAINA.....APPLICANT

VERSUS

FRANCIS KIHORO MAINA

FRANCIS GICHUHI KAMAU MAINA

PETER MAINGI MAINA

LUCY WAMBUI MAINA.....ADMINISTRATORS/ADMINISTRATRIX/RESPONDENTS

RULING

The Summons

Damaris Wanjiru Maina, “The Applicant” has brought this application by way of Summons General dated 18th September 2020 under certificate of urgency citing Sections 76 (d) and 83 of the Law of Succession Act Cap 160 Laws of Kenya, Rules 44 and 73 of the Probate and Administration Rules. She is seeking the following orders:

1. That the Summons General herein be certified as urgent and heard *ex parte* in the first instance.
2. That the honourable court be pleased to re-open the file for the purposes of confirmation of grant and finalizing the distribution of the estate herein.
3. That the Administrators be ordered to provide full, detailed and accurate accounts of the estate including all income and expenditure from the time of death of the deceased to date within 14 days.
4. That pending hearing and determination of this Summons General all persons be restrained whether by themselves, their agents, servants or representatives from in any manner meddling by developing or interfering with the estate or properties comprised thereof in any manner.
5. That pending hearing and determination of this cause all persons be restrained whether by themselves, their agents, servants or representatives from in any manner meddling by developing or interfering with the estate or properties comprised thereof in any manner.
6. That the Administrators as named in the Grant of letters of Administration dated 15th May 2013 be compelled whether by themselves, their agents, servants or representatives to deposit in court all the title documents which they are holding in respect of property forming part of the estate of the late Eston Maina Kimere.
7. That all commercial properties earning rental or other income for the estate be placed under the management of a reputable estate management company to collect and account for the rent and other income of the property.
8. That in default of proving accounts above, the administrators be held personally and criminally liable as provided by law.

9. That further in default of providing accounts as above, the grant of letters of administration to Francis Kihoro Maina, Francis Gichuhi Kamau Maina, Lucy Wambui Maina and Peter Maingi Maina issued on 15th May 2012 be revoked and a new grant be issued to include the Applicant, Damaris Wanjiru Maina with leave to apply for confirmation without having to wait for six months.

10. That the court do make such further orders as are appropriate.

11. That costs the Application be provided for.

The Application is supported by the Affidavit of the Applicant sworn on 18th September 2020. The contents of the Affidavit in support is summarised thus: the Applicant is the daughter of Elishipa Muthoni Maina, deceased. Elishipa Muthoni was a daughter of the deceased Eston Maina Kimere and Hannah Wanjiru Maina, also deceased. The Applicant deposes that a notice to close this file was issued by the court before the administration of this estate was concluded; that the administrators have failed to apply for confirmation of the grant; that the administrators have taken over the management of the estate and continue to enjoy revenue generated from the estate and distributing parts of the estate to some of the beneficiaries arbitrarily; that she received a share of the revenue for some time but this has since ceased; that the administrators have distributed part of the estate in the absence of a certificate of confirmation and that some beneficiaries have already started developing some portions of the estate.

The Applicant further deposes that none of the administrators have her interest at heart and that she fears that the administrators are intermeddling with the estate and asks this court to consider this application and grant the orders sought.

In a Replying Affidavit sworn on 5th November 2020, the Respondents state that the Summons General by the Applicant is premature and an abuse of this court's process save for the prayer to reopen this file; the Respondents deny ever being served, either themselves or their advocate then the late Mugambi Kariuki, with a notice to close the file. They state that the delay in applying for confirmation of the grant was caused by various factors including terminal illness of Gladwel Nyokabi Maina, the 3rd wife of the deceased, which illness required total attention and care including treatment abroad; that all the beneficiaries were occupying parcel number Loc. 19/Kiawambogo/204 and receiving benefits from the proceeds of dividends from shares owned by the deceased; that the administrators were in the process of identifying properties of the deceased and the beneficiaries allowed the administrators time to do so; that the Applicant filed a succession cause No. 21 of 2016 in Kangema in respect of Loc.19/Kiawambogo/204 and a grant in respect of that parcel of land was granted to her; that this parcel of land is registered in the name of Hannah Wanjiru Maina alias Wanjiru Maina the first wife of the deceased in trust for her husband the deceased in this matter and that this matter has been handled by the Environment and Land Court and a declaration made that parcel number Loc. 19/Kiawambogo.204 was held by Hannah Wanjiru Maina in trust for the family.

The Respondents state further that the delay in applying for confirmation of the grant was caused by the Applicant for failing to disclose material facts when filing the succession cause No. 21 of 2016; that the beneficiaries are seeking through Muranga Succession cause No. 145B of 2017 to have the grant issued to the Applicant revoked which has taken long because of the Covid 19 pandemic. They further state that the Applicant has been receiving shares from the revenue collected from the estate up to 2017 when the disputes and court cases were filed and parties took different positions; that the estate has not been distributed as alleged and that the beneficiaries have continued to occupy semi-permanent houses built in the lifetime of the deceased; that the Applicant has not provided evidence to prove allegations of distribution of the estate; that the monies from shares in Rwathia hotel have been utilized to cater for medical bills and other related expenses for Beatrice Wangari Maina, the only surviving wife of the deceased, and that the beneficiary named as Bernard Mwangi Maina constructed a house on parcel No. Mutitu Ngoru Block 2/149 Rwathia during the lifetime of the deceased but the title to that land is still in the name of the deceased.

The Respondents state that the administrators have not wasted or disposed off any of the property forming the estate of the deceased but they have administered the estate to the best of their ability and have managed to restore the property the Applicant had transferred to herself. They state that there are four administrators of the estate and that the law does not allow additional administrators. They state that the Applicant has not demonstrated intermeddling of the estate by the administrators and that the administrators are willing to have the Estate distributed once all the properties have been identified and once Loc.19/Kiawambogo/204 has been restored to the estate. They are asking this court to dismiss the Application.

The Applicant has filed a further affidavit in response to the Replying Affidavit of the Respondents. In it the Applicant reiterates that the notice was served on the late Mugambi Kariuki, advocate, whose offices were open at the time and that the same was received without protest. She claims that the Respondents are playing mischief because the firm of T. W. Murage took over the firm of the late Mugambi Kariuki. She states that her application is in respect of the grant issued on 15th May 2013 which has remained pending for the last 7 years which is an affront to the law and the rights of beneficiaries who are entitled to a closure. She states that Loc.19/Kiawambogo/204 was never registered in the name of the deceased but that of Hannah Wanjiru Maina the first wife of the deceased and that the distribution of that parcel is subject to High Court Succession Cause No. 33 of 2017; that having other court cases filed does not affect her status of being a beneficiary and as such she is entitled to shares like the other beneficiaries.

Submissions

On 24th November 2020, this court directed that this application disposed of by way of written submissions. Both the Applicant and the Respondents have filed their respective written submissions. the Applicant has narrowed to three the issues she wants this court to determine, namely:

(a) If the Respondents should provide a full detailed and accurate accounts of the estate including all income and expenditure from the time of the death of the deceased: To this issue the Applicant submits that the Respondents have failed to perform their duties as administrators of the estate of the deceased as required by the law and therefore this court should step in and order that the administrators should render an accurate account to the court failing which they should be held personally and criminally liable.

(b) If all persons should be restrained whether by themselves, their agents, servants or representatives from in any manner meddling by developing or interfering with the estate or properties comprised thereof in any manner: The Applicant states that she has attached photographs showing a new house being constructed on LR. No. Mutitu Ngoru Block/2/149 Rwathia to prove that the building was not put up during the lifetime of the deceased which is over 10 years ago. She claims that she is not benefitting from revenue generated from the estate of the deceased and that the administrators, their agents, servants or representatives should be restrained from in any manner meddling with the estate.

(c) If the grant of letters of administration issued to the Respondents on 15th May 2013 should be revoked and a new grant be issued to include the Applicant with leave to apply for confirmation in less than six months: The Applicant invokes Section 76 of the Law of Succession Act to support her prayer to have the grant issued to the Respondents revoked for failure to apply for confirmation of the same and to have a new grant of letters of administration issued including her as an administrator with leave to apply for confirmation.

In their written submissions, the Respondents have opposed the Application stating that the Application has been brought in bad faith. They have identified three issues for determination, namely:

(a) Whether at this juncture and time a detailed account, including income and expenditure from the time of the deceased can be given within 14 days.

(b) Whether the grant issued on 5th May 2013 can be confirmed while there is pending several suits between the Administrators and the Applicant herein.

(c) Whether the Applicant has demonstrated by evidence that the grant issued therein is liable to be revoked and whether she can be added as an administrator/administratrix.

The Respondents submit that the properties forming part of the estate of the deceased that generate income are owned by the deceased jointly with other investors and that the deceased holds percentages ranging from 10% to 36%. They submit that it would be a difficult task to involve other investors who hold majority shares to supply titles to the properties to be surrendered to court. They state that the other property generating income is parcel number Loc. 19/Kiawambogo/204 which the Applicant caused to be registered in her name to the exclusion of other beneficiaries but which parcel has been held by the Environment and Land Court to have been held by Hannah Wanjiru Maina in trust for the Estate of the deceased.

The Respondent submit that the Applicant has not demonstrated how all persons, or their representatives have meddled or interfered with the Estate and that Bernard Mwangi Maina who is a beneficiary and not an administrator of the estate is occupying a house which was built during deceased's lifetime and the fences and gate are for purposes of fending off intruders. They deny having transferred any property forming the estate stating that all the properties have remained in the name of the deceased. They submit that the commercial properties are owned by several other investors who have reputable management companies and it would be an arduous task to submit them to this cause when the deceased or the Estate owns minority shareholding in such companies. They submit that the administrators have provided accounts and have held meetings and that the Applicant received cheques up to and including 2017. They submit that the law under Section 56 (i) of the Law of Succession Act does not allow a grant of representation to be issued to more than four persons in respect of the same property and that the Applicant has not provided proof that the grant ought to be revoked as provided under Section 76 of the Law of Succession Act.

The Respondents further submit that there are reasonable grounds why the grant has not been confirmed. They list these grounds as the pendency of ELC No. 4 of 2018 between the Applicant and the Respondents which concluded on 11th November 2019; Succession Cause No. 3 of 2017 at Murang'a High Court between the parties pending in court; terminal illness of Gladwell Nyokabi Maina which required total attention; medical bills, maintenance and upkeep of Beatrice Wangari Maina which was raised from the proceeds of the shares and that Section 72 of the Law of Succession provides that no grant of representation shall be confirmed until the court is satisfied that no application under Part III is pending and this is what they have demonstrated. They submit that the Applicant is a grandchild of the deceased and has been considered as one of the dependants; that she is one of about 40 grandchildren of the deceased with her late mother Elishipa Muthoni Maina being listed as one of the children of the deceased and therefore the Applicant ranks lower in the degree of consanguinity.

Determination

I have considered this application and the supporting affidavit, further affidavit and submissions by the Applicant. I have considered the Replying Affidavit and submissions by the Respondents. It is not disputed that the Applicant is a dependant as her mother is one of the children of the deceased. It is also not disputed that the parties are or have been involved in disputes in respect to parcel number Loc. 19/Kiawambogo.204 which parcel has been subject in Environment and Land Court. As far as I can see, this property is not listed on paragraph 6 of the Affidavit in Support of Petition for Letters of Administration dated 24th April 2010. This is not to say that this property does not form part of the estate of the deceased if there is a finding by a competent court to that effect. That pronouncement is left to the court handling that dispute. My only concern here being whether settlement of that dispute on a property that is not listed on the schedule of assets should hold the parties from applying for confirmation of the grant issued herein. I have also noted that the schedule of assets on paragraph 6 of the Affidavit in support of the Petition includes in 6 (a) to 6 (f), 6 (z) to 6 (jj) properties held by deceased in percentage shares with other shareholders.

The grant of representation herein was issued first on 15th February 2011. It was rectified on 15th May 2013 to include Lucy Wambui Maina as the fourth administrator/administratrix. It is clear to me that since that date to the time of filing this application by the Applicant, the administrators have not applied for the confirmation of the grant. In the course of that time, there seems to have been disagreements especially from the Applicant who claims she was left out of sharing of the revenue generated from the estate. At the same time she has been to court claiming beneficial interest in Loc. 19/Kiawambogo.204 that is said to have been registered in the name of her late grandmother Hannah Wanjiru Maina. She claims the property belongs to her grandmother but the Administrators claim that the property forms part of the estate of the deceased and so did the ELC hold. As I have stated, that property does not form part of the assets listed in paragraph 6 of the

Affidavit in support of the Petition.

I have considered the allegations made by the Applicant and the response by the Respondents. It is clear to me that some of the delay in concluding the administration of the estate is due to the court cases initiated by the Applicant. I have read with care all her evidence contained in her application, affidavits and written submissions. I fail to be persuaded that the Administrators have failed in administering the estate according to the law. I find no evidence proving intermeddling in the estate or transfer of parts of the estate to any person be they beneficiaries or not. I have no evidence from her showing that the statements by the Respondents that the delay in confirming the grant was partly caused by ailments of the deceased's wives. I also appreciate that it is not fair to the other shareholders to drag them to this cause. Whatever is owed to the Applicant from the time the sharing of revenue from the estate to her stopped, if it can be ascertained, can be addressed without dragging in the other shareholders who have no interest in the matter before the court.

On the issue of revoking the grant, it is my considered view that the Applicant has not demonstrated that the Respondents have transgressed the law as provided under Section 76 of the Law of Succession Act. This section provides that:

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—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

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

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(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; or (e) that the grant has become useless and inoperative through subsequent circumstances.

It is true it has taken over seven years to date without the Administrators applying for confirmation of the grant. This is a long time. However, the Respondents have offered reasons to show reasonable cause for that delay. I do not have evidence to the contrary that the Respondents did not have reasonable cause for the delay given that some of the reasons for the delay are due to engagement in court in cases initiated by the Applicant. I find no reasonable ground to revoke the grant herein. Secondly, the law under Section 56 (1) (b) of the Law of Succession Act prohibits issuance of a grant to more than 4 persons in respect of the same property. I do not think, in my considered view, that including the Applicant in the administration of the estate will solve the problems in this cause. The gist of the complaint by the Applicant is her allegation of having been left out of revenue sharing which this court has stated can be resolved without having to make her one of the administrators.

The totality of my determination of this matter is that the Applicant has failed to persuade this court to rule in her favour in this application. Prayers 1, 2 and 4 are spent as rightly observed by the parties. Prayer number 3 is difficult to issue given my reasoning above that the income generating assets are shares whose ownership involve other shareholders who are not part of this cause as argued by the Respondents. In respect to Prayer 5, it is my considered view that the Applicant has not demonstrated that anyone is meddling with the Estate. In respect of Prayer 6, the same reasoning as in Prayer 3 above obtains. The same applies to Prayers 7 and 8. I find no evidence of meddling by any administrator or beneficiary to hold them to account. In respect of Prayer 9 I have reasoned above that there is no demonstration of a reasonable cause to revoke the grant issued on 15th May 2013. The totality of my determination of the Application before me is that it fails and the same is hereby dismissed.

That said, it is my considered view that from 2013 when the grant was issued to date is a long time for the beneficiaries to live without knowing which direction to turn to in respect of the Estate and their shares as beneficiaries. While the Administrators and the Applicant are pursuing the ownership of parcel number Loc. 19/Kiawambogo/204 in court and having noted that it is not listed in the schedule of assets, it is my view that the administrators should move with haste and apply for confirmation of the grant. It will not serve them any further to claim that they are still identifying the properties forming the Estate of the deceased. If there is any property belonging to the Estate that has been left out or that may be discovered after confirmation, the law allows for rectification of the grant include such property. The same case applies to Loc. 19/Kiawambogo/204 if it forms part of the Estate of the Deceased. Any further delay in applying for the confirmation of the grant will only attract mistrust of the beneficiaries. The administrators are given 60 days from today's date within which to apply for the confirmation of the grant issued on 15th May 2013 failing which any beneficiary of the Estate of the Deceased herein is at liberty to so apply. Each party shall bear his/her costs to this application.

DATED, DELIVERED AND SIGNED THIS 20TH DAY OF JANUARY 2021.

S. N. MUTUKU

JUDGE