



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO 163 OF 2012

IN THE MATTER OF THE ESTATE OF GODFREY

KITUKU KILATYA AND REGINA MUKUI NDAKA (DECEASED)

KITUKU MUTISO KILATYA.....APPLICANT

VERSUS

JOSEPH MBEVU NDAKA.....RESPONDENT

CORAM: Hon Justice R. Nyakundi

Mwarabu Advocate for the Applicant

Khaminwa & Khaminwa Advocate for the respondent

RULING

There are two applications queued for the court's consideration initiated by the applicants on 22.10.2020, seeking an order for the administrator **Kituku Mutiso Kilatya (now deceased)** to be substituted with his survivor **Paul Mutinda Mutuku** for purposes of prosecuting these proceedings. In support of the application is an affidavit sworn by **Paul Mutinda Kituku** dated 22.10.2020.

Secondly, on 18.8.2020 the applicant also sought leave of this court for extension of time to appoint auctioneers vide ruling dated 17.12.2018.

The said application is expressed to be brought under Rule 49 and 73 (i) of the probate and administration rules. Further that the applicant beseechs the court upon extension of time to approve Malindi Auctioneer to comply with the directions of the ruling by Hon Korir dated 17.12.2018. Finally, in the same application, the applicant seeks an order of the court directed at the public Trustee to deposit all the funds in his possession belonging to the estate of Godfrey Kalatya Kituku and Regina Mukeu Ndaka (both deceased) to the court to ensure compliance with the stated ruling of 17.12.2018.

To support the reliefs, the applicant swore an affidavit dated 13.8.2020. He stated that the distribution of the Estate has been outstanding in view of the fact that the administrators have failed to agree on the appropriate auctioneer to be appointed within the timelines of sixty (60) days set by the court.

He further asserts that the failure to amicably agree for an auctioneer has exposed the estate of the deceased to be wasted and intermeddled at the expense of the beneficiaries. Having considered the two applications and their respective grounds and affidavits, the vexatious question is whether there is merit on any of the reliefs applied for by the applicants.

Determination

The core question is whether the applicants deserve to be granted the reliefs as premised in the two applications, on the issue of substitution pursuant to Section 3A, 1A, 1B and 71 of the Civil Procedure Act and Section 74 (i) of Law of Succession Act. The applicant's stated purpose is to enable the continuing administration of the estate. That the said estate is yet to be distributed as ordered by the court. The breadth of the language in the aforesaid application is clear. That the court proceeds with the duty of the making of grant of representation intestate, in respect of the estate of the deceased.

From my reading of the Law of Succession Act it is apparent that the court has no jurisdiction in the case of substitution of administrator in the event of death before the estate is distributed. For this proposition there are authorities to that effect. In the case of **John Karamwa Maina v Susan Wajiru Mwangi (2015) eKLR** and **Florence Okutu Nandwa v John Atemba Kojwa** where the courts held that: -

“A grant of representation is made in personam It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another.

The issue of substitution with another person should not arise. Where the older of a grant dies the grant made to him becomes useless and in operative, and the grant exist for the purpose only of being revoked. Such grant is revocable under Section 76 of the Law of Succession Act, upon its revocation a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules I agree with the respondents that there cannot be a substitution of the dead administrator but his wife in the manner proposed by the applicant”

The other case in support of this Legal Principle is that of **Julia Mutune M. Mboroki v John Mugambi & 3 others (2016) eKLR** in which the court stated as follows:

“There is absolutely no room of substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural persona and he or she dies, the grant becomes useless or inoperative by reason of subsequent of his or her demise”.

Consequently, to the above principles, an application set out by the applicant to have him substituted as an administrator to the Estate of the deceased **Kituku Mutiso Kalya** is fatally defective and not supported by any enabling provisions of the Law. In my view this is a case which calls for fresh petitions for making of a grant of Letters of Administration to the estate of the deceased. Relying on that statement of fact on the death of the administrator does not permit the court to invoke inherent power under Rule 73 to grant leave to so amend the Letter of Administration herein by way of substitution as envisaged by the applicant. Furthermore, Section 74 of the Act donates powers to the Court to only correct errors in names and description of the assets or beneficiaries.

For better drawing of this distinction, it is important to note that substitutes of an administrator is based under Section 51 of the Act on provisions for making of a grant of representation intestate.

In the premises, I am not satisfied that there is a proper case in which the court ought to grant the orders for substitution. Accordingly, the application before the court is dismissed. In the circumstances of this summons court, it would be appropriate to Petition a fresh for Grant of Letters of Administration to the estate of Kituku Mutiso Kalatya (now deceased).

The second issue is to determine the Summons filed in court, on 18.8.2020 in a matter on appointment of Malindi Auctioneer to comply with the ruling of the court dated 17.12.2018 and for the Public Trustee to be directed to deposit all the funds in its possession to the court. Here, I am guided by the Provisions of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules on inherent power of the court to make such orders as may be necessary for the ends of Justice or to prevent an abuse of the process of the court.

In the instant case I note at the outset the court on 17.12.2018 in its ruling directed the advocates to the estate of the deceased to appoint auctioneers to auction the properties of the **Estate of the deceased either jointly or sparely by the administrators. Further, the auctioneer was to be approved within 60 days from the date of the ruling.**

From the record the administrators through their respective Counsels have breached the orders to the extent of not complying with the appointment of an auctioneer and deposit of the monies held by the Public Trustee. The Court has inherent jurisdiction under Section 3A of the Civil Procedure Act and Rule 73 (1) of Probate and Administration Rules to preserve the sanctity and integrity of the judicial process. Nothing should be left to chance or operations of the forces of nature on extension of time. The decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (2014) eKLR:**

“Is important for several reasons. Chief amongst these is what it tells, us about natural justice or fairness. Patently this is the unfettered discretion of the Court to extend time which will depend upon the circumstances of each particular case.

Accordingly, at the very least that exercise of discretion requires of the individual to explain the reasons for the delay and why it was not possible to comply with the Court order or statutory timelines which had been previously set.

In the instant application, the circumstances prevailing which impacted on non-compliance with the Ruling of this Court has been clearly explained. Giving weight to this, I think it is right to extend time, but no more, a legitimate expectation of a benefit to be conferred to the beneficiaries to be met.

It would seem however that this passage of time has rendered compliance with the order impracticable on that basis there is need for enlargement of time for the administrator to act in accordance with the order therein.

This state of dysfunction of the estate represents an abnormality on the Succession Law conception of what constitutes administration and distribution of Intestate estate. Following on that failure, it is relevant for the court to exercise discretion to extend time to coincide with desired outcomes of the court Ruling of 17.12.2018.

There are two remarkable aspects to this application. First, there is an acknowledgement on the part of the applicants on the delay and reasons that have occasioned in the estate to remain un distributed.

Decision

In the light of this with regard to the former application seeking substitution of an administrator as a form of rectification of grant of letters of

administration, the same is denied for want of merit. The danger of such a process of substitution is self-evidence. It follows therefore that, in accordance with Section 66 of the Law of Succession, the applicant herein be issued with fresh grant of letters of administration as a co-administrator to the estate of the deceased.

As I have already noted, execution of the Ruling of the Court as earlier directed is dependent upon formulization of the appointment of the administrator in accordance with the criteria set out in the Law of Succession.

In the case of an application for extension of time, the same is declared admissible and allowed to permit distribution of the estate of the deceased. Considering all the circumstances of this matter, upon appointment of the administrator, I allow the application to have Malindi Auctioneer to proceed with the execution of the decree by the Court, which condition has not been complied with. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021.

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R. NYAKUNDI

JUDGE

In the presence of

1. Mwaure advocate for the applicant
2. Muli holding brief for Mwadilo advocate for the respondent