



**REPUBLIC OF KENYA**

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

**SUCCESSION CASE NO 11OF 2019**

**IN THE MATTER OF THE ESTATE OF GEORGE BARBOUR(DECEASED)**

**ANTHONY JOHN BARBOUR.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**HUGH BERIC BROOKSBANK.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**VERSUS**

**ANN MUTHONI STAUDTE.....APPLICANT /OBJECTOR**

**RULING**

1. These proceedings relate to the estate of George Barbour who died testate on 3<sup>rd</sup> October, 2018 while domiciled in Kenya. Prior to his death, he executed a written will dated 11<sup>th</sup> September, 2018 appointing his son Anthony John Barbour and Hugh Beric Brooks Bank as the executors. He was however survived by the following children;

- i. Andrew George (son)**
- ii. Anthony John Barbour (son)**
- iii. Tracy Deborah (daughter)**
- iv. Brandon Robert Barbour (daughter)**
- v. Tania Janet Belcher (daughter)**

2. On 8<sup>th</sup> March, 2019 the executors petitioned for a grant of representation. Subsequently, on 29<sup>th</sup> April, 2019, Ann Muthoni Staudte one of the beneficiaries of the estate, filed a caveat against any activities in relation to the estate. Consequently, vide an undated petition filed on 21<sup>st</sup> June 2019, the said Ann Muthoni petitioned for letters of administration Ad colligenda Bona pursuant to Section 67 of the Laws of Succession. She sought the said limited grant in her capacity as a residuary legatee of the deceased.

3. The application is supported by an affidavit sworn on 21<sup>st</sup> June, 2019 by the said Ann Muthoni. According to Ann, she was a partner to the deceased as confirmed by the deceased's last will at paragraph 7. That despite being a beneficiary, she was excluded from the list of survivors just as Briony Jane cooper who is provided for in paragraph 10 of the deceased's will was.

4. She averred that Briony Jane cooper is an old flame of the deceased who cohabited with the deceased before his death. That she has reason to believe that Briony Cooper is a live and residing in the United Kingdom.

5. That she and Briony Cooper have been excluded from the list of survivors because they are not biologically related with the deceased. She further stated that as beneficiaries to the estate they were not consulted before the petition herein was filed. According to her, the legal remedy in this matter is to preserve the estate to ensure the wishes of the deceased are carried out as per the will.

6. She argued that as a beneficiary of the shares in Transzoia securities Co. Ltd one of the key assets of the estate, she is likely to lose if the company is mismanaged in the manner in which the executors are doing by undervaluing the value of the shares.

7. When the application was placed before the duty Judge under certificate of urgency for directions, the court directed that the petition be served upon the executors and hearing be taken at the registry. Before the application could be heard, the petitioner filed an objection for making of a grant. The objection dated 5<sup>th</sup> August, 2019 and filed the same date raised similar grounds adduced in the Ad colligenda bona

application.

8. She further alleged that the executors had engaged in acts of dishonesty and therefore not fit to be executors; that the executors are foreigners and therefore lack capacity to act as such; that the executors have exhibited acts of bias and racism against the objector and, that they have intermeddled with the estate in breach of their judiciary duty.

9. Prior to the lodgment of the aforesaid objection, the estate was gazetted on 5<sup>th</sup> July, 2019. Subsequently, on 16<sup>th</sup> March, 2020 Ann Muthoni, Staudte filed an answer to petition claiming that the executors had failed to disclose that they were foreigners without the requisite work permit hence flight risk people. She basically reiterated the grounds cited in the Ad colligenda application and objection. In her cross petition of even date, she assessed the value of the estate at Kshs 300,000,000. She also sought to be appointed as a residuary legatee pursuant to the will dated 11<sup>th</sup> September, 2018.

10. Under a preliminary objection dated 27<sup>th</sup> September, 2020, the executors /respondents urged that the application for a grant of letters of Ad colligenda bona is incompetent, fatally defective, without merit and an abuse of the court process and therefore worth striking out. Further, that the applicant has no cause of action nor locus standi to institute any proceedings in this case while the executors are there, ready and willing to process a grant of representation.

11. When the matter came up for hearing, parties agreed to canvass the application dated 21<sup>st</sup> June, 2019 and the preliminary objection dated 27<sup>th</sup> September, 2019 together. They also agreed to file submissions to dispose of the matter.

#### **Applicant's/ Cross petitioner's submissions.**

12. Mr. Okere advocate appearing for the applicant/cross petitioner filed his submissions on 30<sup>th</sup> November 2020. Learned counsel submitted that his client is the most suitable person to administer the estate hence entitled to a limited grant to collect and preserve the estate pursuant to section 54 and 67 of the law of succession Act and rule 36 of the P&A.

13. Learned counsel opined that there was need to preserve the estate more particularly shares in Tranzoia Ltd company which are of a precarious nature. To support this proposition counsel referred to the holding in the case of **Morjaria vs Abdalla(1984)KLR**. He contended that without the role of the deceased who was the majority shareholder, the said company is likely to suffer in its operations and that its value will diminish.

14. To support the fact that company shares are fragile and that their value can decline if not properly managed, counsel placed reliance on the decision in the case of **White head Vs Palmer(1908)KB15** where the court held that, Property should be deemed as precarious where it is obvious that its value would decline with the passage of time.

15. Counsel further submitted that the executors who are non-Kenyans cannot remain in Kenya working without work permits. Mr. Okere asserted that where a majority shareholder is deceased, a court can appoint an administrator under a special grant to continue discharging the role of the deceased share holder. To illustrate this position, counsel made reference to the case of **Lia Chen Toh V Liao Huang Hsiang, BVIHPB93 OF 2011** where a grant Ad colligenda bona was issued to a widow of the deceased majority shareholder.

16. In Mr. Okere's view, any person can apply for a grant of Ad colligenda bona and that there are no qualifications to such a grant. Responding to the preliminary objection, counsel submitted that it does not meet the criteria set out under Section 76 of the law of Succession.

#### **Petitioner's /Respondent's submissions.**

17. Mr. Litoro counsel for the applicant relied on his submissions filed on 8<sup>th</sup> December, 2020 stating that the validity of the will executed by the deceased has not been challenged hence the appointed executors are the legitimate petitioners to seek grant of probate of written will. Counsel stated that the petition for a grant of probate of written will has since been gazetted and nobody has challenged it. Mr. Litoro contended that since the appointment of the petitioners as executors has not been challenged, the application herein is otherwise an abuse of the court process.

18. It was counsel's submission that the application is defective, incompetent and without merit as the applicant lacks locus standi to petition for the limited grant sought; that there is no special circumstances to merit grant of the order and, issuance of such grant will result into absurdities.

19. In Mr. Litoro's view, a person with no locus standi has no right to be heard. In this regard, counsel placed reliance in the finding in the case of **Rajesh Pranjivan Chudasama Vs Sailesh Prannjivan Chudasama ( 2014) e KLR** where the court held:

**“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even or whether or not he has a case worth listening”**

20. Counsel stated that the applicant is clearly intending to intermeddle with the estate while the bonafide executors are still in control and have moved the court for a grant of probate.

21. He contended that the applicant/cross petitioner having abandoned her objection dated 5<sup>th</sup> August, 2019 and that the window for filing an objection and an answer to petition having lapsed on 16<sup>th</sup> March, 2020, the applicant cannot be heard to challenge the same. Mr. Litoro

contended that in the absence of a cross petition and answer to petition, the applicant cannot purport to be appointed as an administrator. That a mere beneficiary of the estate has no locus to claim the status of an executor.

22. That even if the applicant was a residuary legatee, the conditions precedent under Section 63 of the Law of Succession have not arisen. That in any event, Section 63 only allows a residuary legatee to petition on a full grant and not a limited grant.

23. Counsel submitted that the applicant is married to another man in Germany known as Staudte Edger whose marriage is still subsisting and cannot claim the status of an executor to the deceased. He contended that the applicant ought to have propounded or renounced the will before petitioning for a grant. In support of this proposition the court was referred to the holding in the case of **Rajesh Pranjivan (Supra)**.

24. According to Litoro there was no proof of intermeddling with the estate nor claims of racism; That the applicants were challenging the potential of the company without evidence; that the applicant attached records confirming that the company Directors were both Kenyans and foreigners hence nothing stops the executors from managing the estate and that allegations of fraud are unfounded.

25. Learned counsel made reference to cases in which the applicant is seeking to take over ownership of the Tranzoia company inter alia; Mombasa HCC No 113 of 2018 between Forty beach bar Limited V Ann Muthoni staudte and others and Nairobi HCC Misc.application No 72/2019 Ann Muthoni Vs Registrar of companies.

26. As regards the issue that the grant of Ad Colligenda Bona will lead in an absurdity, counsel submitted that if the application is allowed, it will mean that there will be two grants in one application. That since the court is due to grant a full grant, there is no need to issue a temporary one. In this regard, counsel referred to the case of **In the Estate of the late Peter Muraya Chege (deceased) ( 2019) e KLR** where the court stated that;

**“The law does not envisage a situation where a limited grant is to run alongside a full grant. To fortify that argument, counsel referred to the case In the Estate of Margaret NdutaMaina(deceased) (2018) eKLR”**

#### **Determination**

27. Before me is an application dated 21<sup>st</sup> June, 2019 seeking grant of letters of administration Ad colligenda bona to one Ann Muthoni Staudte who is named in the last will of the deceased dated 11<sup>th</sup> September, 2018 as a beneficiary. However, there is no dispute regarding the validity of the will. Further, there is no question regarding the position of the executors in the will.

28. After going through the application and preliminary objection thereof, the only issue that arise for determination is whether the applicant has met the conditions for issuance of a limited grant of ad colligenda Bona.

29. Who is entitled to take out a limited grant of letters of administration Ad colligenda bona? under what circumstances can the said grant be issued? Section 67 of the Law of Succession provides that;

**“(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than 30 days from the date of publication and the period specified has expired.**

**(2) A notice under Sub-Section (1) shall be exhibited conspicuously in the court house, and also published in such other manner as the court directs”**

30. To operationalize Section 67 of the Law of Succession Act, rule 36 of the P&A rules does specify circumstances under which Ad colligenda bona grant can issue as follows;

**“(1) where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled there to in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration Ad colligenda Bona defuncti of the estate of the deceased.**

**(2) Every such grant shall be in form 47 and be expressly limited for the purpose only of collecting and setting in and receiving the estate and until a further grant is made.”**

31. It is apparent from Section 67, that a limited grant can issue temporarily only for purposes of collecting and preserving the estate. A limited grant of this nature can only issue if there are special circumstances such that it is not possible to wait for a full grant. It is therefore in exceptional circumstances and in the best interest of justice that such grant can issue. It is within the court’s discretion to determine whom to issue a grant of letters of administration Ad Colligenda bona. Unless modified by the court, the sole purpose of issuing a grant of Ad colligenda is to preserve the estate See **Morjaria V Abdalla (Supra) and Re Kahawa Sukari Ltd (2004) EA 93.**

32. What special conditions have been cited by the applicant to warrant issuance of this grant. Firstly, the applicant has cited the ground of the parties intermeddling with the estate. No evidence of such interference with assets of the estate have been placed before the court.

33. Secondly, the applicant pleaded that as a beneficiary, she and one Jane Coopers were not consulted or listed as beneficiaries. I do not find this to be a special ground because the will which provides for their entitlement is intact. In any event, that ground can only be a basis

for objecting to issuance of a grant of probate to the executors but not to demand one to be issued with a special limited grant of Ad colligenda bona.

34. Thirdly, the applicant claimed that the executors are foreigners without work permits. There is no law to my knowledge that prohibits foreigners from inhering properties of their relatives who die in a foreign land. Equally, foreigners are allowed to own property or shares in Kenya. In any event, the issue of work permits is the mandate of the department of Immigration and that cannot be a ground to justify issuance of the grant in question.

35. The fourth ground is that the applicant is a residuary legatee. Section 63 of the Law of Succession is very clear under what circumstances a residuary legatee can take over the role of executors. That provision does provide as follows;

**“where a deceased has made a will but;**

**(a) he has not appointed an executor**

**(b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of the will or have failed within the time limited to apply for probate thereof**

**(c) the previous executors have died before completing administration of all the property to which the will applies.**

36. From the above stated requirements, it is clear that the applicant has not with specificity met any of the conditions. She does not fit in any of the stated circumstances.

37. In this case, the executors are there; they have petitioned for a full grant which is due to be issued; they have not renounced their executorship nor have they died. In the circumstances of this case, the issue of a residuary legatee is misplaced. Having dismissed the claim of a legatee taking charge of the estate, I am left with one conclusion to make, that the applicant does not have any cause of action nor locus standi to justify the special grant she is seeking.

38. I do agree with Mr Litoro that the applicant is abusing the court process by filing the application herein. where the executors are ready and willing to petition for a grant of representation the rest of the beneficiaries should facilitate the process to allow the application herein without further hindering the expeditious disposal of this matter. To allow the application will also amount to duplicity of grants as the full grant is about to be issued after gazettelement of the estate. Accordingly, it is my finding that the application dated 21<sup>st</sup> September 2019 is not merited and the same is dismissed. Costs shall be in the cause.

39. Regarding the prayer for this court to issue a full grant, there is already an objection, answer to petition and cross petition. However, the same was filed way beyond the 30 days required to lodge an objection after gazettelement of the estate. Since the estate was gazzeted on 5<sup>th</sup> July,2019, the objection filed on 16<sup>th</sup> March, 2020 it is time barred. Further, considering that leave to file objection out of time was not sought, this court can only deem the objection, answer to petition and cross petition to be of no consequence to the issuance of a grant of probate of written will.

40. Accordingly, it is my finding that the petitioners are entitled to a grant of probate so as to be able to administer the estate among them Transzoia Securities company Ltd whose shares are precariously hanging without a grant. The applicant’s interest is also served as there will a representative of the deceased in transacting the relevant company operations and management. The grant shall be confirmed within six months. Each party shall bear own costs.

**Dated, signed and delivered this 12<sup>th</sup> day of February 2021**

**J. N. ONYIEGO**

**JUDGE**