



**REPUBLIC OF KENYA**

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

**MISC. SUCCESSION NO. 4 OF 2015**

**IN THE MATTER OF THE ESTATE OF M'MWARI M'RAIJI (DECEASED)**

**WILFRED MIRITI HEZRON ..... 2<sup>ND</sup> APPLICANT/PROTESTOR**

**TITUS NTWIGA M'MWARI ..... 1<sup>ST</sup> ADMINISTRATOR**

**HEZRON JOHN NYAGA ..... 3<sup>RD</sup> ADMINISTRATOR**

**RULING**

**INTRODUCTION**

1. This matter is coming up for a Ruling on Summons for Confirmation of Grant of Letters of Administration Intestate dated 12/10/2018.
2. The matter relates to the estate of M'Mwari M'Raiji (Deceased) who died on 12.04.1997. Representation to his estate was sought vide a petition lodged herein (Succession Cause No. 98 of 2010) on 16.06.2010, by **Titus Ntwiga M'Mwari**, in his capacity as son of the deceased. The sole asset listed in this cause is L.R. NO. MWIMBI/S.MUGUMANGO/7 and it was expressed by the said **Titus Ntwiga M'Mwari** that the deceased was survived by:
  - i. John Nyaga Hezron
  - ii. Wilfred Miriti Heshron
  - iii. Peter Njiro M'Mwari
  - iv. David Ileri Hesron
  - v. Eliphas Micheni Hezron
  - vi. Bernard Njagi Hesoron
  - vii. Gideon Githinji Hezron
  - viii. Titus Ntwiga M'Mwari
  - ix. Samwel Kithinji Boore
3. Letters of administration intestate were made to **Titus Ntwiga M'Mwari** and a grant was duly issued, dated 04.10.2011. I shall consequently refer to him as the "initial administrator".
4. Vide a Notice of Motion application dated 21.11.2011, **John Nyaga Hezron, David Ileri Hezron, and Wilfred Miriti Hezron** protested the proposed subdivision and distribution of the subject estate stating that the same would interfere with their respective occupation of the suit land. It was alleged by **John Nyaga Hezron** that before the deceased died, the deceased had shown each of the beneficiaries their respective areas to occupy and that each of the beneficiaries had allegedly developed their area on the land. In response, the initial administrator, on his own behalf and on behalf of the other beneficiaries save for **John Nyaga Hezron**, denied the allegation that the deceased had shown each beneficiary where to cultivate in the suit land.

5. On 18.12.2014 the initial administrator filed Summons for Rectification of Grant on the grounds that one of the beneficiaries (Gladys Mukwanjagi Mukira) was left out during the time of confirmation of the grant and that the actual measurement of the suit land was smaller than earlier indicated in the confirmation of grant. The dependants of the estate save for David Ileri Hesron filed a Consent for Rectification of Grant to the subject estate.

6. On 14.06.2016, the consent of the parties dated 14/06/16 was adopted as an order of the court and consequently, the grant issued on 04/10/11 was revoked and the Titus Ntwiga M'Mwari, Wilfred Miriti and Hezron John Nyaga were appointed as the administrators of the subject estate. I shall consequently refer to Titus Ntwiga M'Mwari as the "1<sup>st</sup> Administrator", Wilfred Miriti as the "2<sup>nd</sup> Administrator" and Hezron John Nyaga as the "3<sup>rd</sup> Administrator".

7. On 15/10/2018, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Administrators filed an application for confirmation of the grant by **summons dated 12/10/2018** (the instant application and the subject of this ruling). The affidavit sworn on 12/10/2018 in support of the instant application states that the deceased was survived by the following listed dependants and proposed that the subject estate be distributed as follows:

- i. Bernard Njagi Hezron – 1.35 Acres
- ii. Gidion Kithinji Hezron – 1.35 Acres
- iii. John Nyaga Hezron – 1.35 Acres
- iv. Titus Ntwiga – 1.35 Acres
- v. Gladys Mukwanjagi Mukira – 0.16 Acres
- vi. David Ileri Hezron – 1.35 Acres
- vii. Eliphaz Micheni Hezron – 1.35 Acres
- viii. Wilfred Miriti Hezron – 1.35 Acres
- ix. Peter Njiru M'Wari – 1.35 Acres
- x. Samwel Kithinji Boore (Purchaser) – 0.50 Acres
- xi. Lydia Wanja Mbae (Purchaser) – 0.12 Acres

8. On record is an Affidavit of Protest sworn on 13/11/2018 by the 2<sup>nd</sup> Administrator. The 2<sup>nd</sup> Administrator/1<sup>st</sup> Protester objects to the mode of distribution indicated in the affidavit in support of the instant application and proposes that the estate should be distributed as follows:

- i. Bernard Njagi Hesron – 1.38
- ii. Gideon Kithinji Hezron – 1.38
- iii. John Nyaga Hezron – 1.38
- iv. Titus Ntwiga M'Mwari – 1.38
- v. Gladys Mukwanjagi Mukira – 1.38
- vi. David Ileri Hesron – 1.38
- vii. Eliphaz Micheni Hezron – 1.38
- viii. Wilfred Miriti Hezron – 1.38
- ix. Peter Njiru – 1.38

9. The 2<sup>nd</sup> Administrator/1<sup>st</sup> Protester also objects to the inclusion of Samwel Kithinji Boore and Lydia Wanja Mbae on the ground that they are purchasers of the suit land and that they were in illegal occupation of the same at the time he was swearing the Affidavit of Protest.

10. On record is also an Affidavit of Protest by David Ileri Hezron (the 2<sup>nd</sup> Protestor) sworn on 15/07/2019. The 2<sup>nd</sup> Protestor concurred with the 1st Protestor stating that the inclusion of Samwel Kithinji Boore and Lydia Wanja Mbae in the distribution of the estate is illegal and has tampered with the portions of land that each of the beneficiaries are entitled to from the estate.

11. The court directed that the protest be canvassed by viva voce evidence. Parties were directed to file and serve affidavit evidence of the

witnesses they intended to call.

12. On 28/10/2020, the 1<sup>st</sup> Administrator filed an undated summons for rectification of grant that sought to amend the grant of letters of administration issued to the 1<sup>st</sup> Administrator on 04/10/2011.

13. When the matter came up for further directions on 10/11/2020 the court proceeded to give a ruling date (on 11/02/2021) noting that there was no representation for the 2<sup>nd</sup> Administrator/Protester.

### **ISSUE ARISING FOR DETERMINATION**

14. It is my view that the only issue for determination by this court is whether the protest to the confirmation of the grant raised by the 2<sup>nd</sup> Administrator is merited.

### **ANALYSIS**

15. Confirmation of grants in probate and administration causes is provided for under **Section 71** of the Law of Succession Act, the relevant portion states as follows:

#### **“71. Confirmation of grants**

**(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”**

16. Under section 71, an administrator is enjoined to apply for confirmation of his grant after expiration of six months from the date the grant was made to him. The provision is in mandatory terms. According to **Kamau J *In the Matter of the Estate of Gachunga Gachamba (deceased) Nairobi HCSC No. 642 of 2000***, stated that the application for confirmation of a grant is a mandatory requirement of law and without it any grant would be void to the extent of want of confirmation. My view is that a final grant is the one which is confirmed by the court after it is satisfied that with the identities of all persons beneficially entitled and their respective shares.

17. The court upon the application for confirmation being made may confirm the grant or, if not satisfied that the applicant will properly administer the estate issue a confirmed grant to another person or persons or order the postponement of the confirmation. Section 71(2)(a) of the Law of Succession Act and the proviso to subsection (2) state as follows:-

**‘(2)The court to which application is made, or to which any dispute in respect thereof is referred, may –**

**(a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or...**

**Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities of the all persons beneficially entitled: and when confirmed the grant shall specify all such persons and their respective shares.’**

18. The claim by the 2<sup>nd</sup> Administrator is that Samwel Kithinji Boore and Lydia Wanja Mbae are purchasers of the subject estate and are alleged to be in illegal occupation of the estate. The basis of the alleged sale of the land to Samwel Kithinji Boore and Lydia Wanja Mbae has not been given.

19. A purchaser is not a beneficiary of an estate that is subject to a succession cause if the sale agreement was done after the death of deceased and before the confirmation of the grant. Such a sale violates the Law of Succession Act and such purchasers should not be entertained in such proceedings. Any dealing with the estate of the deceased before confirmation of grant amounts to intermeddling with the state which this court will not condone.

20. For purposes of directing the alleged purchasers of the subject estate, it suffices to cite Musyoka J ***In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR*** that:

**“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”**

21. According to the provisions of section 71(2) (a) of the Law of Succession Act and the proviso, where the deceased died intestate, as is the case here, the grant of letters of administration should not be confirmed until the court is satisfied about the identities of and shares of all persons beneficially entitled. There is no evidence to link the said Samwel Kithinji Boore and Lydia Wanja Mbae to the estate of the deceased or anything to prove that they are dependents of the deceased.

22. Applying the legal test above, it is my view that the protest by the 2<sup>nd</sup> Administrator/Protester is merited. The undated Summons of Rectification of Grant filed on 28/10/2020 by the 1<sup>st</sup> Administrator cannot to rectify the instant application of confirmation of grant by removing the names of Samwel Kithinji Boore and Lydia Wanja Mbae as the same refer to the grant issued to the 1<sup>st</sup> Administrator (also the initial administrator) on 04/10/2011 which the court has since revoked/annulled.

## **CONCLUSION**

23. The administrators should only include all the surviving children of the deceased in their summons for confirmation of grant.

In conclusion therefore, it is my view that:

- i. The Summons for Rectification of a Grant that were filed on 28/10/2020 are defective in substance.
- ii. The protests by the 1<sup>st</sup> and 2<sup>nd</sup> Protesters to the confirmation of the grant are merited and the summons for confirmation of grant dated 12/10/2018 cannot be confirmed at this stage.
- iii. **The administrators herein should file a fresh application for confirmation of the grant, in which they should specifically propose distribution of the assets of the estate amongst only the persons beneficially entitled. The identities of the beneficiaries and their shares should be properly reflected in the affidavit in support of the summons for confirmation of grant.**

The fresh summons be filed within 60 days.

**Dated, signed and delivered at Chuka this 11<sup>th</sup> day of February 2021.**

**L.W. GITARI**

**JUDGE**

**11/2/2021**

The ruling has been read out in open court.

**L. W. GITARI**

**JUDGE**