



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PROBATE AND ADMINISTRATION NO. 8 OF 1991

IN THE ESTATE OF M'MBIJIWE M'MUGUONGO (DECEASED)

SAMUEL KINOTI MBIJIWE.....ADMINISTRATOR/APPLICANT

RULING

1. Before the court is Summons dated 14th September 2020 for confirmation of Grant seeking specific reliefs as follows:

“i) That the Honorable Court do issue the applicant herein with Temporary Letters of Administration as the sole surviving administrator of the estate of the deceased.

ii) That upon issuance of the Temporary Letters of Administration, the Honorable Court do proceed to confirm the same as per the pronouncement of the court on 11th July 2008 and the Consent Order dated 25th November 2002.

ii) That the court do substitute the deceased beneficiaries with their heirs.”

Although expressed as an application for confirmation of Grant, it is truly one for rectification of Grant as confirmation of the grant herein was already granted on 8th July 1992 and rectified by the order of the court (Emukule, J.) of 11th July 2008, herein sought to be implemented.

2. The facts of the case are set out in the supporting affidavit of SAMUEL KINOTI MBIJIWE principally as follows:

“1. That I am an adult male and one of the four administrators of the estate herein pursuant to a consent order recorded before Justice Kasanga Mulwa on 25th November 2002.

2. That out of the four administrators appointed pursuant to the above referenced consent order, I am the only surviving administrator. (Annexed herein and marked SKM 1a, b & f are copies of their death certificates and chief's letter).

3. That further, the afore-referenced consent order distributed the estate and consequently, on 11th July 2008, Justice Emukule made an order that the same be enforced thereby marking the court's pronouncement on distribution as determined.

4. That the estate of the deceased which consist of L.R. No. Abogeta/U-Churel 145 measuring approx. 2.16 Hectares was distributed as hereunder. a) Frankline Mugambi 0.9 Acres or 0.36 Hectares b) Alexander Muthamia 0.9 Acres or 0.36 Hectares c) M'ikiara M'Mbijiwe 0.9 Acres or 0.36 Hectares d) Samuel Kinoti Mbijiwe 0.9 Acres or 0.36 Hectares e) Geoffrey Mutwiri 0.9 Acres or 0.36 Hectares j) Charity Nkuene 0.8 Acres or 0.32 Hectares

5. That out of the six beneficiaries, four of them are deceased and therefore their interests in the estate ought to devolve to their heirs as hereunder:

a) Frankline Mugambi (Deceased) to be replaced by his wife Lucy N. Mugambi.

b) Alexander Muthamia (Deceased) to be replaced by his wife Agnes Igoki Alexander.

c) M'ikiara M'Mbijiwe (Deceased) to be replaced by his wife Patricia Wanja.

d) Charity Nkuene (Deceased) to be replaced by his son Jeff Munene.

6. That I am advised by my advocate on record that the law provides for a surviving administrator to be vested with all powers to administer the estate to conclusion”

3. At the hearing, the counsel for the applicant faced with the question of appointment of the representatives for the deceased beneficiaries abandoned prayer no. iii and only sought confirmation of the Confirmed Grant in the name of the sole surviving administrator.

Powers of surviving administrator(s)

4. Section 81 of the Law of Succession Act provides as follows:

“81. Powers and duties of personal representatives to vest in survivor on death of one of them

*Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, **all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:***

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”

5. There is no such thing as a **temporary** grant of letter of administration. There are limited grants for specified purposes. In the sense of a *non* permanent grant of representation an *ad colligenda bona* grant may pass. In any other sense, there are only full grant of representation or limited grants for specified purposes. See section 54 and the Fifth Schedule of the law of Succession Act.

6. In the context of the case before the court, the applicant is seeking authority, if he needs it to deal with property as the sole surviving administrator. Is there need for reissue of Grant in the name of the surviving administrator as prayed? It would appear that section 81 is a self-executing provision of the administration process. However, for clarity as to the authority of the administrator especially by third persons with whom he has to deal in the course of the administration the court may issue an amended Grant or amended Confirmed Grant, as the case may be for purpose of certifying the authority of the surviving administrator (trixes) to deal with the property despite the demise of co-administrators(trixes).

7. I would respectfully agree with Emukule J. view as to the scope of the power of the court under section 74 of the Law of Succession Act to issue amended or rectified grants as follows:

“11. Section 74 of the Law of Succession Act empowers the court to amend or rectify a Grant of Letters of Administration on the grounds of errors in the names and descriptions, as in setting out the time and place of the deceased's death or the purpose in a limited grant. The grant may also be amended or rectified for any other good cause. That is why the court is given wide discretion by section 47 of the Act to determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient.”

8. Can the property be distributed to the wives of the deceased beneficiaries without their formal appointment as representatives? Section 45 of the Law of Succession act proscribes as intermeddling all action or dealing with the property of a deceased person without the authority of a grant of Representation., as follows:

9. Can the property of the deceased beneficiaries be appropriated to the wives or other persons on behalf of the estate of the deceased beneficiaries? The duty of the administrator under section 82 (d) is as follows:

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: *Provided that except so far as otherwise expressly provided by any will—*

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”

Ruling on Distribution of the Estate

10. The matter of the distribution of the estate is already settled by the ruling of the court (M. J. Emukule, J.) adopting as an order of the court the consent of the parties previously given, in his Ruling of 11th day of July 2008 in relevant parts held as follows:

“10. Having entered into the various consent orders, it is necessary to give complete force and effect to those orders as they (the orders), had the effect of rectifying the Certificate of Confirmation of the Grant issued on 8th July 1992.

11. Section 74 of the Law of Succession Act empowers the court to amend or rectify a Grant of Letters of Administration on the grounds of errors in the names and descriptions, as in setting out the time and place of the deceased's death or the purpose in a limited grant. The grant may also be amended or rectified for any other good cause. That is why the court is given wide discretion by section 47 of the Act to determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient.

12. In this matter, the parties having on 25.11.2002 consented both as to the beneficiaries, the sub-division and distribution of the parcel of land known as ABOGETA/U-CHURE/145 comprising of approximately 5.31 acres, into firstly 0.8 acres to Charity Nkuene and the balance equally among the sons of the late M'MBIJIWE MUGUONGO, 0.9 acres each, I direct that the Certificate of Confirmation of the Grant dated 8th July 1992 be and is hereby amended as follows:-

(a) Frankline Mugambi – 0.9 Acres

(b) M'Ikiara M'mbijiwe – 0.9 Acres

(c) Alexander Muthamia – 0.9 Acres

(d) Geoffrey Mutwiri – 0.9 Acres

(e) Samuel Kinoti – 0.9 Acres

(f) Charity Nkuene – 0.8 Acres

13. I further direct that the subdivisions carried out pursuant to the consent recorded in the Lower Court on 4th February 1999 are hereby cancelled, and for the avoidance of doubt the said order by R.M. Mutitu Chief Magistrate is quashed or set aside, and shall be of no effect whatsoever by virtue of this Ruling.

14. I also direct that each of the beneficiaries above cited, shall contribute to the costs of subdivision and registration of the new titles. appeal within the period prescribed by law and in accord with the

15. Any party aggrieved by this Ruling shall be at liberty to law applicable.

16. There shall be orders accordingly.”

11. It is these orders of the court that the application for confirmation grant before the court seeks to implement.

Confirmation of Grants

12. The test for confirmation of grant under section 71 of the Law of Succession Act are 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.

(2) Subject to subsection (2A), 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

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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 and shares of all persons beneficially entitled; and when confirmed such grant shall specify all

such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

13. In fact, the relevant provision of law for the present situation is section 75A of the Law of Succession Act which applies post confirmation of Grant as follows:

“75A. Continuing trust arising

(1) If, after confirmation of the grant of letters of administration at any time there is a continuing trust and only one surviving administrator, that administrator shall without delay apply to the court to appoint, subject to section 66, as administrators jointly with him not less than one or more than three persons as proposed by him, which failing as chosen by the court of its own motion.

(2) If a sole surviving administrator fails to apply to the court in accordance with subsection (1) within three months of there being a continuing trust and only one surviving administrator, on the application of any interested party in, or a creditor or debtor of the estate or of its own motion, the court may appoint additional administrators in accordance with subsection (1).

[Act No. 18 of 1986, Sch.]”

14. The application before the court is one for amendment of confirmed Grant following the demise of the four children of the deceased whose wives are proposed to be inserted into the confirmed Grant by necessary amendment or rectification thereof.

Determination

15. In this case, the estate has been ascertained, the heirs are determined as the children male and female of the deceased. Some of the children of the deceased are themselves deceased but that does not affect the administration and distribution of the estate as the property will be divided into the portions as between the children of deceased and where such children are deceased the property will be held by the estate of such deceased child pending distribution to the heirs of that child in accordance with the law. The Act requires the court to appoint another or other administrators (up to three) to join a sole surviving administrator in cases of CONTINUING TRUSTS as provided under section 71 (2A) of the Law of Succession Act set out above.

16. The court considers that a continuing trust arises for each of the deceased child of the deceased herein, whose property the administrators must hold upon trust until there are appointed representatives in accordance with the law of personal representatives for the said deceased children of the deceased. It is not correct as sought by the applicant to have the wives of the deceased automatically registered as owners of their respective deceased husband's share, as this court cannot assume that the said persons offered as wives are the sole heirs of the deceased who should therefore be registered in place of the deceased children of the deceased. There must be in existence lawful appointment of the said wives as personal representatives of the said deceased children in proceedings filed in that behalf in the matter of the estates of the respective children of the deceased. There may be other persons entitled to inherit the property of the said deceased children of the deceased herein and the court can only properly transmit their property to the lawfully appointed personal representatives for distribution to their heirs.

17. The living children of the deceased will have their respective shares registered in their names immediately upon rectification of the confirmed grant now in the names of the surviving administrator in accordance with section 81 of the Law of Succession Act together with another or other persons as required by section 75A of the Act.

18. The administrators shall be required in accordance with section 83 (i) of the Law of Succession Act to within six months, complete administration and file a report thereon in court which provides one of the personal representatives' duties as being:

“(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

Orders

19. Accordingly, for the reasons set out above, the court makes the following orders:

1. The confirmed Grant of Letters of Administration herein shall be rectified in the names of the surviving administrator who proceeds with administration by virtue of section 81 of the Law of Succession Act and one other administrator to be appointed by the court in accordance with section 75A (1) of the Law of Succession Act for distribution of the estate among the children of the deceased herein.

2. In the cases of the **deceased** children of the deceased, the said administrators shall hold the property upon a **continuing trust** until there are appointed personal representatives for the respective estates of the deceased children.

3. A fresh Grant and a Confirmed Grant in the names of the two administrators appointed pursuant to Order no. (1) above shall issue forthwith.

4. The administrators shall within 6 months file a report on the administration of the estate herein in accordance with section 83 of the Law of Succession Act.

Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF MARCH, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kaumbi Kioga Advocate for the Applicant.