

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION CAUSE NO.237 OF 2010

MATILDA WANDERA.....APPLICANT

VERSUS

CECILIA MUDONDO WANDERA.....1ST RESPONDENT

SIMON WANDERA BWIRE.....2ND RESPONDENT

R U L I N G

[1] A grant of letters of administration intestate respecting the estate of John Wandera Magonda (**DECEASED**) was issued to Cecilia Mudondo Wandera and Simon Bwire on the 29th November 2010. This was later rectified to substitute Simon Bwire as co-administrator for Matilda Wandera. A fresh grant was accordingly issued on the 26th September 2011 in the name of Cecilia Mudondo Wandera (**FIRST PETITIONER**) and Matilda Wandera (**SECOND PETITIONER**). On 15th May 2012 the first petitioner took out the necessary summons for confirmation of the grant. Apparently, the parties failed to agree on the distribution of some of the estate property. They therefore requested the court to make a determination on distribution of some selected properties. The court rendered its ruling on 12th June 2014, but later on the 24th February 2015, the first petitioner applied for the review thereof. The application was dismissed by the court on the 7th July 2015. The first petitioner was aggrieved by the dismissal. She therefore preferred an appeal to the Court of Appeal sitting in Kisumu.

[2] The Appellant Court rendered its judgment on 30th March 2017 and remitted the dispute back to this court for distribution of the remaining free property of the deceased identified in the parties consent dated 7th February 2017. Paragraph 38 of the judgment identified a total of ten (10) properties belonging to the deceased at the time of his death and already distributed pursuant to the consent of the 7th February 2017. These included property described Kisumu house, Mombasa house, Kisumu Municipality/Nyalenda "A"/1055 Samia/Luanda Mudoma/656, Samia/Luanda Mudoma/1482 and Kiosks Nos.41,49, 54,57 and 59 Funyula. As a result of the judgment, the second petitioner took out fresh summons for confirmation of grant dated 13th August 2018 on the basis of the mode of distribution set out in paragraph 4 of the supporting affidavit. The first petitioner responded by filing an affidavit of opposition or protest to confirmation of grant dated 20th December 2018 and filed on 10th January 2019.

[3] The application for confirmation of grant was scheduled for hearing on 16th May 2014 but nothing seemed to have happened on that date. Instead, the protest by the first petitioner dated 20th December 2018 was fixed for hearing on 26th September 2019, on which date the second petitioner through the learned counsel **MR. J.V. JUMA**, raised the issue of disobedience of the court Order made on 27th November 2014 on the part of the first petitioner. The court in turn directed learned counsel to file an application for contempt of court against the first petitioner. Pursuant to the directive, the second petitioner filed the necessary application in this succession proceedings vide the Notice of Motion dated 10th September 2020 and filed herein on 17th September 2020 seeking Orders that the first petitioner and one Simon Wandera Bwire do show cause why they should not be punished for disobeying the Order granted by the court on 26th November 2014 and issued on 27th November 2014.

[4] Both the second petitioner's applications for confirmation of grant dated **13TH AUGUST 2018** and for contempt of court dated **10TH SEPTEMBER 2020** were canvassed by way of written submissions. In the regard, the second petitioner's submissions were filed on 17th December 2020 and those of the first respondent were filed on 18th January 2021, through the firm of **R.V MUKOYA & CO. ADVOCATES**.

Having given due consideration to both applications on the basis of the supporting grounds and those in opposition thereto as set out in the relevant affidavits and the rival submissions, it is the opinion of this court that with regard to the first application for confirmation of grant, it is not ripe for determination at this juncture for reasons that there is in existence an affidavit of protest or opposition to confirmation of the grant by the first petitioner which in effect creates another issue with regard to the distribution of the estate. The affidavit also implies that the first petitioner is not agreeable to the mode of distribution proposed by the second petitioner in the application. In the circumstances, direction ought to have been given for the hearing of the protest prior to determination by the court as to whether or not the grant ought to be confirmed as applied. Alternatively, the application should have been held in abeyance to give room to the parties to arrive at an agreement on distribution and decide whether or not to take out fresh summons for confirmation of grant or maintain the present summons or for either party to make their own separate proposals, for distribution of the estate and let the court make its own determination on the issue based on the evidence and the law.

[5] It would therefore follow that the present summons for confirmation of grant were. Lastly and prematurely filed before the parties could agree on the mode of distribution of the estate. Having been so filed, it would have been prudent and proper that the objection by the first petitioner in her affidavit of protest dated 20th December 2018 be heard and determined prior to the hearing of the present summons for confirmation of grant. It cannot be gainsaid and that a determination on the protest would invariably resolve in one way or the other the application for confirmation of grant.

For all the foregoing reasons and in the interest of justice and so that this matter may not be delayed further or be clogged with unnecessary applications, the present summons for confirmation of grant be and is hereby struck out and dismissed to allow the parties to engage and arrive at a consensus on the distribution of the remainder of the estate after which they shall jointly take out fresh summons for confirmation of grant. In default, either party be at liberty to take out fresh summons.

[6] With regard to the second application for contempt of court, it would be unjust to grant it as this juncture in view of the foregoing determination on the first application for confirmation of grant. In any event, it is doubtful whether the application ought to have been made in the present succession proceedings, yet what is being introduced is a new claim against the first petitioner and another based on a different and distinct regime of the law notwithstanding that the impugned court Order dated 27th November 2014 emanated from this court and was in fact an approval of the consent reached between the parties with regard to the estate property described as L.R. No.Kisumu Municipality/Block 10/10. If therefore, there was a breach of the agreement reached between the parties, the aggrieved party's remedy lay in a civil suit rather than a succession cause.

[7] Further, it is only part are of the impugned Court Order relating to the opening of a joint bank account that appears to be in issue. This part relates only to the person called Simon Wandera Bwire yet the orders sought in the application also relate to the first petitioner who is primarily covered by the second aspect of this impugned order which seems not to have any or substantial dispute. It is ironic that the contempt application is also directed at one Stanely Koech and Moses O. Douglas, (**SEE PARAGRAPH 10 OF THE SUPPORTING AFFIDAVIT**) who are not parties to this cause. Clearly, the application is lacking in merit and unsustainable.

[8] In sum, both the two applications by the second petitioner are hereby dismissed with each party bearing their own costs.

Ordered accordingly.

J.R KARANJAH

J U D G E

[READ AND SIGNED THIS 20TH DAY OF APRIL, 2021].