



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2353 OF 2013

IN THE MATTER OF THE ESTATE OF TERESIA MWARA NYAGA alias TERESIAH MWARA NYAGA (DECEASED)

RULING

1. Agnes Wambui Ngugi, the Applicant herein has filed an application dated 2.7.20 seeking orders that the following institutions be enjoined as parties to this suit:

- (a) Kenya Airways
- (b) Co-operative Bank of Kenya
- (c) Barclays Bank of Kenya (Now Absa Kenya)
- (d) Kenya Commercial Bank Limited
- (e) Kengen
- (f) Kenya-Re
- (g) Safaricom
- (h) Family Bank Limited.

2. The Applicant also sought that the above institutions be compelled to distribute shares as per the Certificate of Confirmation of Grant dated 23.9.16, and to hold the shares of Charles Njau Nyagah (Charles) in trust for him. The final prayer is that the costs of the application be paid from the estate of the Deceased.

3. Briefly, the background of this matter as can be gleaned from the record is that Teresia Mwara Nyaga, the deceased herein died on 7.5.13 at the age of 80 years. The record shows that the deceased left a will in which she appointed the Applicant as executor thereof. She further made provision for the Applicant, and 2 other daughters Betty Mwhiki Muchigi, Evelyn Wanjiru Nyaga and Charles her son. She also made provision for 2 grandchildren, Kevin Nyaga Nungari and Yvonne Wanjiku Njiraini. Grant of probate of written will was on 18.12.13 issued to the Applicant. Thereafter, the Applicant filed a summons for confirmation of grant dated 14.7.14. The summons was however challenged by Charles, who claimed that the deceased's will was a forgery, as at the time the deceased was said to have made the will, she was very ill. He also contested the bequests made by the deceased in the will. In its ruling of 12.6.15, the Court found the will of the deceased to be valid and the estate was to be distributed in accordance with the same. A certificate of confirmation of grant was issued on 23.9.16.

4. The present Application is premised on the grounds that the Applicant has distributed most of the assets of the estate of the deceased to the beneficiaries. However, the shares owned by the deceased in the listed institutions are yet to be distributed to the deceased's 4 children as per the will, because Charles has declined to take up the shares that devolve to him. The position of the institutions is that there cannot be partial distribution of the shares. The Applicant therefore seeks that Charles's entitlement in the deceased's shares in the said institutions be held by the respective institutions in trust for him so that distribution of the shares can be done in fulfillment of the wishes of the deceased.

5. The Application was opposed by Absa Bank Kenya PLC by a replying affidavit sworn by Milkah Maina, a legal counsel. Milkah averred that the application by the Applicant is fatally defective as it was brought under Section 74 of the Law of Succession Act, which deals with power of the Court to rectify errors, yet the Applicant has not disclosed any error that needs to be rectified. It was further averred that the Applicant did not produce a renunciation by Charles of his inheritance. Further the question of his shares cannot be determined in his absence given that he is not a party to the proceedings. It was further contended that the Bank cannot act as trustee for beneficiaries of an estate where

there is an executor who has duty is to distribute and hold in trust the estate of the deceased. The Bank further argued that the Executor cannot delegate to the Bank, duties and powers delegated to her by the testator as this would offend the principle of *delegatus non potest delegare*. The Bank urged the Court to dismiss the Application.

6. Sally Kaigwa, a legal officer of Co-operative Bank Limited swore an affidavit on 23.3.21 opposing the its appointment of the Bank as trustee for Charles.

7. The Court has considered the Application and responses as well as the oral submissions made by counsel for the parties.

8. The issue for determination is whether the listed institutions can hold shares in trust for Charles as sought by the Applicant.

9. The deceased in her will appointed the Applicant as executor and trustee thereof. The Court upon proof of the will of the deceased, issued a grant of probate to the Applicant. By the appointment and the issuance of the grant, the Applicant became the personal representative of the deceased. Section 79 of the Law of Succession Act provides:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

10. By dint of the grant of probate issued to the Applicant, the estate of the deceased became vested her as personal representative. The powers and duties of a personal representative are stipulated in Sections 83 and 84 of the Act. Section 84(f) provides that a personal representative has a duty:

subject to [section 55](#), to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

11. A personal representative shall distribute or retain on trust (as the case may require) all the net assets of the estate. In the present case, the Applicant averred that she has distributed most of the assets of the deceased save for the shares in the listed institutions, thus discharging her duties in that regard. The distribution of these shares has been frustrated by the refusal by Charles to take up his shares. This is in my view is a suitable case for the Applicant as personal representative of the deceased to *retain on trust* the shares of Charles as the case so requires. The Applicant however seeks to delegate this duty to the listed institutions.

12. The Applicant's duties as personal representative are fiduciary in nature and may not be delegated to another. A personal representative of a deceased person may not in law delegate the power and discretions conferred by a grant of representation. Kimaru, J. in [In Re Estate of KRISHAN MURTI MAINI \(DECEASED\) \[2011\] eKLR](#) had occasion to consider the issue of delegation of power bestowed by a Grant and had this to say and I agree with him:

“It is therefore clear that when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personal to the person applying to administer the estate of the deceased. The person applying for letters of administration or grant of probate cannot on his part delegate the powers granted to him by the court to someone else to administer the estate (in the case where the deceased died intestate) or to execute the will (in the case where the deceased left behind a written will) on his behalf.”

13. And in the case of [Abdisatar Haji Mohamed & Another v Omar Ahmed & another \[2017\] eKLR](#) the Court of Appeal stated:

“The Judge found and rightly so in our view, that, powers granted to personal representatives or executors cannot be delegated. An executor cannot delegate his authority but may engage the services of other experts or professionals, for instance, advocates, accountants, property valuers, managers, estate agents who may offer services which may be required in the administration of an estate.

14. It must also be noted that under Section 56(2) of the Act the powers and duties of a personal representative cannot be exercised by a body corporate other than the Public Trustee or a trust corporation. To have the listed institutions hold Charles' shares in trust for him would be an abdication of duty by the Applicant as personal representative of the deceased.

15. The Court is alive to the fact that a trustee may be appointed to hold a beneficiary's entitlement in an estate where such beneficiary is under a disability on account of age or infirmity. This however is not the case herein. No evidence has been placed before the Court to demonstrate that Charles is under any disability. Further a person so appointed as trustee must be willing to act as such. This is not the case herein. The respondents who responded to the Application expressed their unwillingness to be appointed trustee. In any event, it was not the intention of the deceased that Charles' shares be held in trust for him.

16. Further and equally fundamental, Charles has not been made a party in this Application. The legal imperative of hearing a person who is likely to be adversely affected by a decision before the decision is made, cannot be overemphasized. The principles of natural justice will not allow a party to be condemned unheard. The Court of Appeal sitting in Malindi observed in the case of [J M K v M W M & another \[2015\] eKLR](#):

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

17. Our Courts have been steadfast in upholding the principles of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. To grant the orders sought without notice to, or the participation of Charles is to go against the principles of natural justice.

18. It was submitted by the Respondents that no formal request has been made to transfer the shares to the beneficiaries. The Applicant as executor need only to formally approach the institutions to have the shares held by the deceased transferred to the beneficiaries in accordance with the will. As regards the shares of Charles, the same vest in the Applicant as personal representative of the deceased by dint of Section 79 of the Act. It is only the Applicant as personal representative, who is empowered in law to hold the same in trust for Charles, until such a time as he shall be willing to have the same transferred to him.

19. In the end, I find the Summons dated 2.7.2020 devoid of merit and the same is hereby dismissed with costs to the Respondents who filed responses. The said costs to be borne by the estate.

DATED, SIGNED AND DELIVERED IN IN NAIROBI THIS 25TH DAY OF JUNE, 2021

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

.....**for the Absa Bank PLC**

.....**for the Cooperative Bank Limited**

.....**for the Family Bank Limited**

.....**Court Assistant**