



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 39 OF 2019

IN THE MATTER OF THE ESTATE OF ALICE MUTHONI MWIHIA DECEASED

RULING

1. By this Ruling the court will determine applications dated:-

- 24th July 2020
- 27th July 2020
- 27th August 2020

2. Even though there are three applications for consideration, my perusal of this matter reveals there is no monumental dispute for determination.

BACKGROUND

3. This succession relates to the **Estate of ALICE MUTHONI MWIHIA deceased**. Initially, the succession of this estate was filed before the Limuru Chief Magistrate's court. The succession was subsequently transferred to this Court, Kiambu High Court. A grant was issued before the Limuru Chief Magistrate's Court on 18th July 2017. That grant was confirmed by the Kiambu High Court on 26th November 2019. On that day, all the beneficiaries attended court and confirmed their acquiescence to the proposed mode of distribution of the assets of the deceased's estate.

4. The three administrators, **JACINTA NJERI GAKWA (Jacinta)**, **FRANCIS GITAU MWIHIA (Francis)** and **DOMINIC KAMUNYU MWIHIA (Dominic)** have this far failed to carry out the actual distribution of the estate's assets to the respective beneficiaries even though the grant was confirmed setting out the mode of the distribution of the estate. That delay in the distribution is, in my view, the cause of the friction between the beneficiaries leading to the number of applications that have been filed herein.

THE APPLICATIONS

5. The first application, in time, is the one dated 31st January 2020. That application was filed by Jacinta and Francis. They sought prayers to restrain Dominic, by an injunction, from collecting rental income from one of the properties the subject of this succession, namely EASTLEIGH PLOT NO. 36/VII/221. The application also sought an order for the tenants on that EASTLEIGH property do deposit their rent to the Estate Account. Further by that application leave of the court was sought to permit the administrators to sell the EASTLEIGH property and the sale proceeds thereof be distributed amongst the ten beneficiaries.

6. The second application is dated 27th July 2020. This application is filed by Dominic. He seeks the prayer that the mode of distribution of L.R No. GATAMAIYU/KAGWE/433 be rectified for the mode of distribution, to "reflect mode of sharing."

7. The third application filed by Jacinta and Francis is dated 27th August 2020. By that application Jacinta and Francis seek the removal of Dominic as their co-administrator.

8. The submissions of the three applications cut across and I will therefore consider them collectively.

9. The confirmed grant distributed the EASTLEIGH property to the following:

- Jacinta Njeri Gakwa
- Francis Gitau Mwhia

- Dominic Kamunyu Mwinia
- Teresia Wanjiru Gachanja
- Hannah Wanjiku Mwhia
- Virginia Mugure Mwhia
- Salome Wangui Mwhia
- Edward Kimemia Mwhia
- Peter Mburu Mwhia
- George Mwhia Ng'ang'a
- Ruth Wairimu Ng'ang'a
- Alice Muthoni Ng'ang'a

10. The EASTLEIGH property was ordered, by the confirmed grant, to be held in trust for the above beneficiaries by the three administrators, namely Jacinta, Francis and Dominic. Jacinta and Francis by their application dated 31st January 2020 stated that Dominic was collecting the rental income of the EASTLEIGH property but that he was not banking the whole amount collected from the tenants and was allegedly diverting some of that rental income to his own use. The applicant also stated that the EASTLEIGH property is indivisible and that accordingly all the beneficiaries, except Dominic, have consented to the property being sold and the sale proceeds be divided amongst the beneficiaries. Jacinta and Francis are of the view that Dominic is reluctant to consent to the sale of that property because of the personal gain he gets from the rental income.

11. Dominic by his replying affidavit dated 10th July 2020 denied that he was personally benefiting, to the exclusion of other beneficiaries, from the rental proceeds of EASTLEIGH property. Dominic deponed that he banks the rent he collects into the account in the names of the three administrators. By a further affidavit dated 3rd February 2021 Dominic stated that Jacinta and Francis wish to sell the EASTLEIGH property without considering his lawful interest and that he was unwilling to sell his portion of that property.

12. Jacinta and Francis seek the removal of Dominic as their co-administrator because he has become un-cooperative in that he has refused to sign documents for transfer of shares to beneficiaries even despite the court ordering him to sign and further that even though all the beneficiaries of EASTLEIGH property have consented in writing to sell that property Dominic has declined, and has refused to accompany them to the bank to collect the title document where the title being held.

13. Dominic has argued by his application dated 27th July 2020 that that GATAMAIYU property be re-distributed and in that re-distribution their late mother be allocated a portion of that land.

ANALYSIS

14. The court has discretion on the appointment of administrator as provided under **Section 66 of the Law of Succession Act Cap 160**. That section provides:-

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors”(underlining mine)

15. In exercise of that discretion and by applying the jurisdiction under **Section 47 of Cap 160** and **Rule 73** of the Probate and Administration Rules this court can entertain the application before this court. I find and hold that Dominic has failed to carry out the duties of an administrator. Dominic was before court when the grant and the mode of distribution of the estate was confirmed by this court on 26th November 2019. The two co-administrators of Dominic and all the other beneficiaries of EASTLEIGH property are of the view that that property is indivisible and it ought therefore to be sold. Dominic does not dispute that assertion. He however declines to consent to the sale of that property for no good reason other than he does not wish to sell his portion. His portion is however indivisible. One is tempted to accept as true the depositions of Jacinta and Francis that Dominic is personally benefiting from the rental income of that property to the exclusion of other beneficiaries. That may explain his reluctance to consent to its sale.

16. In my view Jacinta, and Francis have made out a case for the sale of that property and for division of the sale proceeds equally amongst the beneficiaries.

17. In addition, I find that the failure of Dominic to co-operate with his co-administrator is sufficient reason to remove him from the office of administrator. Dominic has failed to show that his co-administrators have acted to the detriment of the beneficiaries. It is for that reason I will order the removal of Dominic as an administrator. I wholly associate myself with the holding of *Justice L Njuguna* in the case **In re ESTATE OF THE LATE KUBUTA KAMARA NGUURO ALIAS PHARIS NJEGEGU (Deceased) [2021] eKLR** as follows:-

“25. However, this court being a succession court has ample powers donated to it by Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to resort to, in order to meet the ends of justice. The task of administering the estate is still on the shoulders of the respondent (administrator). As I have already noted, despite the grant having been confirmed in the year 2007 and even after the subsequent amendment by Muchemi J (which included the Wang’uru Plot in the certificate), the respondent has nonetheless failed to administer the estate. I believe that court orders ought not to be issued in vain but must be complied with. Further, the office of administrator of estate of a deceased person is an office which is built on the foundation of trust and goodwill. Where such is seen to be lacking, then the court ought to invoke its powers to ensure that justice is done to the beneficiaries more so where the administrator puts the beneficiaries in an unenviable position.”

18. The application by Dominic dated 27th July 2020 seeking re-distribution of GATAMAIYU property is incompetent. I fail to understand how Dominic would say that part of that property be allocated to their late mother. A deceased person cannot have property distributed to them. Dominic participated in the confirmation of the grant and in the distribution of that property. That application fails.

DISPOSITION

19. In view of the above holdings I grant the following orders.

- a) **DOMINIC KAMUNYU MWIHIA** is hereby removed as an Administrator of the Estate of **ALICE MUTHONI MWIHIA (Deceased)**.
- b) As a consequence of order (a) above the grant dated 18th July 2017 and the confirmed grant dated 26th November 2019 are hereby revoked.
- c) A grant shall be issued in the names of **JACINTA NJERI GAKWA and FRANCIS GITAU MWIHIA**.
- d) That a grant shall be confirmed in terms of the previous confirmed granted hereof dated 26th November 2019.
- e) **DOMINIC KAMUNYU MWIHIA** is hereby restrained from collecting rent of EASTLEIGH PLOT NO. 36/VII/221.
- f) Leave is hereby granted to **JACINTA NJERI GAKWA and FRANCIS GITAU MWIHIA** as administrators of the Estate of **ALICE MUTHONI MWIHIA (Deceased)** to sell by private treaty property EASTLEIGH PLOT NO. 36/VII/221 and the sale proceeds shall be divided equally amongst the beneficiaries of that property.
- g) Accordingly, applications dated 31st January 2020 and dated 27th August 2020 succeed and the application dated 27th July 2020 is dismissed. There shall be no order as to costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 23RD DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Jacinta Njeri and Francis Gitau: Mr. Omondi H/B Mr. Gachie

For Dominic Kamuyu: N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE