



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 77 OF 2014

IN THE MATTER OF THE ESTATE OF BENJAMIN NG'ONO MBATI alias NG'ONO MBATI (DECEASED)

JUDGMENT

1. I have not had sight of the certificate of death in respect of the deceased herein, for one does not appear to be in the record before me, but the deceased herein, Benjamin Ng'ono Mbatu, is said to have died on 7th June 2012. Representation to the intestate estate of the deceased was sought by Harrison Mbatu Ng'ono, in his capacity as son of the deceased, vide a petition filed herein on 31st January 2014. He is said to have been survived by a widow and 6 sons, being Rispa Ndolwa Ngono, Jerald Okuna Ngono, Eliakim Wepo Ngono, Patrick Omusebe Ng'ono, Jackson Wesonga Ngono, Richard Wamamu Ngono and Harrison Mbatu Ngono. The deceased is said to have died possessed of South Wanga/Lureko/2041. Letters of administration intestate were duly made to the petitioner on 29th April 2014, and a grant was duly issued, dated 7th May 2014. That grant was subsequently confirmed on 8th December 2014, on an application dated 30th May 2014, and a certificate of confirmation was duly issued, dated 9th February 2015.

2. The confirmation of the grant of 29th April 2014 prompted the filing of a summons for its revocation, dated 25th May 2016. The same was heard, and a ruling on it was delivered on 31st October 2016. The court found that some of the survivors of the deceased had not been disclosed, some assets were also not disclosed, at confirmation some of the beneficiaries were not provided for, and even after confirmation the administrator failed to complete administration. The court revoked the said grant, and appointed new administrators, being Jackson Wesonga Ng'ono, Richard Wamamu Ng'ono and Harrison Mbatu Ng'ono. They were directed to file for confirmation of their grant within 30 days. A grant was duly issued, dated 19th May 2017.

3. A summons for confirmation of grant was filed herein on 21st November 2017, by Harrison Mbatu Ngono, dated 6th November 2017. I shall refer to him hereafter as the applicant. The persons listed in the application as the persons beneficially entitled to a share in the estate are 1 widow, 8 sons and 4 daughters. The widow is named as Rispa Ndolwa Ng'ono. The sons are said to be Harrison Mbatu Ng'ono, Richard Wamamu Ng'ono, Eliakim Wepo Ng'ono, Gerald Okuna Ng'ono, Jackson Wesonga Ng'ono, the late John Wamukoya Ng'ono and Patrick Omusebe Ng'ono. The daughters are listed as Selipha Queen Ng'ono, Christine Nanzala Ng'ono, Sela Nanjira Nambande Ng'ono and the late Repha Chitemi Ng'ono. The deceased is said to have had owned 2 pieces of land, being South Wanga/Lureko/464 and 2041. It is explained that South Wanga/Lureko/2041 was a creation from South Wanga/Lureko/81, which belonged to the deceased. The deceased caused it to be subdivided into South Wanga/Lureko/2041 and 2042. He transferred South Wanga/Lureko/2042 to his son, Richard Wamamu Ng'ono, and retained South Wanga/Lureko/2041. He states that the deceased had distributed his property amongst his sons as follows: South Wanga/Lureko/2042 – to Richard Wamamu Ng'ono; South Wanga/Lureko/2041 – to Harrison Mbatu Ng'ono 3½ acres, Eliakim Wepo Ng'ono 3 acres, Gerald Okuna Ng'ono 3 acres, the late John Wamukoya Ng'ono 3 acres, and the homestead ½ acre; and South Wanga/Lureko/464 - to Patrick Omusebe Ng'ono and Jackson Wesonga Ng'ono, equally. The late John Wesonga Ng'ono then died without a spouse and children, and the deceased repossessed his portion. The applicant subsequently bought the 3 acres that were meant for the late John Wamukoya Ng'ono from the deceased. He avers that the deceased did not make any provision for his daughters, because they were married and were catered for by their husbands, but if they wished to get a share they could always ask the court to provide for them. He proposes distribution as follows:

- a. South Wanga/Lureko/464 - to Patrick Omusebe Ng'ono and Jackson Wesonga Ng'ono, equally;
- b. South Wanga/Lureko/2041 – to Harrison Mbatu Ng'ono 6½ acres, Eliakim Wepo Ng'ono 3 acres, Gerald Okuna Ng'ono 3 acres, the late John Wamukoya Ng'ono 3 acres, and Rispa Ndolwa Ng'ono ½ acre; and
- c. South Wanga/Lureko/2042 – to Richard Wamamu Ng'ono.

4. To that proposal, Jackson Wesonga Ng'ono and Richard Wamamu Ng'ono swore a joint affidavit of protest, on 9th October 2018. They aver that the deceased had been survived by a widow, 6 sons and 2 daughters. 1 son and 2 daughters were deceased. He had died possessed of 2 parcels of land, being South Wanga/Lureko/464 and 2041. They aver that the deceased had subdivided his property amongst his sons before he died, and had planted beacons. The late John Wamukoya Ng'ono was said to have not left any survivors. They assert that the deceased never sold any part of his property to anyone, including Harrison Mbatu Ng'ono. They propose that the 2 assets be shared out as follows:

a. South Wanga/Lureko/464 – Patrick Omusebe Ng’ono and Jackson Wesonga Ng’ono, equally; and

b. South Wanga/Lureko/2041 – 3.4375 acres each to Harrison Mbatu Ng’ono, Eliakim Wepo Ng’ono and Gerald Okuna Ng’ono, 0.6675 to Richard Wamamu Ng’ono, and ½ acre being devolved to the widow, Risper Ndolwa Ng’ono, during lifetime, and thereafter equally to Gerald Okuna Ng’ono and Eliakim Wepo Ng’ono.

5. The matter was disposed of orally, and the oral testimonies largely recapitulated the material in the sworn affidavits.

6. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

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 administered; 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.”

7. It would appear that there are no issues with respect to appointment of the administrators as such. Their appointment as such was by the court in the ruling delivered 31st October 2016. Since they were appointed by the court, there would be no basis to say that they were not appointed through due process. Have they administered the estate in accordance with the law after their appointment? No one has raised issue with that. In any event, they have not done much in terms of administration, for they were required to move quickly to have their grant confirmed, hence the instant application. Consequently, I find that there is no impediment to their confirmation as administrators.

8. The principal purpose of confirmation of grant is distribution of the assets. The proviso to section 71(2) of the Law of Succession Act requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”

9. I would like to emphasize that the provisions above cast a duty on both the administrator and the court with respect to ascertainment of the persons beneficially entitled and their shares. The administrator who moves the court under section 71, is under an obligation to ascertain all the persons beneficially entitled to a share in the estate of the deceased, and to identify those shares in the application. The proviso is about cases of intestacy. The administrator ought to go back to Part V of the Law of Succession Act, and look at the provisions in that Part that apply to intestate distribution, and satisfy himself that he has ascertained the persons entitled in intestacy in accordance with those provisions. Part V runs from sections 32 to 42 of the Law of Succession Act. These provisions are very clear on who the persons beneficially entitled are where the intestate was survived by a spouse and children, a spouse but no children, children but no spouse, and no spouse and no children. They also address situations where the intestate died a polygamist, how to deal with shares due to minors and how to treat previous gifts, settled to some of the persons beneficially entitled, either *inter vivos* or by will. The provisions are gender neutral, for the law does not entertain discrimination based along those lines.

10. The obligation on the court faced with a summons for confirmation of grant, according to the proviso, is that the court ought not treat the application casually, by just going by what the administrator has disclosed, in terms of the person beneficially entitled. The court ought not treat the list of survivors furnished by the administrator as the gospel truth. There is need to probe, to ask questions, to go through the entire

record, to peruse the petition that initiated the cause, read the letter by the local Chief or his assistant, among other measures. Go beyond the confirmation application. This is critical because a succession cause in intestacy is about distribution of the assets amongst those entitled. In probate, the exercise is easier, for distribution is in accordance with the will of the deceased, and the persons beneficially entitled would usually be those that the testator had named in his will. In intestacy, the court relies entirely on the honesty of the administrator. The court can be misled, and so it has to be vigilant. It must therefore go the extra mile. It must avoid a casual approach to the application.

11. The importance of the confirmation process cannot be gainsaid. A succession or probate cause is initiated for the sole purpose of distribution of the estate. The process under section 71 is about that distribution. That should make the process of confirmation of grant the most critical in the entire succession process. It is the one process that ought to bring closure to the succession of probate cause. The parties and the court must get it right. Failure to get it right will mean that there would be no closure, and the parties will have to re-visit it for one reason or other. This would explain why, after confirmation, most causes do not close, for parties keep coming back for review, or redistribution of the estate, or for rectification of the certificate of confirmation, or for revocation. Much of it has something to do with the bungling of the confirmation process. To avoid that the court ought to do is to insist on scrupulous compliance with what is required under section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules, for the converse is that succession litigation then never ends.

12. The importance of the court doing duty in terms of section 71 of the Law of Succession Act, was underlined in *In the Matter of the Estate of Ephraim Brian Kavai (Deceased)* Kakamega HCSC No. 249 of 1992 (unreported) (Waweru J), where the court said:

“What is immediately obvious is that the court (Hon. Tanui J.) did not enquire into or satisfy himself as to the persons beneficially entitled and their respective shares to the estate of the Deceased as required by the proviso to subsection (2A) of section 71 of the Law of Succession Act, Cap 160 before making the order for confirmation of the grant. The proviso is in mandatory terms, and from its wording, failure of the court to so satisfy itself, in my judgment, renders the order of confirmation (and the resulting confirmed grant) illegal. Contrary to what might be thought, confirmation of grant in intestate succession is a not a mere formality. It is probably the most important aspect of intestate succession, as it is at that stage that the court determines who are beneficially entitled to the estate of the deceased and their respective shares therein. In this station and in my previous station (Kisii) I have come across hundreds of disputes which would have been avoided if the court concerned had performed its statutory duty. The present dispute is one such.”

13. I have a duty, therefore, to be satisfied, before I can proceed to confirm the grant herein, as to whether the administrators herein have ascertained the persons beneficially entitled to a share in the estate, and of their shares in the estate. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? On the first limb of the proviso, as to whether the administrators have properly identified all the beneficiaries of the estate, I am persuaded that they have. The court in the ruling of 31st October 2016 made a definitive finding that the daughters of the deceased had been left out of the process, and it was for that, among other reasons, that the grant was revoked, and fresh administrators appointed. That anomaly was addressed in the confirmation application, for the daughters have been disclosed.

14. However, the second limb of the proviso has not been complied with. The law requires that all the survivors be ascertained, and their shares in the estate should also be identified. Although the administrators have identified the daughters of the deceased as survivors, they have not allocated to them any shares. They are given nothing. That would mean that their shares have not been identified, contrary to what the proviso requires. The Judge in the ruling of 31st October 2016 said that the Law of Succession Act does not discriminate against daughters, and I need not reiterate that. They should have been provided for, and the fact that they were not means that I should not confirm the grant. It is not enough to just list the daughters as survivors of the deceased, they must be allocated their due shares. If the daughters are themselves not keen on taking up their entitlement, then evidence must be provided that they have renounced or waived their right or entitlement. That could take the form of an affidavit averring to that or a deed of renunciation, or the daughters ought to have been presented at the hearing of the confirmation application, for them to state to court orally, in the spirit of Rule 41(1) of the Probate and Administration Rules, their position on their entitlement.

15. The deceased herein died in 2012, long after the Law of Succession Act had come into force on 1st July 1981. His estate is, therefore, by dint of section 2(1)(2) of the Law of Succession Act, for distribution in accordance with the provisions of the Act. He died intestate, and, therefore, distribution should be in accordance with Part V of the Law of Succession Act. The parties have mentioned that one of the wives survived the deceased, to whom provision ought to be made, in accordance with section 35(1)(b) of the Law of Succession Act, by allocating to her a life interest in the net intestate estate. The majority of the survivors are the children of the deceased. Where the deceased is survived by children only, without a surviving spouse, that is, sections 35(5) and 38 of the Law of Succession Act apply, the property is shared equally amongst the children. Of course, in case of polygamy, the estate is first dealt with in terms of section 40(1) of the Law of Succession Act, where the assets are devolved to the houses, and thereafter each house is required, under section 40(2), to distribute the assets devolved to the house, in terms of sections 35 to 38 of the Act, whichever is applicable.

16. These two provisions say, for avoidance of any doubt, state as follows:

“35 Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) *Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*

36...

37...

38. *Where intestate has left a surviving child or children but no spouse*

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

17. The proviso to section 71(2) is gender-neutral. Indeed, the entire Law of Succession Act is gender-neutral, largely, and more specifically with regard to children. It does not classify children into male and female, or sons and daughters. The reference to children in Part V, whether in section 35(5), or 38 or 40, means children of both gender. The interpretation section in the Law of Succession Act, section 3, does not define children in gender terms. In fact, the definition in there, on children, has nothing to do with children being either male or female, and addresses other issues that are not relevant to gender. The provisions in section 3, on children, are in subsections (2)(3)(4), and they state as follows:

"3. Interpretation

(1)...

(2) *References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*

(3) *A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.*

(4) *Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated."*

18. As the deceased died after the Law of Succession Act had come into force, distribution of his estate must factor in his daughters. They are entitled to a share in the estate, according to the provisions of the Act. Daughters, therefore, should not be ignored, or be disregarded, as if they did not exist, or as if the deceased never had any such children. The Law of Succession Act has provided for them, they should be taken into account in succession proceedings, by being disclosed in the petition, and in the confirmation application, and being involved in all the processes in the succession proceedings. Of course, under the customary law of succession, daughters, especially the married ones, had no entitlement to a share in their fathers' estates, because they were entitled through the men who married them. If customary law were of application here, unfortunately it is not, then the failure to provide for the daughters would, perhaps, be acceptable or tolerable.

19. Other than the Law of Succession Act, I am obliged to take into consideration the rights of the daughters of the deceased, by the Constitution of Kenya, 2010, and the international law. Article 27 of the Constitution of Kenya, 2010, decrees that men and women are to be treated equally, in all spheres of life, and succession is one of them. When a father dies and his estate is up for distribution, then, under Article 27 of the Constitution, all the children of the deceased, male and female must be taken into account, and afforded equal treatment. Under Article 2(5) of the Constitution of Kenya, 2010, the general rules of international law form part of the law of Kenya, and under Article 2(6) of the Constitution, any treaty or convention ratified by Kenya forms part of the law of Kenya. Kenya has signed up to many treaties and conventions, which, by dint of that Article have become part of the law of Kenya, even without any form domestication. I shall refer to only one of the, the Convention on the Elimination of All Forms of Discrimination Against Women, otherwise known as CEDAW. It vouches for equal treatment of men and women, and enjoins States to promote non-discrimination against women. CEDAW came before the Constitution, 2010, and the promulgation of the Constitution was, so to speak, part of the domestication of the said convention. This court cannot therefore turn a blind eye to these legal instruments, and proceed as if there is nothing untoward in the manner that the administrator and the sons of the deceased have done, concealed the existence of the daughters and granddaughters of the deceased, and proceeded as if they do not exist and do not matter.

20. I was told that the deceased had distributed his estate during his lifetime. That would be what is called distribution *inter vivos*. If that had happened then these proceedings would not be necessary, for the deceased would have had caused the land to be subdivided, after obtaining the relevant consents of the Land Control Board, and had the subtitles transferred to the names of the sons, so that each of the sons would, therefore, be holding title deeds of their own, making succession proceedings superfluous. That is what lifetime distribution is about. The only person who benefitted from an *inter vivos* distribution or transfer was Richard Wamamu Ng'ono, with respect to South Wanga/Lureko/2042. The rest of the sons did not, and the rest of the assets were not distributed in similar manner. Those assets are now

available to distribution to the rest of the children of the deceased, who did not benefit from the *inter vivos* distribution, and who include the daughters. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J), and *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J).

21. In view of everything that I have said above, I am moved to make the following orders:

- a. That I hereby postpone determination of the summons for confirmation of grant, dated 6th November 2017;**
- b. That I direct the administrators to file further affidavits making provision for the daughters of the deceased;**
- c. That in the event the daughters, or any one of them, not wishing to take up their shares, then the administrators shall cause them to file evidence of waiver or renunciation of those rights or entitlements, or have them attend court to state their position orally in open court;**
- d. That the grant on record shall be confirmed only after full compliance with the proviso to section 71(2) of the Law of Succession Act and the directions in (b)(c) above; and**
- e. That the matter shall be mentioned, on a date to be allocated to the parties at the registry, to confirm compliance with the order in (b) and (c) above, and for further directions.**

22. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF AUGUST, 2021

W MUSYOKA

JUDGE