



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO 744 OF 2012

IN THE MATTER OF THE ESTATE OF DENIAL OMARI ONGORI (DECEASED)

AND

IN THE MATTER OF: NOTICE OF OBJECTION TO GRANT OF LETTERS OF ADMINISTRATION

RICHARD JOSHUA OMARI.....PETITIONER/RESPONDENT

VERSUS

CAROLINE LISS KYANA.....CO-ADMINISTRATOR/APPLICANT

RULING

1. The application before me is titled ‘*Summons for revocation of grant, setting aside and/or review, tender accounts & provision*’ dated 15th April 2021.

2. It is however necessary to give a brief background of the succession cause and the events leading to this application. The applicant is the deceased widow and the co-administrator of the deceased estate. Following her appointment as administrator, she filed an application for confirmation of grant dated 16th April 2018. Upon the hearing of the application, the parties agreed on the mode of distribution and the court confirmed the grant in favour of the two co-administrators, CAROLINE LISS KYANA and RICHARD JOSHUA OMARI in terms of the amended consent of the schedule on the mode of distribution dated 31st July 2018. The confirmed certificate of grant was later rectified to reflect shares account in Barclays Bank to read 41715 for 55520 shares in favour of the applicant and the share account No xxx of 550 shares be confirmed to the respondent to hold in trust for William Ongori.

3. The applicant in this instant application now contends that she did not consent to the amended schedule of distribution in regard to the deceased estate. She also pointed out that two beneficiaries William Ongori and Okweba Samson did not sign the consent. The consent order was also attacked on the basis that it was contrary to the provisions of the Law of Succession Act as it did not recognize the applicant as a single unit. The applicant advanced that the deceased also had a business trading as Omari Motor Stores and the same is being operated by the respondent at the exclusion of all the beneficiaries who are supposed to benefit from the proceeds of the business. The applicant claims that the Share certificates at various banks, Barclays Bank of Kenya Ltd (now ABSA Bank) and National Bank of Kenya Limited bear the name of the deceased as OMARI DANIEL.

4. The applicant thus seeks the following orders;

1. *SPENT*

2. *The Honourable Court be pleased to rectify the Certificate of Confirmation of Grant issued on the 31st day of July 2018 by correcting and/or amending the name of the Deceased to read as DANIEL OMARI ONGORI alias OMARI DANIEL.*

3. *Pending the hearing and determination of the instant summons, the Honourable court be pleased to make an order granting the Applicant provision of upkeep and/or maintenance of Kshs 175,000/- only, from deceased business namely OMARI AUTO SPARES which business is being managed by the Petitioner/Respondent herein.*

4. *The Honourable court be pleased to issue an order for reasonable monthly maintenance provision in the sum of Kshs 175,000/- only, out of the deceased business namely OMARI AUTO SPARES to the Co-Administrator/Applicant who is the only surviving widow of the deceased.*

5. The Honourable Court be pleased to Order and/or Compel the Petitioner/respondent to tender, avail and/or supply the Accounts, relating to the Administration in terms of the Grant of Letters of Administration hitherto granted on the 11th March 2015.

5. The application was opposed by Richard Joshua Omari who averred that the procedure in which the grant was obtained was not defective in form and substance. He explained that the grant was obtained without any fraud or making of false representations on all material aspects relevant to the proceedings and the applicant participated in the said confirmation as the administrator. The issue of accounts had already been settled by Wakiaga J. and the same is *resjudicata* contrary to **section 7 of the Civil Procedure Act**.

6. The respondent avers that the applicant through an application dated 29th November 2018 moved the court to amend the said grant amounting to redistribution of the estate and thus the consent dated 31st July 2018 sought to be reviewed does not exist. He contends that the consent of 31st July 2018 on distribution of the deceased estate was a compromise by the beneficiaries.

7. According to the respondent, Omari Motor Spares is being operated by the applicant's son Erick Manyara Omari and the said business is a continuing trust for all the deceased's beneficiaries.

8. The respondent claims that the demand of a sum of Kshs 175,000/- by the applicant as upkeep is not tenable considering that records of accounts for the estate have not been prepared. In any event the respondent argues that the estate of the deceased has since been distributed and there is thus no legal provision for maintenance. The respondent explained that there is no free property of the estate that needs distribution.

SUBMISSIONS

9. The applicant submitted that the deceased was a shareholder in various banks and caused his name to be registered as Omari Daniel. The petitioner submitted that for purpose of accessing the shares therein it is necessary to amend the grant to incorporate the deceased's name as in the share certificate. The applicant cited the decision by this court in **Re-Estate of Njoroge Njuguna (Deceased) 2018 eKLR** where an application for amendment of name was allowed by virtue of the provisions of **section 74 of the Act of the Law of Succession Act** (*the Act*).

10. The petitioner advanced that the consent disinherited her as it failed to comply with the provisions of **section 40 of the Act** which considers that she is the surviving widow and should be a unit. The Applicant advanced that despite her advocate being in court on the day the consent was adopted she did not agree with terms of the consent. She advanced that although the consent was signed by 10 beneficiaries, the same was not signed by William Ongori, Okweba Samson and the applicant. She cited the cases of **Kim Jong Kyu v Housing Finance Company Limited & 2 Others [2015] eKLR** and **Re-Estate of Michael Warui Gicharu [deceased] [2019] eKLR** in support of her case.

11. She submitted that the proceeds from Omari Auto Spares have been wasted under the management of the respondent and has not been accounted for. She thus advanced that the respondent should be ordered to render account of the deceased's estate.

12. The respondent submitted that the application has not met the threshold set out in **section 76 of the Act** for revocation of grant. He also advanced that he is not engaged in the daily running of Omari Auto Spares.

ANALYSIS AND DETERMINATION

13. According to the consent dated 31st July 2018 the stock in trade in Omari Motor Spares were to be held by the respondent and Erick Manyara Omari in trust for the deceased's beneficiaries including the petitioner.

14. Administrators are required to render accounts at the end of administration. **Section 83 of the Act** state that personal representatives have the following duties:

“a).....

.....

g) *within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;*

h) *to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;*

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.”*

15. Without a doubt the administrators are mandated to render account following confirmation of grant. However, I agree with the respondent that on 11th March 2015 Wakiaga J had directed both administrators, to render account regarding the assets of the estate that are within their possession. Both administrators including the applicant have failed to comply with the order of this court. However, there are

two instances in which administrators are required to render accounts and this was discussed by this court in **re Estate of Julius Mimano(Deceased) [2019] eKLR** where Musyoka J observed that;

“.....section 83 of the Act has imposed a positive duty on personal representatives to specifically render accounts at two stages. The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether the spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. Indeed, these duties can only be discharged if there are assets sufficient to settle debts leaving a surplus for distribution. It would also be from the assets collected that the estate would have a pool of resources for administration expenses. Section 83(e) commands the personal representatives to produce in court a full and accurate inventory of the assets and liabilities, no doubt generated from the exercise of getting in the assets and ascertaining the debts of the estate. There is also an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account. The second occasion for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the Act. The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of distribution of the estate to the beneficiaries.”

16. The applicant contends that the grant ought to be revoked because the respondent has failed to comply with the provisions of **Section 76 (d) of the Act. Section 76 (d) of the Act** provides that a grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by interested party or its own motion:

(d) The person to whom the grant was made has failed, after due notice and without reasonable cause either:-

- i. To apply for confirmation of the grant within a year from the date thereof or such longer period as the court has ordered or allowed; or*
- ii. To proceed diligently with the administration of the estate; or*
- iii. To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced such investigation or account which is false in any material particular; or*

17. Interestingly the applicant as the co-administrator and has not produced any inventory or an account of administration as required under **section 83 of the Act**. The applicant as the co-administrator is also obligated to render accounts at the completion of administration and this duty does not solely fall on the respondent. I therefore find that the applicant cannot succeed on a prayer for accounts when she is jointly obligated to render the accounts with the co-administrator, respondent.

18. The second issue raised by the applicant revolves around the legality of the consent on the mode of distribution. The applicant contends that the consent was entered into without her instructions. According to the applicant, her advocate (which interestingly is still the same firm) acted contrary to her instructions by accepting to be bound by the consent order. A careful reading of the proceedings on the eventful day reveals as follows;

“31/7/2018

Before: Hon D.S Majanja (J)

C/A: Limo

Mr. Nyambati:- We have filed and served an amended schedule of distribution dated 31.07.2018 taking into account all the parties.

***Dennis Jamal Omai** passed away 3 weeks ago.*

Mr. Ochwangi:- My client and her children have no objection. The only issue concerns KISII MUNICIPALITY/BLOCK3/33. It is said that the...of the estate. Court should summon land registrar to produce the green card.

Mr. Nyambati: The property was transferred to Jeliamari. The property is not part of the estate.”

19. The court also note that parties who were present in court were Richard Joshua Omari, Eric Manyara Omari, Rose Moraa Omari, Kevin Kyana Omari, Jemiah Kwamboka Omari, Everline Omari, Linet Kenyaga Omari, George Kasongo Omari, Brenda Martha Omari, Wanaina Rehab Martha, Caroline Liss Kyana, Okweba and Okweba Samson. There was no objection raised by any of the beneficiaries who were in court.

20. Not only was the applicant’s advocate present when the consent order was adopted, the applicant raised no issue concerning the consent. In the case of **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625**, said in his judgment at page 626 -

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

21. In **Hirani v. Kassam (1952), 19EACA 131**, the Court cited the a passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124

as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

22. The applicant has neither demonstrated any presence of any of the elements discussed in **Hirani v. Kassam (supra)** case. There is therefore no sufficient ground to review/vary the consent of 31st July 2018.

23. Indeed subsequent to the recording of the consent, the applicant approached the court for amendment of the consent vide an application dated 29.11.2018 which application was allowed in her favour. That in effect means that the consent order of 31.7.2018 is no longer existent in its original form and therefore cannot be set aside as prayed.

24. By failing to raise the discontentment with the consent when filing the application dated 29.11.2018, the applicant demonstrates clearly that she had no problems with the content of the consent on distribution of the estate, as, had that been the case, nothing would have been easier than to raise the issue at that early stage. It is safe to infer that the current application is an afterthought.

25. As regards the issue of provision of Kshs. 175,000 for the applicant’s upkeep, it is common ground that the grant herein has been confirmed. The applicant was provided for to the extent shown in the certificate of confirmed grant. The stock in trade in Omari Motor Spares was distributed to Richard Joshua Omari and Eric Manyora Omari to hold in trust for all beneficiaries in equal shares.

The onus is on the administrators herein being the applicant and the respondent to account to the beneficiaries on the dealings with the estate in so far as this asset is concerned. It is legally untenable for the applicant, an administrator, to seek provision from the estate yet it is her duty to administer the estate to the satisfaction of all beneficiaries. That prayer must fail.

26. The only other remaining issue concerns amending the name of the deceased to read DANIEL OMARI ONGORI alias OMARI DANIEL. Rectification of grants is provided for in **section 74** of the **Act** as follows:

“74. Errors may be rectified by court

Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

27. The respondent has not challenged the amendment of the name of the deceased as per the share certificates that the deceased had at Barclays Bank Kenya Limited (ABSA) and National Bank of Kenya. This court is satisfied that the application to amend the name of the deceased to read DANIEL OMARI ONGORI alias OMARI DANIEL is envisaged under the provisions of the above **section 74** of the **Act**.

28. With the result that the application herein succeeds to the extent that the certificate of confirmation of grant is hereby amended to include the name of the deceased as DANIEL OMARI ONGORI alias OMARI DANIEL.

Further, in order to comply with the provision of **Section 83(g)** of the **Law of Succession Act**, the joint administrators are directed to complete the administration of the estate within the next 180 days hereof in respect of all matters other than continuing trusts and to produce to court a full and accurate account of the completed administration. All other prayers not expressly allowed stand dismissed. The parties to bear their own costs.

Dated, Signed and delivered at Kisii this 23rd day of September, 2021.

A. K. NDUNG’U

JUDGE