



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 609 OF 2008

IN THE MATTER OF THE ESTATE OF NASON MUSEMBI MUSOMBA

JOHN MUSYOKA MUSEMBI.....ADMINISTRATOR

VERSUS

DAVID MUEMA MUSEMBI

BENJAMIN MAKENZI MUSEMBI.....BENEFICIARIES/APPLICANTS

AND

PRISCILLA MUSYOKA MUSEMBI.....RESPONDENT

RULING

1. By a Chamber Summons dated 3rd October, 2019 and filed on 7th October, 2019, the Beneficiaries seek the following orders:-

1. THAT the administrator of the Estate of the late John Musyoka Musembi be substituted with David Muema Musembi and Benjamin Makenzi Musembi.

2. THAT costs be in the cause.

2. According to the Applicant, **David Muema Musembi**, he is a beneficiary of the estate of **Nason Musembi Musomba** whose dependants are **Benjamin Makenzie Musembi**, **Ekiud Makosi Musembi**, **Rodah Mwikali Katunga**, **Susan Nzisa**, **Grace Mukenyi Mutie** and **Rose Bernard Nzioka** who have all consented that **David Muema Musembi** and **Benjamin Makenzi Musembi** do take over as administrators of their late father's estate in place of the late **John Musyoka Musembi**. According to the deponent, it is in the interest of justice to grant the application to allow the transmission and further administration of the estate.

3. The Summons were however opposed by **Priscilla Musyoka Musembi** who stated that she is the widow of the late **John Musyoka Musembi** who died on 8th March, 2019. She deposed that during the pendency of these succession proceedings, **David Muema Musembi** and **Benjamin Makenzi Musembi** filed several applications seeking to be made administrators of the estate but the applications were dismissed for various reasons including; the inclination towards giving some properties of the deceased to third parties hence they are not the right people to be appointed as administrators.

4. According to the deponent, she is a beneficiary of the **Estate of Nason Musembi Musomba** estate and her late husband ought to be substituted with herself and **Eliud Makosi Musembi**. According to the deponent, vide a ruling dated 22nd October, 2018 this court allowed the administrator's Summons for Confirmation of Grant dated 27th May, 2017 where the Beneficiary had protested. She averred that since the death of her husband, the Applicants have purported to hold meetings with third parties to transfer the deceased's properties in particular parcel of land No. Machakos/Konza North Block 1/112 despite the aforesaid court ruling.

5. According to the deponent, '*the consent to substitute administrator*' is forgery hence she will seek to have the purported signatories examined on oath regarding their purported signatures. While appreciating that the appointment of administrators is the prerogative of this court, she asserted that the present Summons are a deliberate attempt by the applicants to leave her late husband out of the purported consent to substitute administrator.

6. She deposed that the Chamber Summons is incompetent, incapable of being granted and an abuse of the court process and urged the court

to dismiss it with costs.

7. In response, the Applicant swore a supplementary affidavit on 11th March, 2020. He deposed that **Priscilla Musyoka Musembi** is a daughter in law to their late father **Nason Musembi Musomba** hence cannot be made an administrator when there are 6 surviving children of the deceased who have superior right to administer the estate than her.

8. According to the deponent, they have never filed any applications in regard to their suitability or lack of it to be administrators of the estate of the deceased herein. According to the Applicant, the applications dated 3rd August, 2011 and 4th July, 2012 seeking revocation of the grant were struck out on technicalities prompting them to file the application dated 26th June, 2015 wherein the Judge revoked the confirmed Grant and ordered fresh distribution of the estate. According to the Applicant, they did seek the revocation of the Grant since the deceased administrator had in his Petition of Grant excluded all the other beneficiaries of the estate and declared himself as a sole beneficiary. He deposed that the deceased administrator intermeddled with the deceased estate by disposing off several properties.

9. The Applicant averred that the court in its ruling of 22nd October, 2018 found that the deceased administrator had omitted several properties of the estate and the alleged sales had not been demonstrated to be protected under Section 93(1) of the Law of Succession Act. According to the Applicant, it is untrue and undemonstrated that the parcel of land Machakos/Konza North Block 1/1125 is still a subject of ELC No.141/2011 and any settlement in this matter if any has to be done with the consent of all the beneficiaries.

10. According to the Applicants, they obtained consent from all beneficiaries to substitute the deceased administrator while **Priscilla Musyoka Musembi** refused to give her consent. According to the Applicants, it is only **Priscilla Musyoka Musembi** who has an issue with substitution of her deceased husband hence a probability that she doesn't want them to know the people who were illegally and irregularly sold the deceased properties. To the Applicants, Priscilla Musyoka Musembi is not a trustworthy person.

11. The Applicants urged the court to allow the Chamber Summons.

12. In a Further affidavit, **Priscilla Musyoka Musembi** sworn on 1st October, 2021, she deposed that her late husband **John Musyoka Musembi**'s interests both as an administrator and beneficiary of the estate should be secured hence a reason for her bringing these proceedings not in her personal capacity but in her capacity as an administrator ad litem to her husband estate.

13. She deposed that she had been advised by her advocate that the protestors have filed several applications seeking to be made administrators of the estate but the applications have been dismissed by this court upon being heard on merit and the orders therein have never been varied and/or set aside or appealed against successfully. According to the deponent, it was in the family meetings that her late husband was mandated to institute succession proceedings and be appointed as an administrator of the estate which meetings were attended by the Protestors hence any allegations by them are falsehoods meant to hoodwink the court. According to the deponent, during her late husband tenure as an administrator, he instituted proceedings in Machakos ELC Case No. 141 of 2011 with a view of protecting the interest of the estate for the benefit of all beneficiaries.

14. According to the deponent, it is after her late husband filed the ELC Case that the Protestors filed Summons for Revocation of Grant dated 3rd August, 2011 but this court struck out the Summons on 16th June, 2015. She deposed that her late husband is still a beneficiary of the estate of **Nason Musembi Musomba** and by virtue of her being an administrator of the estate, her consent was equally required by the Protestors when they purportedly sought consent from the other beneficiaries. She deposed that she has been treated with suspicion and scepticism for reasons unknown to her. According to the deponent, the consent is a sham hence their application seeking to be administrators is fatally flawed by intentionally leaving *bonafide* beneficiaries out.

15. She deposed that despite **Eliud Makosi Musembi** declining to be appointed with her as a co-administrator of the estate, the court has powers to appoint any other beneficiary to co-administrate with her.

Determination

16. I have considered the Chamber Summons, affidavits in support and in opposition and written submissions.

17. The only issue for consideration by this Court is the substitution of the Administrator of the Estate of **Nason Musembi Musomba**. From the affidavits filed, the Administrator, **John Musyoka Musembi**, died on 8th March, 2019. The Applicants herein are his brothers while the Respondent is his wife. In other words, the Respondent is a daughter in law to the deceased.

18. It is not in doubt that in terms of priority, the Applicants rank higher to the Respondent. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

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;

19. It is therefore clear that the ultimate power as to whom the grant of representation ought to be made rests with the Court. In arriving at that determination the Court is to be guided by the provisions of section 66 of the said Act. In other words, in the absence of any impediment,

the grant ought to be issued in accordance with the said provision. In this case however, the Applicants and the Respondent are suspicious of one another. While the Respondent is in the ordinary course of things not entitled to be appointed as an administrator of the estate of the deceased herein, her late husband was the administrator and it is her late husband that is sought to be substituted. Being the administrator of the estate of her deceased husband, she steps into his shoes and to that extent, may be appointed to in place of her deceased husband.

20. Therefore, in the circumstances of this case, I hereby substitute the late **John Musyoka Musembi** with **David Muema Musembi**, **Benjamin Makenzi Musembi** and **Priscilla Musyoka Musembi** as the joint act administrators of the estate of the late **Nason Musembi Musomba**.

21. They are cautioned that as administrators they are trustees of the said estate and must always act in the best interest of the estate. Should they fail to do so, this Court will remove all of them from the administration and appoint neutral persons to administer the said estate.

22. There will be no order as to the costs of the Summons.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

Miss Wanjiku for Mr B. N Nzei for the Applicant/Interested Party

Mr Kyobika for Mr Gichuki for the Applicant

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