



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 111 OF 2007

IN THE MATTER OF THE ESTATE OF MOHAMMED BILALI (DECEASED)

ASHA SWALEH.....1ST PETITIONER

SALIM KIPRONO LANGATA RUTO.....2ND PETITIONER

VERSUS

YUSUF MOHAMMED.....1ST RESPONDENT/OBJECTOR

IDI HAMISI.....2ND RESPONDENT/OBJECTOR

AND

LEONARD MUTUKU SESI.....INTERESTED PARTY

RULING

1. Before me for determination are three applications. Application dated 14.8.2018 is a summons indicated as being brought under Section 45, 7, 7b and 76 of the Law of Succession Act in which the counsel for the objectors herein seek that directions be given as the petitioners have no claim to the estate. They sought that the objectors be replaced with Hadija Ali and Zainabu Mzee Kanuna and that the name of the deceased be rectified to read Mohammed Bilali alias Mohammed Kanuna Ndolo alias Kanuna Ndolo.

2. The Application is premised on the grounds that the beneficiaries to the estate have consented, the petitioners have withdrawn their claim to the estate and the interested party's claims should be established. The application is supported by joint affidavit deposed by Hadija Ali and Zainabu Mzee Kanuna who averred that the 1st objector had been missing since 2006 and that the 2nd objector died in 2006 and that the name of the deceased be rectified to read Mohammed Bilali alias Mohammed Kanuna Ndolo alias Kanuna Ndolo for clarity purposes.

3. By replying affidavit deposed on 22.10.2018, the interested party opposed the application and averred that he is the registered owner of the property in dispute and that no proper documentation was annexed by the objectors to prove death. On the issue of missing objectors, the deponent cited Section 118A of the Evidence Act and averred that the application did not meet the threshold for substitution and that the applicants have not demonstrated their relationship to the deceased.

4. The objectors filed a summons dated 29.3.2019 indicated as being brought under Rule 35, 47 & 73 of the Probate and Administration Rules. In the said application the objectors seek that the objectors be substituted with Hadija Ali and Zainabu Mzee Kanuna in place of Yusuf Mohammed (missing) and Idi Hamisi (deceased). They sought that Hadija Ali and Zainabu Mzee Kanuna be substituted as administrators of the estate in place of Asha Swaleh and Salim Kiprono Langat Ruto and grant be issued to them. They sought that LR NO. Matungulu/Kyaume/1613 be included as part of the estate of the deceased and that the court order that there be no encroachment on the same. They also sought that the name of the estate be rectified to read Mohammed Bilali alias Mohammed Ndolo.

5. The application is supported by the affidavit of Hadija Ali who annexed a copy of records of death of Iddi Hamisi as well as an abstract indicating that Yusuf Kanuna Ndolo and Zuhura Mohammed Bilali were missing. Annexed was a search indicating that LR NO. Matungulu/Kyaume/1613 was registered in the names of Mohammed Ndolo.

6. In reply to the application was a replying affidavit deposed by the interested party wherein he averred that there is a similar application dated 14.8.2018 that is seeking similar orders. He averred that the relationship of the proposed petitioners to the deceased is not indicated and that the properties are being managed by the public trustee and thus there is no need for grant to be issued to the proposed petitioners.

7. There is a 3rd application dated 17.4.2019 vide summons under Section 47 and 73 of the Law of Succession Act and Order 45 of the Civil

Procedure Act wherein the interested party sought that the court review its orders made on 19.7.2017. The deponent averred that there is a Succession P& A 66 of 1998 at Machakos where a grant was issued hence there cannot exist two certificates of confirmation and thus they urged the court to allow the application dated 8.11.2016.

8. The application dated 17.4.2019 was opposed vide grounds of opposition dated 9.9.2019 wherein counsel for the objectors found that the application was an abuse of court process and that the interested party had no locus standi. There is no indication of any other reply by the objectors to the application.

9. In their submissions dated 22.8.2019, counsel for the interested party submitted that the orders that were obtained on 19.7.2017 were via misrepresentation and non –disclosure in that the initial petitioners had withdrawn their claim, that the objectors were both dead and missing since 2016, that the applicants swore affidavits as petitioners before being made parties.

10. Counsel for the objector submitted that they are well deserving of the orders and that the interested party’s application should be dismissed.

11. The record shows that Yusuf Mohammed and Idi Hamisi were the original protestors in this cause. It is averred by Hadija Ali and Zainabu Mzee Kanuna that the said Yusuf Mohammed and Idi Hamisi are dead and missing respectively before the protest could be determined.

12. The issues for determination are as follows;

a. Whether the Probate and Administration Rules grant the court any power to substitute a protestor.

b. Whether this court has jurisdiction to rectify the name of the deceased.

c. Whether the application for review has merit

d. What orders the court may make

13. In addressing the first issue, Order 24, Rules 3 and 4 of the Civil Procedure Rules provides the procedure to be followed in the substitution of a deceased Plaintiff or Defendant, and provide that the court can upon application cause a legal representative of the deceased Plaintiff or Defendant to be made a party to a suit, and that party shall proceed with the suit. In the case of **Re Estate of Omar Abdalla Taib (2017) eKLR** court observed that a succession matter is governed by the Law of Succession Act. Rule 63 of the Probate and Administration Rules provides:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”

14. The court observed that Order 24 is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by virtue of the above provision and that the Law of Succession Act has its very own provisions for substitution of a deceased party. Section 54 of the Act provides that a Court may limit a grant of representation ***which it has jurisdiction*** to make in any of the forms described in the Fifth Schedule Paragraph 14 of the Fifth Schedule provides:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

15. In light of the foregoing provision an applicant armed with a limited grant of representation for the estate of the deceased objector may represent the deceased in the suit herein. In addition, this Rule 40(6) of the Probate and Administration Rules allows any person wishing to object to the proposed confirmation of a grant to file an affidavit of protest against such confirmation stating the grounds of his objection. The Applicant can also in his own right and on behalf of other beneficiaries file an affidavit of protest without necessarily substituting the deceased Protestor. From the record, no one has been joined in place of the said protestors and there is no ad litem application or grant that has been placed before me and there is no basis that the applicants be substituted with the deceased objectors for purposes of pursuing this cause.

16. In addressing the 2nd issue, the procedure for seeking the relief is set out in Rule 43 (1), which echoes **Section 74** of the Law of Succession Act. Rule 34(1) says:-

“Where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made.....”

17. The import of the section is that rectification of grants is limited to three instances, to wit; **errors in names and descriptions of persons or things; errors as to time or place of death of the deceased; and in cases of a limited grant, the purpose for which such limited is made.**

18. In the matter of the **estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** the court stated;

The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules..... What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.....

19. The objectors have taken issue in this case with the name of the deceased. No explanation is given by the applicants in their application dated 14.8.2018 and 29.3.2019. In this case it cannot be said that there is an error or omission and in the absence of such proof, the prayer fails.

20. In matters of Succession review under Order 45 in the Civil Procedure Rules is provided for under Rule 63 of the Probate and Administration Rules. Order 45 Rule 1 provides that:-

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

21. In all review cases, the Applicant should prove discovery of new matters or evidence which the Applicant alleges was not within his or her knowledge or could not be adduced by him or her when the decree or order was passed or made. During an application for review as per Rule 63 of the probate and administration rules, it ought to be established that fresh evidence has been discovered which would have had material effect on the judgment or decision; that the evidence has been discovered since the judgment or decision; that such evidence could not with due diligence have been discovered before and that such evidence does not comprise events that have occurred for the first time after delivery of judgment.

22. It was the strong argument of the interested party that after the ruling dated 19.7.2018 it was the initial petitioners had withdrawn their claim, that the objectors were both dead and missing since 2016 and this information was not available to the court. The impugned ruling dismissed an application to strike out the instant succession cause for being res judicata and to lift and suspend the orders vesting the estate of the deceased in the Public Trustee. In effect the interested party in the application dated 17.4.2019 seeks that the instant matter be dismissed and that the orders vesting the estate of the deceased in the Public Trustee be reversed vide a review.

23. In Ex parte Side Botham in re Side Botham (1880) 14 Ch. D 458 at 465 James L.J held that:

“the words “person aggrieved” do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title.”

24. In light of the finding in the above authorities, I find that the interested party has not demonstrated what grievance he has suffered as a result of the decision for the reasoning in the ruling dated 19.7.2018 as the same will still remain regardless of the death of the objectors. Res judicata is a matter of law that is dependent on a decision that has been finalized and placing of the estate in the hands of the public trustee for administration was to protect the estate of the deceased. Without the interested party providing proof by way of evidence in court that he suffered a legal grievance the court finds that the application dated 17.4.2019 lacks merit and the same is dismissed. Further in view of the fact that some of the parties herein cannot be traced and that the names of the deceased have not been fully established it is safe and proper to have the estate vested in the Public Trustee for preservation as all the claims are addressed.

25. Despite my finding aforesaid on the applications it is my considered view that the parties herein should be given an opportunity to present their rival claims via viva voce evidence so as to enable the court to establish the genuine persons to administer the estate and also to establish whether there are any creditors to the estate. It is noted from the record that at the beginning this matter had started by way of viva voce evidence and the evidence of only one witness was taken. Since then no further evidence has been received. There has been a flurry of applications brought about by parties herein who seem to have vested and diverse interests over the estate of the deceased. What emerges from these applications is that there is no clarity as to who are the legitimate administrators of the estate. Both the objectors and interested party are staking claims. There are accusation and counter accusation as to the right person to administer the estate. In the midst of this state of affairs the Public Trustee has been managing the estate. It is appropriate to have the administration vested in the said Public Trustee as the court determines these rival issues. Even though the parties herein had proceeded by way of written submissions I find that the surest way of determining the rival issues herein is through oral evidence. This court must establish the genuine administrators and thus is prepared to entertain the parties herein again via oral evidence. It is not in doubt that this court has the inherent powers to resort to in order to ensure that justice is served to the parties. In this regard and pursuant to the provisions of Rule 73 of the Probate and Administration Rules I direct that the parties herein file and exchange witness statements as well as list of documents within 45 days from the date hereof and prepare to tender viva voce evidence regarding their rival claims as that is the best way out of this matter. In the meantime the Public Trustee shall continue to administer the estate pending further directions by this court. Each party to meet their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **23rd** day of **January, 2020**.

D. K. Kemei

Judge