

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 450 OF 2009

IN THE MATTER OF THE ESTATE OF ZAKARIA INDOGO SHIVOGO (DECEASED)

RULING

1. I am called upon to determine an application dated 22nd November 2019. It is brought by Frida Ingaiza Indogo, a surviving spouse of the deceased. I shall refer to her as the applicant. The ground upon which the application is brought is principal that members of the family of the deceased had agreed on the applicant as the administratrix. The current administrator is the Public Trustee, who is accused of failing to complete administration of the estate, hence the need to have him substituted. There is a prayer for amendment of the certificate of confirmation of grant to include shares in a limited liability company that had not been disclosed at confirmation. It is argued that the shares were discovered after confirmation of the grant.

2. There is a response to the application by an officer from the Public Trustee. He states that since the confirmation of the grant, the applicant had failed to avail the Public Trustee with the documents that would have enabled the Public Trustee to cause transmission of the assets in terms of the certificate of confirmation of grant. He avers that the failure to avail documents of the Public Trustee made it difficult to effect transmission, and blames the applicant of not visiting the offices of the Public Trustee so that he could do the needful. He also blames the applicant of failing to avail documents to the Public Trustee relating to the shares.

3. The application was argued orally by the advocates for both sides on 20th January 2020, both of who breathed life to the averments made in the respective filings of the parties.

4. The application seeks two principal prayers, for substitution of the Public Trustee as an administrator and rectification of the certificate of confirmation of grant.

5. The Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules do not provide for removal of administrators through substitution, unless the same is done by consent. The only route for removal is through a summons for revocation of grant, mounted on section 76 of the Law of Succession Act, premised on the grounds listed in that provision. The power to remove an administrator is granted by that provision and no other. I can only exercise discretion under that provision, on an application that is grounded on the grounds stated in section 76. The instant application is not grounded on section 76, and there was no attempt to bring out facts that would have brought it within the specified grounds.

6. I note that the application is purported to be brought under section 71 of the Law of Succession Act. Section 71 provides for confirmation of grant. There is nothing in section 71, which provides substitution of administrators unless the court is faced with a confirmation application. There is no confirmation application before me, and, therefore, there is no foundation for me to exercise the discretion given by section 71(2) (b) (c) of the Law of Succession Act. The powers stated in section 71 are exercisable only where the court has before it a confirmation application. I do not have any before me.

7. The reason given by the applicant to seek the so-called substitution is that the Public Trustee has failed to complete administration. The Public Trustee has responded to the application, and explained that it was the applicant who has failed to work together with the Public Trustee. She failed to visit the offices of the Public Trustee so that they could work on the necessary documentation. She is also accused of failing to furnish the Public Trustee with the documents necessary to carry out transmission of the assets. The applicant did not respond to these pointed explanations. They are uncontroverted, and she appears to be the villain. The Public Trustee cannot be expected to have the property transmitted if the person holding the documents required for the relevant process fails to cooperate. She is no doubt approbating and reprobating. She is to blame for the fiasco. She cannot possibly turn the blame on the Public Trustee, when she has failed to facilitate the Public Trustee, along the lines explained in the replying affidavit. Surely, the court should not be expected to revoke the Public Trustee's grant on account of the failings of the applicant.

8. On what she describes as amendment of the certificate of confirmation of grant, the position is that it is not as simple about amendment of the certificate of grant. The certificate is generated from confirmation orders. The actual position is, therefore, that what is sought is actually a supplementary confirmation of the grant to allow for distribution of the shares that had been omitted. Confirmation of grants is sought by the administrators. That comes very clearly out of section 71 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules. The applicant is not the administrator. She does not hold a grant. She has no standing, therefore, to ask the court to confirm the grant with respect to distribution of the shares. That is the mandate of the holder of the grant, the Public Trustee.

9. The application is clearly not well founded or conceived. It is for dismissal and I hereby dismiss the same. Let the applicant work together with the Public Trustee, rather than against the Public Trustee, by furnishing that office with the documents that it requires to discharge its duties to her. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE