



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2517 OF 1996

IN THE MATTER OF THE ESTATE OF JACOB MAKHULO FWAYA (DECEASED)

VICTORIA AKUMU FWAYA 1ST APPLICANT

MMF 2ND APPLICANT

V E R S U S

JAMES FWAYA RESPONDENT

AND

HENRY OKUMU FWAYA 1ST INTERESTED PARTY

ERIC OMONDI FWAYA 2ND INTERESTED PARTY

ROBERT OTIENO FWAYA 3RD INTERESTED PARTY

RULING

1. The Deceased herein died intestate on 1st January 1995. He was predeceased by his wife who passed away on 25th April 1989. Among the survivors to the deceased as listed in form P & A 5 are Francis Fwaya Obare (father) and MMF a minor (daughter) then aged 12 years. The only assets listed as comprising the estate is L.R. 37/266/27House No. 66 South C.
2. Subsequently, Francis Fwaya Obare (father) to the deceased and James Fwaya (brother to deceased) petitioned for a grant of representation. On 29th January, 1997 a grant was issued to the two petitioners jointly. Vide a Chamber Summons dated 5th March 1997, John Makhulo Fwaya, Margaret Aloo Fwaya and Victoria Akumu Fwaya moved the court seeking revocation of the grant. They sought a fresh grant to issue to Francis Fwaya Obare, John Makhulo Fwaya and Victoria Akumu Fwaya.
3. The reasons averred for revocation were that the previous grant was obtained through concealment of material information; Francis Fwaya was aged and a drunkard hence susceptible to manipulation by James Fwaya his co-administrator who was mismanaging the estate by collecting rent from one of the properties of the estate and failed to account for it. Upon hearing the application exparte, the court directed that rent collected from L.R. No. 37/266/27 House No. 46 Kabiyet Road be deposited in a joint account to be opened by Lumumba and Ojwang Advocates and Ramogo and Co. Advocates.
4. In response to the application dated 5th March, 1997 James filed a replying affidavit sworn on 29th September 1999 denying any acts of misappropriation of monies collected as rent from the house in question. He contended that the property was co-owned by the deceased and their father on equal shares. He further claimed that he was the one staying with Melinda the only child to the deceased whom he was taking care of since childhood.
5. Consequently, the grant issued on 29th January 1996 was revoked and afresh grant amended on 5th May 2000 was issued jointly to James Fwaya, Victoria Akumu Fwaya and Henry Okumu Fwaya replacing Francis Obare who had died. Since then no step has been taken to confirm the grant.
6. By Summons dated 9th June 2020, Victoria Akumu Fwaya (hereinafter the 1st applicant/co-administrator) and MMF (hereinafter the second applicant) a daughter and the only child to the deceased moved this court seeking orders that;

(a) This application be certified urgent.

(b) The Honourable Court be pleased to issue a temporary injunction restraining the Respondent whether by himself, his agents, assigns, servants or employees, or howsoever otherwise, from trespassing onto or entering, occupying, developing, leasing and/or selling all that property situate in Busia County and measuring approximately 21 acres, constituting part of the deceased's Estate; and from dealing in the said property in any manner howsoever that would affect its nature or topography thereby prejudicing the Estate of the deceased, pending hearing and determination of this application or the distribution of the estate.

(c) The Honourable Court be pleased to issue an order of mandatory injunction compelling the Respondent to immediately give account of all income received and to provide details of all agreements/contracts and bank statements in respect of all incomes received in respect of the usage, exploitation and excavation of all that property situate in Busia and measuring approximately 21 acres, constituting part of the deceased's Estate, pending hearing and determination of this application or the distribution of the estate.

(d) The Honourable Court be pleased to issue a permanent injunction restraining the Respondent whether by himself, his agents, assigns, servants or employees, or howsoever otherwise, from trespassing onto or entering, occupying, developing, leasing and/or selling all that property situate in Busia and measuring approximately 21 acres, constituting part of the deceased's Estate; and from dealing in the said property in any manner howsoever that would affect its nature or topography thereby prejudicing the Estate of the deceased.

(e) The Honourable Court be pleased to issue an order substituting HENRY OKUMU FWAYA, being an Administrator of the Estate of the deceased, with MMF, the 2nd Applicant herein, being the sole beneficiary of the estate of the deceased.

(f) The Honourable Court be pleased to order MMF, the 2nd Applicant herein, to take over possession of all that property known as House Number 46, located along Kabiyet Road in South C, Nairobi, and situate on L.R. No. 37/266/27 – forming part of the estate of the deceased, from the current tenant upon giving sufficient notice; and accordingly, to remit Kenya Shillings Twenty Thousand (Kshs. 20,000.00) being half rental income earned from the said property and for the benefit of Estate of Francis Fwaya Obare (Deceased), into the estate's Bank Account held at Kenya Commercial Bank (KCB), and of Bank Account No. 110xxxxxxx.

(g) The Honourable Court be pleased to order the Respondent to provide a full and frank account of all rental incomes received in respect of all that property known as House Number 46, located along Kabiyet Road in South C, Nairobi County, and situate on L.R. No. 37/266/27 that forms part of the Estate of the deceased for the period between January, 2019 and January, 2020.

(h) The Respondent be ordered to disclose and provide full details and ownership documentation including title deeds of all those known properties and assets constituting the Estate of Jacob Makhulo Fwaya (Deceased); inter alia:-

(i) A 21 acre piece of land in Busia;

(ii) Half of all that property known as House Number 46, located along Kabiyet Road in South C, Nairobi (L.R. No. 37/266/27_ - where the other half forms part of the Estate of Francis Fwaya Obare (Deceased);

(iii) 260 Kenya Commercial Bank (KCB) shares held under Share Certificate Number xxxxx and in Shares Account Number xxxx;

(iv) 16,440 Barclays Bank of Kenya Ltd Shares held under Shares Account Number xxxxx; and all or any other property of the Deceased yet to be ascertained.

(i) The Honourable Court be pleased to issue appropriate orders under Section 45 of the Law of Succession Act against the Respondent herein.

(j) Costs.

7. The application is premised upon grounds set out on the face of it and an affidavit in support sworn on 9th June 2020 by Victoria Akumu Fwaya on her behalf and that of MMF. Despite service of the said application upon the said James Fwaya named as the respondent and the interested parties herein, none of them filed a response. Consequently, the application was heard *ex parte* on 23rd June 2020. M/s Marienga appearing for the applicant simply adopted the averments contained in the affidavit in support of the application.

8. According to the applicants, the respondent herein one James Fwaya has engaged in wanton destruction and misuse of the estate by misappropriating rent receipts from the house belonging to the estate, and also carrying out quarrying activities on the deceased's property situate within Busia measuring 21 acres. That the said excavation has completely destroyed topography of the land thus affecting its value before distribution. That the respondent has not accounted for the amount collected as rent from the said house since January 2019 up to January 2020.

9. They contended that the conduct of the respondent is an act of intermeddling with the estate of the deceased. Further, the second respondent sought to be included as co-administrator now that she is a grown up.

10. I have considered the application herein and averment contained in the affidavit in support.

11. From the onset, I wish to express my disappointment at the conduct of the administrators of the estate herein. This is an old file whose proceedings commenced 1996. Since the grant was first issued in 1996 over twenty years down the line, none of the administrators has ever moved the court for confirmation of the grant.

12. The applicants are seeking to include the 2nd applicant the only child to the deceased who is now an adult as one of the administrators. This prayer is not opposed and none of the respondents ever filed a response. Being an adult and the only child and therefore a direct beneficiary to the estate, she has the right to administer the estate of her father pursuant to section 66 of the Law of Succession Act whereby she ranks first in priority to the uncles and Aunts who are the administrators.

13. Given the conduct of the administrators and in particular the respondent herein James Fwaya in delaying completion of the administration of the estate, it is prudent that the only child to the deceased be brought on board being the only direct beneficiary. Accordingly, it is my holding that the amended grant issued on 5th May 2000 be further amended and a fresh one to issue with the second applicant as the 4th administrator of the estate.

14. Regarding the orders directing that an injunction do issue preserving the estate of the deceased person situate in Busia, the said property has never been included in the list of assets comprising the estate of the deceased. The applicants do not even know the registration number of that property. The court cannot issue an injunction against unknown property.

15. Therefore, it is the duty of the applicants to research from the lands office or through any other source to find out the actual registration of the Busia property, who the owner is and then seek by way of application to include it in the list of assets if it is registered or proved to be the deceased's property.

16. As regards the allegation of intermeddling with the estate by the respondent, the applicant claimed that the respondent one James Fwaya has been excavating or conducting grazing activities on Busia property and also collecting rent from the rental house but failed to account for it. In particular, they sought the respondent to account for rent collected since January 2019-January 2020.

17. Intermeddling with an estate refers to unauthorized handling of the property making up the estate of a deceased person without authority. Section 45(1) of the Law of Succession provides that;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

18. Indeed, intermeddling is a criminal offence which is punishable by a fine of Kshs. 10,000/- or imprisonment for a period not exceeding one year. In the case of Gitau and two others v. Wadai and Five others (1989)KLR 231 the court had this to say:-

“Any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”

19. Unless authorized by the court, an administrator is not supposed to spend any income generated or realized from the estate. Being a holder of a grant of letters of administration does not confer upon the administrator any right to dispose or spend monies or any benefits realized out of the administration of the estate.

20. The object of a grant of letters of administration is to enable the administrator collect and preserve the estate. Any expenditure for any purpose including the cost of administration of the estate must be authorized by the court. It is therefore illegal for the respondent to collect rent and fail to account for the same. Since there is no objection that the respondent has been collecting rent from January 2019 to January 2020, I will direct that he files a statement of accounts indicating how much rent was collected during that period, how he spent the same and the balance if any.

21. Regarding the prayer that the property be distributed to the 2nd applicant as the sole beneficiary, due process must be followed. An application for confirmation of a grant must be filed and thereafter confirmation if not opposed. Accordingly, the administrators are directed to file an application for confirmation of a grant forthwith to enable the court distribute the estate.

22. Having held as above, I am satisfied that the applicants have proved their case to the required degree and therefore allow the same with orders that;

(a) The amended grant issued on 5th March 2000 be and is hereby further amended and rectified to include MMF as the 4th administrator in addition to the current administrators.

(b) That the Administrators shall immediately without delay file an application for confirmation of grant upon seeking consent from all those entitled to a share.

(c) That in the event any of the administrators is reluctant to file the application for confirmation of the grant, the remaining administrators shall move the court and file the said application;

(d) That the applicants shall be at liberty to file an application seeking to include Busia property upon attaching relevant ownership documents as one of the assets of the estate;

(e) That the respondent one James Fwaya is hereby directed to file a statement of accounts relating to rental income due to the estate for the period January 2019 up to January 2020 within 45 days from the date of this Ruling;

(f) That this being a family dispute, each party shall bear own costs.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JULY 2020.

.....

J. N. ONYIEGO

JUDGE