



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC. SUCCESSION CAUSE NO. 1 OF 2020

IN THE MATTER OF THE ESTATE OF JOHN MULWA NZIOKI –DECEASED

BETWEEN

BERNARD MUTINDA MULWA.....1ST PETITIONER/APPLICANT

JACKSON MUISYO MULWA.....2ND PETITIONER/APPLICANT

VERSUS

MICHAEL WAMBUA MULWA.....1ST RESPONDENT

ANDERSON MUIINDE MULWA.....2ND RESPONDENT

RULING

1. By Summons brought, *inter alia*, under section 47 of the *Law of Succession Act* the Applicants herein, **Bernard Mutinda Mulwa** and **Jackson Muisyo Mulwa**, seek the following orders:

a) That the application be certified urgent.

b) That the court do issue an order that the petition as presented herein be accepted for filing at the registry even without MICHAEL WAMBUA MULWA and ANDERSON MUIINDE MULWA having executed the consent to making of grant.

c) That the court do issue an order that the two beneficiaries namely MICHAEL WAMBUA MULWA and ANDERSON MUIINDE MULWA who have declined to sign the consent to the issuance of grant be served with the filed petition so that they can file their objections if any.

d) That in the alternative the court do issue summons the said MICHAEL WAMBUA MULWA and ANDERSON MUIINDE MULWA to attend court and explain why they have declined to sign the consent to issuance of grant and whether they are willing to execute the same or not

e) That, cost of this application be borne by the in cause.

2. According to the Applicants, the deceased the subject of these proceedings the deceased herein is their father who died on 4th April, 2020 leaving behind the following beneficiaries as per the letter from chief:

TABITHA KALEKYE MULWA-1ST WIFE (DECEASED)

1. PETER NZIOKI MULWA.....SON (DECEASED)

2. BERNARD MUTINDA MULWA.....SON

3. JANE MUENI MULWA.....DAUGHTER

4. MICHAEL WAMBUA MULWA.....SON

5. BENSON MUTUKU MULWA.....SON
6. ANDERSON MUINDE MULWA.....SON
7. NICHOLAS MUTHAMA MULWA.....SON
8. MONICAH NHTENYA MULWA.....DAUGHTER

BETH MBULA MULWA-2ND WIFE (DECEASED)

9. GRACE MBESA NDAMBUKI.....DAUGHTER
10. JOSEPHINE KAMENE MULWA...DAUGHTER (DECEASED)
11. JULIUS MUTISYA MULWA.....SON
12. JACKSON MUISYO MULWA.....SON
13. DANIEL NGUYO MULWA.....SON (DECEASED)
14. JOHNSON MBENZA MULWA.....SON
15. PAMELA KALONDU MUANGE MBITHI.....DAUGHTER

3. It was averred that all the other beneficiaries have executed the consent to the issuance of grant except the two named beneficiaries who are the respondents to this application. The said Respondents, it was disclosed had active cases against the deceased in person during his lifetime one being **Machakos ELC 73 of 2018-Michael Wambua Mulwa and Anderson Muinde Mulwa-versus- John Mulwa Nzyoki & 4 Others** which is still pending. Even after the deceased died and was buried, the two said beneficiaries filed **MKS CMCC 137/2020-Michael Wambua Mulwa and Anderson Muinde Mulwa - versus - Jackson Muisyo & Another** seeking exhumation of the deceased's body for unknown reasons which was dismissed an action which is causing untold mental and psychological strain on other beneficiaries.

4. It was deposed that the deceased left behind several properties which include the following:

1. MAVOKO TOWN BLOCK 3/79984
2. MAVOKO TOWN BLOCK 3/79985
3. MAVOKO TOWN BLOCK 3/79987
4. MAVOKO TOWN BLOCK 3/79988
5. MAVOKO TOWN BLOCK 3/79989
6. MAVOKO TOWN BLOCK 3/79990
7. MAVOKO TOWN BLOCK 3/79991
8. MAVOKO TOWN BLOCK 3/79992
9. MAVOKO TOWN BLOCK 3/79993
10. MAVOKO TOWN BLOCK 3/79994
11. MAVOKO TOWN BLOCK 3/79995
12. MAVOKO TOWN BLOCK 3/79996
13. MAVOKO TOWN BLOCK 3/79999
14. MAVOKO TOWN BLOCK 3/80020
15. MAVOKO TOWN BLOCK 3/80021
16. MAVOKO TOWN BLOCK 3/80022

17. MAVOKO TOWN BLOCK 3/80023
18. MAVOKO TOWN BLOCK 3/80024
19. MAVOKO TOWN BLOCK 3/80025
20. MAVOKO TOWN BLOCK 3/80026
21. MAVOKO TOWN BLOCK 3/80027
22. MAVOKO TOWN BLOCK 3/80028
23. MAVOKO TOWN BLOCK 3/80029
24. MAVOKO TOWN BLOCK 3/332
25. MACHAKOS/KIANDANI/5458
26. MACHAKOS/KIANDANI/5459
27. MACHAKOS/KIANDANI/5460
28. MACHAKOS/KIANDANI/5461
29. MACHAKOS/KIANDANI/5462
30. MACHAKOS/MUA HILLS/450
31. MACHAKOS/MUA HILLS/451
32. MUVUTI/KITUNDINI/1126
33. ½ SHARE OF MACHAKOS/MUNICIPALITY BLOCK II/277
34. MACHAKOS TOWN/BLOCK II/242(OLD. LR. NO. 909/664)
35. MACHAKOS TOWN/BLOCK II/341
36. MONEY IN ACCOUNT NUMBER 07100303725400- STANDARD CHARTERED BANK OF KENYA LTD
37. MONEY IN ACCOUNT NUMBER 01109071108800- CO-OPERATIVE BANK OF KENYA LTD
38. COMMERCIAL PLOT 50 FT BY 100 FT AT MUTHWANI WITHIN LUKENYA RANCHING AND FARMING COOPERATIVE SOCIETY LTD.
39. ORNINARY SHARES AT STANDARD CHATTERED BANK KEMYA LTD
40. SHARES AT CO-OPERSTIVE BANK OF KENYA LTD
41. MOTOR VEHICLE REGISTRATION KBN 406 S
42. L.R Number 12715/11253
43. Shares at National Bank of Kenya member No. 0077294
44. Shares at Kenya Commercial Bank A/c Number 0097326
45. Kenya Airways share A/c Number ****70813*

5. According to the Applicants, the petition for letters of administration was presented to the registry for filing but the same was declined by the registry officials because the consent to making of grant was not executed by two beneficiaries namely **Michael Wambua Mulwa** and **Anderson Muinde Mulwa** insisting that they must sign the same. The Applicants lamented that the insistence by the registry officials that the petitioners must present a consent signed by the two beneficiaries even after explanation of the existing circumstances defeats justice because they cannot sign due to their bad blood between the deceased and themselves as already highlighted. Apart from the foregoing, the Respondents have also failed to attend family meetings so that they can present their views and their actions border sabotage of the estate.

6. It was further disclosed that there are also tenants occupying parts of the estate and they are not sure where to pay the rent because they used to pay it directly to the deceased, an uncertainty that exposes the estate to loss and default by some of the tenants who may take advantage of the death of the deceased and absence of any administrator.
7. The Applicants averred that it is in the interest of justice and for purposes of protecting the interests of the estate, to grant the orders sought.
8. In the submissions filed on behalf of the Applicants, it was contended that this court has wide jurisdiction under section 47 of the **Law of Succession Act** and Rule 73 of the **Probate and Administration Rules** to make orders to meet the ends of justice and therefore has jurisdiction to grant the orders sought. In the Applicants' view, the registry official's insistence that the respondents must sign the consent even upon being given an explanation that the respondents are sworn enemies of their deceased father and they had sued him during his life time and the cases are still pending occasioned a miscarriage of justice. It was noted that since respondents in their reply have not stated if they are willing to execute the consents, it can only be taken that they are not ready.
9. It was submitted that the law does not make it mandatory for a beneficiary who is unwilling to cooperate to be forced to sign documents since it does not make it compulsory for such beneficiaries to give consents. The law on the other hand allows parties to file objections if they oppose any bit of administration filed by another party. It was therefore the Applicants' case that by declining the filing of documents in this instance where the applicants and the respondents are all children of the deceased and rank equally in terms of petitioning amounts to wishing away the objection procedure as provided under sections 51 and 68 of the **Law of Succession Act**.
10. Based on the above it was submitted that the declining of the filing of the petition at the registry was thus improper, not informed by any law and amounted to miscarriage of justice as regards the estate of the deceased. No reasons were given for insistence of the requirement for the two opposing beneficiaries to sign the consent. It was contended that the registry official having been explained the circumstances obtaining in this intended succession cause and still rejecting the filing, her action are bereft of reasons or merit, and therefore, in contravention of Articles 48, 50(1) and 163(7) of the Constitution which speak to the right to access to justice and fair trial. This court has power to supervise such actions. In support of their submissions the Applicants relied on the case of **Okiya Omtatah Okoiti & Another vs. Attorney General & Another [2019] eKLR**.
11. It was submitted that the fact that a person views an intended motion or suit as unmerited is not a ground for rejecting them from being filed and placed before the court for hearing. Whether it will be granted or rejected by the court after hearing is another thing all together. The said submission was based on the case of **Truckers Association of Kenya-versus-County Government of Machakos [2020] eKLR**.
12. According to the Applicants, they rank equally with the respondents and they can both petition for grant as sought by the applicants. The respondents can file objections if they feel dissatisfied with any issue concerning the sought administration but not to totally oppose it.
13. As regards the issue whether the applicants should have filed a citation as alleged by respondents, it was submitted that the applicants in their petition have disclosed all the beneficiaries of the estate and there is no allegation any beneficiary or property has been left out. Having disclosed all the beneficiaries of the estate, that was enough and there was no need to take out citation proceedings. Secondly, the applicants and the respondents rank equally and have equal rights to petition for letters of administration. In support of their submissions the Applicants relied on this court's decision in the case of **Re Estate of Philip Nthenge Mukonyo (Deceased) [2018] eKLR**.
14. The Court was urged to find that there was no need to take out citation proceedings.
15. On the issue of notice to the respondents as required in Part VI Rule 26(1) of the **Probate and Administration Rules** the applicants reiterated that the respondents were invited to family meetings but they neither attended nor signed the consents yet all other beneficiaries have executed the consent and the applicants come from each house and thus both houses are represented. It was urged that in view of the acrimonious position and stand taken by the respondents towards the deceased, they are not expected to tell the truth and the court should treat their words with caution. They are thus creating confusion and trouble as a continuation of their disputes with the deceased.
16. It was further submitted that the respondents have interests which are adverse to the estate of the deceased since they had sued the deceased claiming interest in some properties registered in the name of the deceased. Since the suit shall proceed to conclusion, administrators need to be appointed to defend the interests of the deceased since the respondents cannot be plaintiffs as against the estate and also be administrators of the estate as that would occasion obvious injustice due to the conflict of interest. This clearly explains why they have no interest in having the estate succeeded.
17. It was submitted that from the application and the draft petition, it is evident the estate is vast and it is exposed to risks of wastage if no administrator is appointed to run and manage its affairs. For the respondents to insist on having the succession drag and the estate remain without an administrator is not only malicious but also serves their unknown interests. They can pursue their cases as against the deceased (now his estate) but they should not prejudice the interests of all other beneficiaries who want the estate protected even for the benefit of the respondents.
18. The Court was urged to find merit in the application, allow the same and grant the applicants the go ahead to file the petition. The respondents can still pursue their rights thereafter.
19. In response to the application, the Respondents averred that the deceased died on 4th April, 2020 and there was a dispute as to his place of burial which was litigated in Machakos CMCC No. 137 of 2020 in which judgement was delivered on 11th June, 2020. Dissatisfied with the decision therein, the Respondents instructed their advocates to appeal against the said decision. However, before the said case was concluded, these proceedings were commenced.
20. According to the Respondents, the deceased was a polygamous man married to **Tabitha Kalekye** and **Beth Mbula Mulwa** as 1st and 2nd

wives respectively and left behind several children from each house and that the applicants are imposters. The denied that they had refused to attend family meetings stating that they have never been notified of such meeting. They further averred that no consent for petitioning of the grant was taken to them for signing and that the purported filing of the petition was premature as there was no consensus of all the family members towards the same. They accused the applicants of bulldozing their will against all the family members with the intention of misusing, mismanaging and squandering the properties of the estate. According to them, had they declined to sign the consents, the applicants ought to have cited them rather than file this application.

21. The Respondents' position was supported by **Monicah Nthenya Mulwa** and **Benson Mutuku Mulwa** a daughter and son of the deceased who denied having appended their signatures I support of the applicants' case.

22. In the submissions the Respondents reiterated the foregoing and stated that since the deceased was a polygamous man, it is only fair that parties be given time for each family to meet and propose two names of their family members which should petition for the grant and in default, the applicants and the respondents should jointly petition for the same.

Determination

23. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

24. 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;

25. It is therefore clear that the Court retains the discretion in every case to determine the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. In exercising that discretion the Court is to be guided by the aforesaid order of preference but it is not necessarily bound to follow the same if the circumstances dictate otherwise.

26. Under Part V of the Act, the children of a deceased person rank equally. In this case the Applicants and the Respondents are brothers. Accordingly, there is no superior right to a grant as between the two. It follows that Part VI Rule 26(1) of the **Probate and Administration Rules** becomes relevant and it provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

27. Therefore, what the law requires is that a notification be given to every person entitled in the same degree as or in priority to the applicant. The law does not necessarily require that before a Grant is sought, there must be a consensus between the beneficiaries as to who should petition for the same. While that approach is laudable, the Court cannot bar a person who is entitled to petition for grant from doing so on the basis of lack of a consensus. Once the Petition is made, all those who have legal interests in the estate are at liberty to put forward their positions for the determination by the Court since the mere fact that a petition is filed does not automatically mean that the petitioners will be he administrators.

28. The Respondents have however contended that the Applicants ought to have taken out citation proceedings. Rule 22(1) of the **Probate and Administration Rules** (hereinafter referred to as "the Rules") however provides that:

A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

29. A citation, it was held in **the Estate of Sheikh Fazal Ilahi [1957] EA 697** in which the Court relied on ***Henderson on Testamentary Succession (4th Edn)***, is an instrument issued by the court, citing persons to come in and show cause why a grant should not issue to a particular person. It was therefore held in **Maamun Bin Rashid Bin Salim El-Ruhmy vs. Haider Mohamed Bin Rashid El-Basamy [1963] EA 438** that:

“Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who is interested in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the *citor*. It follows that, save in cases where the court thinks it necessary to do so; non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it... If on the other hand the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt (after he has been served with citation) is to enter appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters

appearance but takes no further step, the *citor* may apply on summons for an order that the person cited to take the grant within a stated time and in the event of the latter neglecting to do so, the grant will be ordered to be made to the *citor*...**The only issue before the court in a cause brought as a result of a caveat being entered is whether or not the person who has applied for the grant is entitled to it and there is no issue as to whether he or some other person has a better right to the grant.**" [Emphasis supplied].

30. It was therefore held by **Kneller, J** (as he then was) in **Kiboko vs. Assistant Land Registrar and Others [1973] EA 290** that:

“Citations need not be ordered to issue to all persons shown as heirs in the petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason.”

31. It is therefore clear that unless the Court thinks otherwise, the Citor must be a person who is himself entitled to a grant, in the event that a person with a superior right fails to take up the grant or for any other special reason. Where two or more persons have equal rights to grant of representation, there is no necessity for a citation to be made unless when for some special reason the court sees fit to make such an order. In those circumstances, one of them is at liberty to apply for grant and the Court may in its discretion join the other persons if it deems fit. Accordingly, there was no need to issue a Citation.

32. In this case, the Applicants have set out facts which have not been denied by the Respondents that the Respondents' interests both before and even after his death ran contrary to those of the Respondents. In the premises, it would not be in the interest of justice to keep the administration in limbo.

33. I agree that the interests of the Respondents may still be catered for by other legal means in the Succession proceedings without necessarily exposing the estate to waste. Nothing bars this Court from joining other beneficiaries as administrators of the estate of the deceased once there is a consensus in the family.

34. I also agree that whereas the registry is properly entitled to point out deficiencies in the pleadings being filed by parties, there is no provision for declining to accept the same though such deficiencies may be noted. Where the registry is in doubt, the directions of a judicial officer ought to be sought. However, it is upon the parties to raise any objections they may deem fit for the determination by the Court. It is not for the registry to hold brief for other parties as it were by declining to receive pleadings. I therefore associate myself with the position of the Supreme Court in **Okiya Omtatah Okoiti & Another vs. Attorney General & Another [2019] eKLR** where the said Court expressed itself as hereunder:-

“[23] It is also our view that, Rule 4A(1)(b) is not a mere administrative provision. It calls upon the Registrar/Deputy Registrar to consider the pleadings sought to be filed against the expectations of the Constitution, the Supreme Act, the Supreme Court Rules and Practice Directions and apply his/her legal mind to the question whether the said pleadings are in accord with specific provisions of the said Laws and Directions. Where they are not, justice demands that reasons, predicated on specific provisions of the Laws and Directions, ought to be given to an Applicant as being locked out of the seat of justice, more so at the apex Court, is a serious matter indeed.

[24] With respect therefore, and without going into the merits of whatever issues the Applicants has sought to place before the Court, the decision of the Deputy Registrar is one for review and setting aside.”

35. In the premises, I find merit in this application and I hereby direct that:

- a) The petition as presented herein be accepted for filling at the registry even without Michael Wambua Mulwa and Anderson Muinde Mulwa having executed the consent to making of grant.
- b) The two beneficiaries namely Michael Wambua Mulwa and Anderson Muinde Mulwa who have declined to sign the consent to the issuance of grant be served with the filed petition so that they can file their objections if any.
- c) As the parties herein are siblings, there will be no order as to costs.

36. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 12th day of August, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Munyao for Mr Nthiwa for the Applicants

Mr Sila for the Respondents

