



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 109 OF 2016

SARAH MWAKA KATHURIMA PETITIONER

VERSUS

JOSEPH KIMATHI KATHURIMA INTERESTED PARTY

R U L I N G

1. On 11/12/2019, this Court revoked the grant that had been issued to the petitioner and ordered that a full inventory of the assets and liabilities of the deceased be filed. The petitioner was to file a fresh application for confirmation of grant and the beneficiaries to file their respective responses.

2. Consequently, the petitioner filed a fresh application for confirmation of grant on 5/3/2019. Contemporaneously, she also filed an application seeking leave to be allowed to sell **L.R. Ntirimiti Settlement Scheme/149** through private treaty for purposes of repaying of an outstanding loan of Kshs.12,000,000/= with Post Bank (in liquidation). She attached correspondence from the bank showing that the estate owed the bank Kshs. 43, 081,497/60 but had been negotiated to KShs.12,000,000/=.

3. The **Interested Party** opposed the application stating that the petitioner had concealed the actual amount owed by the bank. That he had it on good authority that the actual amount owing to the estate was Kshs. 4,000,000/=. He further averred that 11.3 acres in **L.R. No. Ngusishi Settlement Scheme No. 10** allocated to him by the petitioner in the proposed distribution ought to be used to settle the amount owed the bank.

4. In a brief rejoinder, vide supplementary affidavit filed on 8/7/2020, the petitioner denied the averments made by the interested party and retorted that she had written to the interested party's advocates disclosing the particulars of the intended purchaser and the purchase price. She annexed a copy of the letters dated 9/3/2020 and 10/3/2020. She was against selling of **L.R. No. Ngusishi/S.Scheme/10** as a substantial part of it constitutes her matrimonial home.

5. **In re Estate of Barrack Deya Okul (Deceased) [2018] Eklr**, the court held: -

“My clear understanding of this requirement is that once a Petitioner is notified of the existence of a liability (debt) by a creditor or once the Petitioner comes to learn of an existing proven liability (debt) owed by the estate, it is mandatory to include such a liability or debt as required above.

6. **Section 86 of the Law of Succession Act** provides that debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.

7. **Section 83 (d) of the Act** provides that one of the duties of personal representatives is ascertaining and paying, out of the estate of the deceased's debts.

8. In her petition, the petitioner set out the liabilities of the estate of the deceased which included monies owed to Post Bank Limited (in liquidation). She produced a copy of the search records that showed that the deceased had charged the property for KShs.800,000/=. She contended that she had negotiated the debt to Kshs.12,000,000/= and attached correspondence from the bank to that effect.

9. On the other hand, the contentions by the interested party were not supported by any evidence. They remained unsubstantiated. It is trite that he who alleges must prove. Without cogent evidence to back his claims, the allegations by the interested party remained just that, mere allegations.

10. As pointed out earlier, a debt is a liability against the estate. It must be paid out as the first point of call. From the search records, the

property is still charged to the bank. It is therefore the proper asset to be disposed as opposed to **LR. No. Ngusishi Settlement Scheme No. 10.**

11. The proceeds of the sale and the balance thereof will be made clear to the court as it is part of the responsibility of the petitioner/administratrix.

12. In this regard, I find merit in the petitioner's application dated 4/3/2020. The same is allowed in terms of prayer Nos. 1 and 2 thereof. An interim certificate of confirmation of grant shall issue distributing **L.R. Ntirimiti Settlement Scheme/149** to the petitioner for the sole purpose of its sale through private treaty and subsequent paying out of the liabilities owing to the estate of the deceased. This order is made under **Rule 41(3)** of the probate and Administration Rules.

13. The application for confirmation of grant shall be dealt with after taking into account the liabilities paid out as a result of the sale.

It is so ordered.

Signed at Meru: -

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 17th day of September, 2020

F. GIKONYO

JUDGE