REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

SUCCESSION CAUSE NO. 5 OF 2013

IN THE MATTER OF THE ESTATE OF: MICHAEL GEORGE TENDWA SAID (DECEASED)

BETWEEN

ROSE EVERLINE TENDWA.....OBJECTOR/APPLICANT

VERSE

YUDA KENGERE TENDWA ..... 1ST RESPONDENT

PAUL TENDWA LULE .....2ND RESPONDENT

RULING

[1] The history of this matter goes back to the year 2003, when a grant of letters of administration intestate respecting the estate of the late **Michael George Tendwa Said** (deceased) was issued to Yuda Kengere Tendwa, George Arnold Said and Pius Felix George Said on the **13th December, 2003** by the Magistrate's court at Homabay in their capacity as the respective eldest sons of the deceased with his three wives. **Wilhalmina Halima,** (first wife), **Jael Mildred Said,**(second wife) and **Rose Everline Tendwa**(third wife).

In essence, the deceased was survived by the three wives and several children numbering seventeen (17). The first and second wives and several children are since deceased. The estate property comprised five(5) parcels of land described as Kanyada/Kotieno-Katuma'B'/297(**plot 297**), Kanyada/Kotieno'B'/302(**Plot 302**), Kanyada/Kanyadier/41(**Plot 41**), Kabuoch/K/K/Karading/2318(**Plot 2318**) and Plot No.93 site and service Scheme(Plot 93).

[2] Approximately, thirteen(13) years after the issuance of the grant on the **13th March 2013,** the deceased's surviving third wife, Rose Everline Tendwa together with the deceased's eldest son with the first wife, Yuda Kengere Tendwa and the deceased's youngest son with the second wife, Paul Tendwa Said Lule, took out the necessary summons for revocation of the grant for reasons that the value of the estate property exceeded kshs.100,000/- and therefore out of reach of the magistrate's court and that the dealings of the second administrator George Arnold Said and third administrators, Pius Felix George Said made it impossible to apply for confirmation of the grant.

On 22nd May 2014, the court allowed the application for revocation of the grant with an order that any person including the applicants' were at liberty to apply for a fresh grant. However, the record does not show that any such fresh application was made by any person. Instead, in a move that was apparently erroneous, the first original administrator, Yuda Kengere Tendwa, took out the summons for confirmation of grant dated **17th March 2016**, purportedly on the basis of the order made by the court on 22nd May 2014. Thus the applicant ended up applying for confirmation of a non-existent grant dated 22nd May 2014 issued to Rose Eveline Tendwa, Yuda Kengere Tendwa and Paul Tendwa Said Lule.

[3] With the error going unnoticed by the parties, the summons for confirmation of grant proceeded to hearing with parties being given an opportunity to explore possibility of settlement with a view to recording a consent on the distribution of the estate, particularly in relation to the estate property herein referred to as **Plot no.297**. However, no such settlement was reached. In the meantime, the purported three petitioners/administrators i.e Rose Everline Tendwa, Yuda Kengere Tendwa and Paul Tendwa Said Lule kept the matter active in the corridors of justice not withstanding that it was erroneously progressing on account of a non-existent grant.

In that regard, the second and third petitioners i.e Yuda and Paul, filed an application dated 23rd May 2017 for conservation and/or preservation of the estate property described herein as **Plot No.297** and **Plot no.93**. the application was canvassed by way of written submissions and on the 12th July 2018, this court made a ruling in which it identified the error alluded to herein above and noted that the matter had all along proceeded erroneously on the basis of a non-existent grant.

[4] This court thus concluded

"In sum, there is no grant to be administered by anybody and confirmed by the court"

Indeed, there is currently nothing to canvass and/or preserve.

This means that the estate of the deceased remains the property of the deceased unavailable for distribution until such time that a fresh grant of letters of administration intestate shall be issued to any party and confirmed by the court. The grant initially issued on 15th December, 2003, was lawfully revoked and remains invalid for the purpose of the administration of the estate herein. Any proceedings or applications arising from that grant after its revocation on 22nd May 2014 was null and void ***"ab-initio".***

[5] Taking cue from that conclusion, **Yuda Kengera Tendwa** and **Patrick Michael Said,** hitherto, second and third applicants took out what they described as summons for application for fresh grant of representation and incorporated **Rose Everline Tendwa** as the first applicant. The summons dated **27th August 2018**, and was brought under **Section 71(2b)** and **Section 47** of the **Law of Succession Act** as well as **Rules 49, 59, 63 and 73** of the **Probate and Administration Rules**' in a manner which suggested that There was no consensus between the applicants and indeed all the beneficiaries of the estate as to who among them should petition for the fresh grant. This explains why the application was presented by the second and third applicants putting themselves against the hitherto reluctant first applicant.

[6] Be that as it may, the ruling of the court made on the 22nd may 2014 and that made on 12th July 2018 clearly implied that a fresh petition for grant of letters of administration intestate ought to have been made in the normal manner as provided by the Law of Succession Act and the procedural rules made thereunder.

In this case, **Rule 7** of the **Probate and Administration Rules 1980**, was most applicable as well as **Section 51** of the **Act**.

In an intestate succession such as the present one, grant of letters of administration is normally made to any of the beneficiaries on the basis of the order of preference provided under **Section 66** of the **Law of Succession Act**, which gives first priority to the surviving spouse or spouses, with or without association of other beneficiaries. The second priority is given to other beneficiaries entitled on intestacy, with priority according to their respective beneficial interest as provided by Part V of the Act.

[7] **Section 71(2)(b)** of the **Succession Act and Rules 49, 59, 63** of the **Probate and Administration Rules**, which were invoked in the application dated 27th August 2018, were inapplicable in the circumstances. In sum, that application in as much as it was made by way of summons was misconceived, fatally defective and clearly an abuse of the court process on the part of the second and third applicants who are sons of the deceased with his first and second wives who are since deceased thereby leaving the first applicant who was the third wife of the deceased as his sole surviving widow and therefore possessed of the first priority in applying for grant of letters of administration intestate respecting the estate of the deceased in comparison to the second and third applicants. The foregoing notwithstanding, the application dated 27th August 2018 was compromised in terms of the consent recorded by the parties and approved by the court on **27th March 2019.**

[8] It was thus consented that a fresh grant of letters of administration intestate respecting the estate of the late Michael George Tendwa Said (deceased) be issued to The three applicants/petitioners, Rose Everline Tendwa, Yuda Kengere Tendwa and Patrick Michael Said and be confirmed within a period of six(6) months from that 27th day of March 2019 or any shorter period that the parties may deem necessary.

Indeed, the necessary application vide summons for confirmation of grant dated **30th April 2019**, was filed herein on 17th May 2019 by the second and third applicants with the first applicant being ironically joined as a respondent.

What was stated by the second and third applicants as the agreed mode of distribution of the estate was disputed by the first applicant who filed an affidavit of protest dated 10th July 2019 in which she proposed an alternative mode of distribution. The protest was heard by way of "viva-voce" or oral evidence.

[9] In that regard, the first applicant/petitioner testified as the Objector/plaintiff**(PW1)** and called one witness, Elizabeth Atieno Ogola**(PW2).**

The second applicant/petitioner testified as the first respondent/defendant**(DW1)** while the third applicant/petitioner, testified as the second respondent/defendant**(DW2)**. The two did not call any witness.

After the oral hearing, both Objector and respondent filed their written submissions in support of their respective positions or proposals relating to the distribution of the estate.

The rival submissions have been given due consideration by this court in the light of the oral evidence adduced herein by the parties and in its opinion, there being no dispute that the deceased died intestate while married to three wives including the Objector as the third wife, the distribution of his estate was placed in the hands of the objector and the respondents as the administrators of the estate who were thus tasked with ensuring that the proposed mode of distribution would be beneficially to and agreed upon by all the three houses of the deceased. Failure to come up with a mutually agreed and acceptable mode of distribution of the estate meant that the applicants/petitioners would be required to adhere to the applicable statutory guidelines in that regard i.e **Section 40** of the **Law of Succession Act**.

[10] A mutually agreed and acceptable mode of distribution would have removed the distribution of that estate from the guidelines provided under Section 40 of the Succession Act and have the grant confirmed by the court for the benefit of all the three houses of the deceased.

The evidence confirmed that no such agreement was reached. Instead, the objector came up with her own mode of distribution and the respondents came up with theirs. Both modes of distribution appear to have been made without proper and/or adequate input from the other beneficiaries. Indeed, the respondents conceded that not all the beneficiaries agreed with their proposed mode of distribution.

None of those other beneficiaries was called to testify and shed light on what informed the separate mode of distributions presented by the Objector and respondent. The mere presence of two proposals, on the mode of distribution was sufficient evidence to show that all the beneficiaries did not agree on the proposal made by the objector or that made by the respondent. This fact on its own confirm that the grant is not ripe for confirmation and that the summons for confirmation of grant dated 30th April 2019, was taken out prematurely. In the circumstances, the objector's protest was rendered obsolete.

[11] Consequently, the said summons for confirmation of grant is hereby disallowed and struck out with orders that the parties may take out fresh summons for confirmation of grant after reaching a mutually agreed and acceptable mode of distribution for the benefit of all the three houses of the deceased. For the avoidance of doubt, the proper beneficiaries of the estate are the three wives of the deceased and his children with any one of them.

In default of any agreement on the mode of distribution of the estate by all the beneficiaries, the matter be referred to the public trustee for necessary distribution of the estate in accordance with Section 40 of the Law of Succession Act and in any event, within a period of six(6) moths from this date hereof.

[12] Section 40 of the Act, provides for guidelines for distribution of the estate of a polygamous intestate in the following terms:-

> *"(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;*
>
> *(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38".*

[13] The provision is the applicable law in the present circumstances where there is no agreement on distribution of the estate. Any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings.

In the case of **Esther Wanjiku Burugu Vs Margaret Wairimu Burugu Civil Appeal No. 319 of 2002**, the court of Appeal sitting in Nakuru observed that the provision does not state that the division of the estate must be equal and that it specifically states that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, it nonetheless specified that that would be done according to the number of children in each house.

The court was of the view that the provisions negates any proposal that the division must be equal between the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.

[14] In the Case of **Mary Rono Vs Jane Rono & Another(2005)eKLR**, the court of Appeal stated that if parliament had intended that there must be equality between the houses, there would have been no need to provide in Section 40 of the Succession Act that the number of children in each house be taken into account. The case of **Elizabeth Chepkoech Salat Vs Josephine Chesang Salat Civil Appeal NO.211 of 2012 at Nairobi,** reiterated and fortified the fact that Section 40 of the Succession Act does not provide for equality between houses or that each child must receive the same or equal portion. The court held that:-

> *"Section 40 of the Act does not give discretion to a court to deviate from the general principles therein annunciated.*
>
> *Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court had no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustment to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust".*

[15] Herein, the respective proposals by the first applicant/petitioner/objector and that second and third applicants/respondents as reflected in the affidavits in support of the summons for confirmation of grant and protest thereof could not result into a consent judgment as the proposal of each was apparently subject to the entire scheme of distribution proposed by each being accepted by the court.

Such proposals as was held in the **Salat Case (Supra)** have little weight in the application of statutory principles and cannot be "rubber stamped" by this court as that would be tantamount to wanton breach of **Section 40** of the **Succession Act.**

As directed herein above, the parties herein together with all the other beneficiaries must spare no effort in arriving at a consent judgment on the matter within the next six(6) months and take out fresh summons for confirmation of grant. Their failure in that regard, will mean that the distribution of the estate among the three houses, of the deceased shall be undertaken by the public trustee on this court's order.

Ordered accordingly.

[Delivered and Signed this ***17th*** Day of ***December***, 2020]

J.R. KARANJAH

JUDGE